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SCHOOL OF LAW

A TREATISE
ON THE
LAW OF DAMAGES

EMBRACING
AN ELEMENTARY EXPOSITION OF THE LAW

AND ALSO
ITS APPLICATION TO PARTICULAR SUBJECTS OF
CONTRACT AND TORT

BY
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THIRD EDITION
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STATUTES OF 1898," ETC., ETC.

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INTEREST DURING PROCEEDINGS TO COLLECT A DEBT.

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Interest as an element of damage has already been several times mentioned, and will frequently be considered in the chapters which treat of special branches of the law of damages. But as such and otherwise it is an elementary topic deserving more particular treatment, and this seems the most appropriate place to introduce it.

§ 300. **Definitions and general view.** Interest is the compensation fixed by agreement or allowed by law for the use or detention of moneys, or for the loss thereof to the party

entitled to such use. It is computed at a certain rate per centum by the year, unless stipulated for upon some other period of time. In a strict sense, it is the compensation agreed to be paid for the use of money while the debtor has a right to retain the principal, and during a stipulated period of credit; in other words, before the principal is due and payable. A creditor is not entitled to be paid for the use of money owing to him before it is due unless by agreement, express or implied.¹ And this should be for the prospective use of money; otherwise it has been held not to be strictly interest.² But past use may be a valid consideration for a promise to pay money by way of compensation.³ When expressly stipulated [532] for to accrue during the period of forbearance it becomes, as it accrues, a positive addition to the principal, and is thence a distinct and integral part of the debt,⁴ payable, unless otherwise agreed, when the principal is due,⁵ and in the same funds.⁶

¹ *Minard v. Beans*, 64 Pa. 411; *Thorndike v. United States*, 2 Mason, 1; *Beardslee v. Horton*, 3 Mich. 560; *Robinson v. Bland*, 2 Burr. 1077; *Rensselaer Glass Factory v. Reid*, 5 Cow. 587; *Robinson's Adm'r v. Brock*, 1 Hen. & M. 211; *White v. Walker*, 31 Ill. 422; *Pollard v. Yoder*, 2 A. K. Marsh. 264; *Brainerd v. Champlain Transportation Co.*, 29 Vt. 154; *Evans v. Beckwith*, 37 Vt. 285; *Tanner v. Dundee Land Investment Co.*, 8 Sawyer, 187, 12 Fed. Rep. 648.

² *Daniels v. Wilson*, 21 Minn. 530. The action was on a note given for a sum agreed upon for interest after the time for which it was computed had elapsed, and at a rate in excess of that antecedently specified in the contract for the principal. The court say: "A contract to pay interest is a contract to pay a consideration for the future use of money. The contract in this case was a contract to pay a consideration for the past use of money, and, therefore, not a contract to pay interest in any proper or legal sense." *Adams v. Hastings*, 6 Cal. 126, 65 Am. Dec. 496.

³ *Wilcox v. Howland*, 23 Pick. 167.

⁴ *Southern Central R. Co. v. Moravia*, 61 Barb. 181; *West Branch Bank v. Chester*, 11 Pa. 282, 51 Am. Dec. 547; *Foster v. Harris*, 10 Pa. 457.

Interest is also an incident of the principal, in analogy to the doctrine of accession, in cases of breach of trust. *Stickney v. Parmenter*, 74 Vt. 58, 52 Atl. Rep. 73 (*sub nom.* *Johnson's Adm'r v. Parmenter*).

⁵ *Tanner v. Dundee Land Investment Co.*, 8 Sawyer, 187, 12 Fed. Rep. 648; *Koehringer v. Muemminghoff*, 60 Mo. 406; *Ramsdell v. Hulett*, 50 Kan. 440, 31 Pac. Rep. 1092; *Motsinger v. Miller*, 59 Kan. 573, 53 Pac. Rep. 869; *Saunders v. McCarthy*, 8 Allen, 42; *Cooper's Adm'r v. Wright*, 23 N. J. L. 200.

⁶ *McCalla v. Ely*, 64 Pa. 254.

It was expressed in a note, payable subject to collateral agreements, that interest was payable semi-annually. Such agreements gave the creditor, if the note was not paid when due, the right to look to certain securities for its payment, and waived his right to any other rem-

As such it has a substantive character. The creditor is not obliged to forego what is unearned of the interest for an agreed period on a tender of the principal. The borrower or debtor cannot, by tendering the money to pay the debt before it is due, stop the interest; for the time of payment is part of the contract, and is fixed for the mutual benefit and convenience of the parties.¹ After it accrues and is due it

edy. By failing to collect the semi-annual interest it became a part of the principal, and subject to the conditions in such agreements. *Reed v. Cassatt*, 153 Pa. 156, 25 Atl. Rep. 1074.

¹ *Davis v. Yuba County*, 75 Cal. 452, 13 Pac. Rep. 874, 17 id. 533; *Ellis v. Craig*, 7 Johns. Ch. 7.

In the last case interest was payable at stated periods before the principal was due. This circumstance appears, in some measure, to have influenced the decision, but the general course of reasoning, as well as the force of the authorities cited, are in favor of the broader doctrine stated in the text. The chancellor said: "There can be no doubt that the parties may, by express stipulation, agree that a debt shall not be paid before a given time, and until that time arrives the debtor cannot tender the debt and stop interest. The question then occurs, what was the intention of the parties in this case, upon a fair and sound interpretation of the terms of the condition of this bond? The time of payment was made an essential part of the contract for the loan of the money. The terms of this bond were equally the agreement of both parties, and in which their mutual interest and convenience are presumed to have been consulted. A prolonged time of payment, when money is loaned upon interest payable periodically, is not always given for the accommodation of the debtor; the time is intended to meet the will and wishes of both parties; under the case of

persons who are unable to earn money by their own exertions, or to employ themselves profitably in business, such as aged and infirm persons, women and infants, and also in the case of literary and charitable institutions, a safe investment of money with a prolonged time of payment of the principal and short times of payment of the interest is most likely to meet their wants and promote their welfare. The interest of money is liable to fluctuation, and money itself is a marketable commodity, and subject to greater or less demand according to the vicissitudes of trade and credit. These considerations may be supposed to have had a material influence upon the terms of the loan. We can hardly believe that both parties in this case had not equally in view their own convenience in fixing upon a distant day of payment of the principal, or that it was the meaning of the contract that the obligor, should be able on the next day, or the next month after the loan, to force back the money upon the plaintiff, and break up an advantageous investment. Why were the usual words *or before* omitted in the condition of the bond but to show the intentions of the parties that the principal was not to be paid before the day specified in the condition?

"The cases in the common-law courts do not appear to have settled the question by any direct or definitive decision. I think, however, the language of the books is against the

[534] may be recovered by action whether the principal be then due or not,¹ or whether the principal has been paid or not.² In pleading to show a case for such interest, the agreement must be specially counted on and a breach of it

defendant; and it would seem to be everywhere conceded that in no case was a tender before the day good. If the condition of a bond be payable *on or before* such a day, a plea of payment before the day, to wit, on such a day, is good. Anonymous, 2 Wils. 173. But if the condition of the bond be payable on *such a day*, a plea of payment before the day is bad, and the defendant must either plead it by way of accord and satisfaction, or plead *solvit ad diem*, and prove payment before the day (Jernegan v. Harrison, 1 Str. 317; Anonymous, 2 Wils. 150; Winch v. Pardon, Buller's N. P. 174). These cases turned upon the technical terms of pleading; and whatever subtleties exist on that subject, there can be no doubt that if money be tendered and accepted before the day appointed it would, when skilfully pleaded, amount to a discharge of the bond; for if, as Lord Coke says (Coke, Litt. 212b), 'If the obligor pay a lesser sum before the day and the obligee receives it, it is a satisfaction.' The bearing of these cases upon the point now under discussion consists, however, in the distinction which they assume between a bond payable *on* such a day, and *on or before* such a day, and in the doctrine which they necessarily convey that it requires the assent and concurrence of the creditor to discharge, before the day, a bond payable on a given day.

"The language of Lord Hardwicke, as chief justice of the king's bench, in Tryon v. Carter (2 Str. 994), is still more explicit on the subject. The bond in that case was payable *on or before* the 5th of December, and payment was made on that day. The case itself is not applicable, but the observations of the chief justice are much in point. 'In the case,' he observes, 'of a bond conditioned for payment at a certain day, or *upon such a day*, there can properly be no *legal payment* or *legal performance* of the condition till that day. Payment before the day may, indeed, be given in evidence on *solvit ad diem*, but that goes upon the reason that the money is looked upon as a deposit in the hands of the obligee until the day comes, and then it is actual payment.' The argument in favor of the right of the obligor to pay before the day stipulated is founded on the assumption of the fact that the delay of the time of payment is introduced into the contract solely for the benefit of the debtor, and that he may waive a benefit or renounce a time given on his account according to the maxim that *quisquis potest renuntiare jure pro se introducto*. But this is asking the concession of the very point in dispute. When a specific sum without interest is made payable at a distant day, or perhaps, where the sum may be on interest, but the interest is not payable peri-

¹ Walker v. Kimball, 22 Ill. 537; Dulaney v. Payne, 101 id. 325, 40 Am. Rep. 205; Sparhawk v. Willis, 6 Gray, 163; Andover Savings Bank v. Adams, 1 Allen, 28; French v. Bates,

149 Mass. 73, 21 N. E. Rep. 237, 4 L. R. A. 268; Smart v. McKay, 16 Ind. 45.

² King v. Phillips, 95 N. C. 245, 59 Am. Rep. 238; Kurz v. Suppiger, 18 Ill. App. 630. See Eames v. Cushman, 135 Mass. 573.

alleged. Interest is also recoverable for the detention of money after it is due. It is in many such cases recoverable of right and as a matter of law, independently of the discretion of a jury.¹ It may also be claimed of right under various circumstances of contract and tort, on the value of property or things in action, and on the value of services, though such value has to be proved; on money lent, paid, had and received, as well as on divers other forms of loss to the plaintiff or gain to the defendant, capable of pecuniary estimate; and in such cases it is immaterial that there is no agreement for interest or forbearance. When the principal is due upon contract, of course the obligation or duty to pay interest for its detention results from the same contract, and is recoverable thereon as damages for failure to perform; and when recoverable in tort it is chargeable on general principles as an additional element of damage for the purpose of full indemnity to the injured party.

As damages, interest is an inseparable incident to the principal demand; follows it as the shadow follows the substance. Whenever the demand is satisfied and discharged the accrued interest which was accessory, whether paid or not, is extinguished.² In pleading, it is sufficient to declare on a default

odically in the intermediate time, there is color for the construction that the time is given solely for the accommodation of the debtor; and if I am not mistaken, the doctrine contended for on the part of the defendant is founded entirely on that ground. But when money is loaned upon interest, payable quarter yearly, and a distant day is mentioned for the payment of the principal, the delay is evidently as much for the benefit of the creditor as of the debtor, and the law itself most clearly implies it. The one party wants the principal to employ as capital in his business, and the other party relies upon the enjoyment of a portion of the profits of that capital, in the shape of interest periodically paid for his support and comfort. These cases of loans upon interest are,

therefore, cases of mutual accommodation, and each party has an equal interest in the preservation of the definite period of payment; and neither can violate it without a violation of the terms and intention of the contract."

¹ "Both reason and authority say that if by the terms of the contract, whether oral or written, a debt be due at a certain time, then it by law carries interest from that time in the absence of any agreement otherwise by the parties." *Henderson Cotton Manuf. Co. v. Lowell Machine Shops*, 86 Ky. 668, 673, 7 S. W. Rep. 142.

² *Southern R. Co. v. Dunlop Mills*, 22 C. C. A. 302, 76 Fed. Rep. 505; *Stewart v. Barnes*, 153 U. S. 456, 14 Sup. Ct. Rep. 849; *Hynes v. Chicago*, etc. R. Co., 64 Iowa, 753, 19 N. W. Rep. 245; *Doxlin v. Mayer*, 60 Hun,

in not paying the principal demand; the interest as damages, [535] when not made special by contract but left to be measured by law, may be recovered under a general allegation of damages, without being specially claimed.¹ In another class of cases, similar to those last mentioned, but where the right to interest is less obvious, and in some others where the injury cannot be measured by any precise pecuniary standard, interest is allowable under the advice of the court in the discretion of the jury. These distinctions will be made more manifest, and the authorities which recognize and support them cited, when we come to discuss particular interest topics, and the law of damages in connection with particular subjects.

§ 301. **Interest by the early common law.** By the ancient common law it was not only unlawful, but criminal, to take any kind of interest. As late as the reigns of Henry VII., of Edward VI., and of Mary, every rate of interest was forbidden by express statute.²

§ 302. **Interest in England legalized by statute.** In 1545 the statute of 37 Henry VIII. was enacted. The preamble shows that the taking of interest was still illegal and criminal, but the act gave a negative sanction to it by providing that "none shall take for the loan of any money or commodity

68, 14 N. Y. Supp. 251; *Cutter v. Mayor*, 92 N. Y. 166; *Hamilton v. Van Rensselaer*, 43 id. 244. See *Southern Central R. Co. v. Moravia*, 61 Barb. 181; *Consequa v. Fanning*, 3 Johns. Ch. 587; *Gillespie v. Mayor*, 3 Edw. 512; *Jacot v. Emmett*, 11 Paige, 142; § 372.

¹ *Heiman v. Schroeder*, 74 Ill. 158; *McConnel v. Thomas*, 3 id. 313; *Padley v. Catterlin*, 64 Mo. App. 629, 645, summarizing the foregoing propositions and citing the text.

² *Earl of Chesterfield v. Jansen*, 1 Wils. 290.

In *Houghton v. Page*, 2 N. H. 42, 9 Am. Dec. 30, Judge Woodbury says: "To take it (interest) was also *in foro conscientie* punished as a crime, and not only subjected the offender to the forfeiture of all his estate, but

in the 'Mirror of Justice,' 191 and 248, one of the first English law-books extant, it is lamented, as 'an abusion of the common law,' that the offender was not likewise deprived of christian burial." After referring to the prohibitory statutes in England, he remarks: "It therefore follows that if the common law of England concerning interest should be adopted, we must hold void all contracts for any quantity of interest, however small and reasonable. But in this enlightened age such a rule could no more be tolerated than the absurd principles of the common law concerning witchcraft and heresy." *Laycock v. Parker*, 103 Wis. 161, 79 N. W. Rep. 327; *Pekin v. Reynolds*, 31 Ill. 529, 83 Am. Dec. 244.

above the rate of ten pounds for one hundred pounds for one whole year." It is said that the first legal interest was taken in England under this statute. The rate was subsequently, in Queen Anne's time, reduced to five per cent.¹ And in the reign of William IV., and by various statutes of Victoria, interest has been directly and affirmatively provided for. [536] The existing statutes repealed the law against usury; and parties are at liberty to contract for any rate of interest.²

§ 303. Interest at common law in America. There are some cases in which judges have declared interest to be of statutory creation.³ But the general course of judicial decision and legislation in this country assumes the validity of contracts for interest without statutory sanction and the legal obligation to pay it in many cases not provided for either by contract or statute.⁴ That the law recognizes the use of money as valuable is placed beyond question by the allowance [537] of interest as damages for its detention when the debtor is in default or guilty of fraud. Interest is now universally treated as a legitimate consideration for the use of money. To take it is deemed morally, as well as legally, just in the general commerce of the world; and not only where private interests may be subserved by credit, but also in those public exigencies which induce states and nations to become borrowers. Statutes generally exist providing what shall be the rate when it is not fixed by agreement, and in many states a maximum rate is established beyond which interest is expressly or impliedly prohibited. In some states the consequences of transcending this limit are prescribed; these are various.

¹ 12 Anne, St. 2, ch. 16.

² 17-18 Victoria, ch. 90 (August 10, 1854).

³ *Close v. Fields*, 2 Tex. 232; *Isaacs v. McAndrew*, 1 Mont. 437; *Eastin v. Vandorn*, Walk. (Miss.) 214; *Hamer v. Kirkwood*, 25 Miss. 95; *Harts v. Fowler*, 53 Ill. App. 245.

In some states interest, as such, is only recoverable in the cases provided for by statute. *Vietti v. Nesbitt*, 22 Nev. 390, 41 Pac. Rep. 151; *Hurlburt v. Dusenbury*, 26 Colo. 240, 57 Pac. Rep. 860.

⁴ *Young v. Godbe*, 15 Wall. 562;

Parmelee v. Lawrence, 48 Ill. 331; *Davis v. Greely*, 1 Cal. 422.

In *Young v. Polack*, 3 Cal. 208, the plaintiff and the defendant had a joint lease for improving certain property; the plaintiff, with consent of the defendant, made a contract in his own name for making the improvement and performed it. He paid all the expenses out of his own funds. That contract was drawn by the defendant, of whom the plaintiff claimed damages for not paying his

§ 304. **Agreements for interest.** There is no difference in principle between agreements to pay for the use of money and those to make compensation for anything else that is valuable. And, as a general rule, contracts are valid and will be enforced although there is a great disproportion between the burden of the undertaking on one side and the value of the consideration for it furnished on the other. The theory of the law is, and its practical operation is consistent therewith, that a small consideration will support an onerous agreement. The comparative benefits to be derived from the mutual considerations, executed or executory, which are technically valuable in character are not weighed. It is enough that a valuable consideration exists; its adequacy is not an element in determining whether or not an agreement founded upon it is valid. A few examples of unconscionable bargains are to be found in the books,—examples of contracts so immensely unequal, and, if held valid, so certain to be disastrous to one party, that on the ground of being unconscionable they were held not obligatory. Still, it is an axiom of the law of contracts that mere inadequacy of consideration is no defense.

The compensation, however, for the use of money or for its detention, there being always a customary or legal rate, is susceptible of precise measurement. Therefore, contracts for a higher rate, though intended to have effect only after the principal sum is due and to measure the damages for delaying [538] its payment, are liable to be treated in respect to the interest they provide for as contracts for penalties.¹ But when parties are authorized by statute to contract for more than the ordinary legal rate of interest, either with or without restriction, such contracts are permitted to have a more liberal effect. A contract to pay interest at a given rate, while the debtor has a right for a definite period to the use of the principal, is different in its nature and incidents from a contract to pay interest after that right has expired; in the one case it

share of the expense as the building advanced. The court decreed that he should pay his contribution of one-half, with three per cent. interest per month, the current rate, which decree was affirmed.

¹Mosby v. Taylor, Gilmer, 172; Taul v. Everet, 4 J. J. Marsh. 10; Gould v. Bishop Hill Colony, 35 Ill. 324. See § 286.

is the price of a rightful use and possession of the money; in the other it is a liquidation of the damages for detaining it without right; in the former case the contract creates the law; in the latter interest as damages is imposed by law, though the rate may be regulated by agreement. In the computation of interest, however, beginning before and continuing after maturity of the debt, no rest is to be made at maturity or at the commencement of the suit, but the interest is to be computed continuously from the time when it commences to the settlement, judgment or decree.¹

Where there is an agreement for the payment of money at a future day, and it contains or is accompanied with an express promise to pay interest² from date to the time specified for payment, the law is settled that interest is chargeable afterwards if the principal remains unpaid, although the contract is silent in regard to interest after maturity. This results from the general principle that all contracts to pay money give a right to interest from the time the principal ought to be paid.³ It can make no difference with the application of this principle that the contract contains an express stipulation for interest until the day fixed for payment, for that is not inconsistent with the implication that if not paid on [539] that day interest is to be paid afterwards; since, without such express stipulation, no interest could accrue until a default of

¹ *Lamprey v. Mason*, 148 Mass. 231, 19 N. E. Rep. 350; *Barker v. International Bank*, 80 Ill. 96; *Brewster v. Wakefield*, 1 Minn. 352, 69 Am. Dec. 343; *Folsom v. Plumer*, 43 N. H. 469.

² See *Harts v. Fowler*, 53 Ill. App. 215.

³ *Boddam v. Riley*, 2 Bro. Ch. 2; *Williams v. Sherman*, 7 Wend. 109; *Ten Eyck v. Houghtaling*, 12 How. Pr. 523; *Cartmill v. Brown*, 1 A. K. Marsh. 576, 10 Am. Dec. 763; *Van Rensselaer v. Jewett*, 2 N. Y. 135; *Hunt v. Jucks*, 1 Hayw. 199; *McKinley v. Blackledge*, 2 Hayw. 28; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 285; *Purdy v. Phillips*, 11 N. Y. 406; *Farquhar v. Morris*, 7 T. R. 124; *Wenman v. Mobawk Ins. Co.*, 13 Wend.

267; *Robinson v. Bland*, 2 Burr. 1077; *Chapin v. Murphy*, 5 Minn. 274; *West Republic Mining Co. v. Jones*, 108 Pa. 55; *Henderson Cotton Manuf. Co. v. Lowell Machine Shops*, 86 Ky. 668, 7 S. W. Rep. 142; *Fleming's Estate*, 184 Pa. 80, 39 Atl. Rep. 27.

Where a trust company bound itself to pay the debts of M., not to exceed \$130,000, and the indebtedness was computed with interest to January 1, 1891, and amounted to \$140,000, creditors who had been paid in part prior to that date were not entitled to interest on such amounts from date of payment to January 1, 1891. *Barnes v. Mendonhall*, 89 Minn. 383, 83 N. W. Rep. 391.

payment. The maxim *expressum facit cessare tacitum* does not apply,¹ for the contract does not speak to the particular case.²

The law will not presume the existence of a contract to pay interest where a direct agreement to pay it would have been a felony; in such a case interest cannot be recovered as profits.³ One who holds money in readiness for another who has given an interest-bearing obligation for it is entitled to interest though it is not actually called for.⁴

Contracts relating to interest have not been enforced with uniform construction and effect. The English and American courts have not entirely harmonized; and there is a diversity in the decisions of the latter. For the purpose of showing more clearly and in detail the distinctions which have been made and the conflict of judicial decisions, the classification of subjects in the following sections has been adopted as convenient and sufficiently comprehensive.

SECTION 1.

GENERAL PROMISE TO PAY MONEY "WITH INTEREST."

§ 305. **Rule of construction.** Under the first point it is to be observed that such contracts, in common with all others, are to have a reasonable construction with a view to carrying out the actual lawful intention of the parties. The construction as to sureties will be strict.⁵ It is liberal in respect

¹See *Spaulding v. Lord*, 19 Wis. 533.

²*Thorndike v. United States*, 2 Mason, 1.

³*Los Angeles v. City Bank*, 100 Cal. 18, 34 Pac. Rep. 510.

⁴*Primley v. Shirk*, 163 Ill. 389, 45 N. E. Rep. 247, 60 Ill. App. 312.

⁵*Bowery Savings Bank v. Clinton*, 2 Sandf. 113. The bond of J. to the plaintiffs bore interest at six per cent. C. indorsed a covenant binding himself to them for "an additional one per cent. per annum interest, making in all seven per cent. per annum on the principal secured by the bond, until the principal should be

paid; the interest to be paid at the time and in the manner mentioned in the bond. It was held that C. was not bound to pay *seven per cent.* interest but only *one per cent.* on the amount of the bond; that he was bound to pay one per cent. until the bond was paid off."

In *Hamilton v. Van Rensselaer*, 43 Barb. 117, 28 How. Pr. 192, it was held that a surety who guarantees the payment of the interest on a money bond not bearing interest by its terms is liable for interest accruing after the bond becomes due.

In *Hamilton v. Van Rensselaer*, 43 N. Y. 244, the defendant guaranteed

to the ordinary short hand expressions by which interest is commonly stipulated for orally, and which frequently find their way into written promises. Contracts for interest at a given rate per cent. will be treated as contracts for that rate per annum,¹ and even an abbreviation like "interest at ten per

"the punctual payment of the interest" upon a bond payable in six years and six months from date, with interest semi-annually. It was held that the guaranty only extended to the interest falling due before the time of the payment of the principal; and that after the principal sum has fallen due, interest is payable, not by the original terms of the agreement, but as damages for its breach. Church, C. J., said: "He (the guarantor) neither agreed to pay the principal nor to be liable for the consequences of its non-payment. The intent of the defendant, ascertained by legal rules, was to agree to pay the interest expressly provided for in the bond only; but when the plaintiff urges that the defendant has employed general words guarantying the payment of interest upon the bond without limitation, and that these words include interest after as well as before default, and claims to enforce the rigid rule of liability therefor, it is pertinent to answer that by strict legal rules interest as such cannot be recovered after default in the payment of the principal; and that such interest is not therefore within the language of the contract. We do not place the decision upon this narrow ground, but prefer to rest it upon the proposition that by the plain, ordinary meaning of the language used in the contract, when applied to the facts existing at the time it was made, the interest recoverable after the principal became due, whether it is regarded as interest upon a continuing contract, or as damages for its non-performance, was not in the contemplation

of the parties at the time, and was not the interest specified and provided for in the defendant's contract. The construction contended for by the plaintiff might render the contract as burdensome as if it had been a guaranty of the payment of the principal itself. The defendant might never be able to discharge the obligation except by the payment of the principal, and in that case the result would be to compel him substantially to perform a contract which it is conceded he never entered into."

A promise to pay a debt which, otherwise, would be barred will enable the creditor to recover interest as well as principal, though interest was never demanded and nothing was said concerning it between the parties. *Estate of Fritz*, 19 Phila. 95.

¹ *Thompson v. Hoagland*, 65 Ill. 310.

"Annual interest" means interest payable annually. *Kurz v. Suppiger*, 18 Ill. App. 630.

If a note is silent as to interest and is described in a mortgage contemporaneously executed as collateral security as bearing interest the description will be imported into the note. *Prichard v. Muller*, 86 Ala. 500, 5 So. Rep. 784.

A testator, two years after he had compromised with his creditors and nine years after he had failed in business, made his will expressing "that the balance due my old creditors whose claims were compromised be paid in full." This was construed to provide for interest on the unpaid principal. *Sinclair's Appeal*, 116 Pa. 516, 9 Atl. Rep. 657.

cent." has received the same construction.¹ These characters in a note were interpreted to mean interest at the rate of six per cent. per annum, "int. at 6 p. a."² A bond payable "\$2,000 within two years from date; balance in annual payments, with interest, until aggregate sum is paid," carries interest from its date.³ An agreement to pay a given per cent. has been construed as though it were an agreement in terms to pay interest at that per cent.⁴ "With the interest at the rate of one and one-quarter" was construed to mean that no rate was specified; hence the legal rate was due.⁵ One who agrees to contribute to the cost of a work, if it is successfully completed, and to pay interest on expenditures is liable for interest from the time of making the expenditures.⁶ An obligation to pay interest on condition will be construed ac-

¹ *Fitzgerald v. Lorenz*, 181 Ill. 411, 54 N. E. Rep. 1029, 79 Ill. App. 651; *Durant v. Murdock*, 3 D. C. App. Cas. 114; *Gramer v. Joder*, 65 Ill. 314. See *Strickland v. Holbrook*, 75 Cal. 268, 17 Pac. Rep. 204.

Where the jury were instructed that if they found for the plaintiff they should allow him interest, a verdict allowing interest on the amount due "at .07 per cent. per annum" from a given date until verdict supported a judgment for the sum found due with interest at seven per cent. per annum. *Lake Shore Cattle Co. v. Modoc Land & Livestock Co.*, 130 Cal. 669, 63 Pac. Rep. 72.

² *Belford v. Beatty*, 145 Ill. 414, 34 N. E. Rep. 254.

³ *Kilmer v. Gallaher*, 107 Iowa, 676, 77 N. W. Rep. 685.

⁴ *Davis v. Rider*, 53 Ill. 416; *Higley v. Newell*, 28 Iowa, 516. But see *Griffith v. Furry*, 30 Ill. 251, 83 Am. Dec. 186, which was a suit on a note in these words: "One day after date, we promise to pay D. F., or order, four hundred and fifty-six and $\frac{7}{10}$ dollars, value received, ten per cent." It was held that the words "ten per cent." in their connection

were without meaning. The note being described in the declaration as a note bearing ten per cent. interest, it was rejected when offered in evidence on the ground of variance.

In *Patterson v. McNeely*, 16 Ohio St. 348, the action was upon a promissory note made payable one year after date, and which contained this clause: "the above to be at ten per cent. annually." It was held that the word "annually" should be understood as relating to and defining the rate of interest, and as equivalent to the words per annum; it did not bind the debtor for the annual payment of interest. *English v. Smock*, 34 Ind. 115, 7 Am. Rep. 215. But see *Kurz v. Suppiger*, 18 Ill. App. 630.

The omission of the words "with interest" from a note which expressed that "five years from date at the rate of six one-half per cent. per annum, payable semi-annually," was taken to be a clerical error. *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. Rep. 71.

⁵ *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. Rep. 369.

⁶ *Union Improvement Co. v. Mar- kle*, 191 Pa. 329, 43 Atl. Rep. 199.

ording to its terms.¹ A promise to pay money "with interest" means simple interest only;² and a promise to pay "accruing interest" means running or accumulating interest; it does not include interest due at the time it was made.³ A statute providing for interest on recognizances taken under the direction of a court will not be read into a recognizance entered into between the parties, without action by the court, the instrument being silent as to interest.⁴

§ 306. Law or custom fixes the rate. If the promise is to pay interest simply, the law supplies the rate if one is fixed by statute, for the parties are supposed to contract in that general way with reference to the law.⁵ Where no rate is established by statute it is assumed that, in making and accepting a promise for interest generally, the parties have in view the rate which is customary where the contract is made and to be executed. That rate will govern in respect to liquidated debts on which the law permits interest to be recovered as damages for delay of payment after it is due.⁶ In the absence of a statute limiting the rate of interest on contract, if parties to an account acquiesce in the statements of credits and charges made and stated, they adopt the rate of interest charged with the same effect as if there had been an express agreement in writing to pay it.⁷ In transactions with banks if it is the custom to compute interest at thirty days to the month and twelve months to the year, and no mode of computation was agreed upon, such custom may be followed, though it is not the ordinary legal rule.⁸ A corporation which

¹ *Folmar v. Carlisle*, 117 Ala. 449, 23 So. Rep. 551.

² *Sawyer v. Child*, 68 Vt. 360, 35 Atl. Rep. 84.

³ *Gross v. Partenhimer*, 159 Pa. 556, 28 Atl. Rep. 370.

⁴ *Meyers' Estate*, 179 Pa. 157, 36 Atl. Rep. 239.

⁵ *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. Rep. 369; *Prevo v. Lathrop*, 2 Ill. 305; *Clay v. Drake*, Minor, 164; *Everett v. Ditley*, 39 Knn. 73, 17 Pac. Rep. 661; *O'Brien v. Young*, 95 N. Y. 428; *Genet v. Kissam*, 53 N. Y. Su-

per. Ct. 43; *Pearson v. Treadwell*, 179 Mass. 462, 467, 61 N. E. Rep. 44.

⁶ *Seton v. Hoyt*, 34 Ore. 366, 43 L. R. A. 634, 55 Pac. Rep. 967, 75 Am. St. 641; *Young v. Golbe*, 15 Wall. 562; *Reeves v. Lane*, 8 N. Z. 44; *Willard v. Mellor*, 19 Colo. 534, 36 Pac. Rep. 148.

⁷ *Sayward v. Dexter*, 19 C. C. A. 176, 72 Fed. Rep. 758; *Anzerals v. Naglee*, 74 Cal. 60, 15 Pac. Rep. 371; *Van Fleet v. Sledge*, 45 Fed. Rep. 750; *McKnight v. Taylor*, 1 How. 164.

⁸ *Pool v. White*, 175 Pa. 459, 34 Atl. Rep. 804.

has assumed liability for the payment of bonds and which circulates among their holders a notice to the effect that if they forbore demanding payment until a fixed date it would pay the contract rate of interest — the legal rate being less — is liable for the former rate.¹ If parties may agree for the payment of any rate of interest, the statute so providing binds a court of equity as well as a court of law, and neither may set aside or annul contracts because the stipulated rate is largely in excess of the current rate.² Where a contract expressed that the plaintiff shall pay to the defendant “a fair proportion of the interest of the investment” of the defendant “in its power house and equipment, and in car houses and equipment,” there was no “legal indebtedness” within the meaning of a statute providing that interest for any “legal indebtedness” shall be at the rate of seven per cent.; neither was the case one where the analogy of the statute was applicable. The plaintiff was not liable for the rate of interest the defendant incurred in constructing such property, nor the rate which it then paid or was paying at the time the action was brought on any such indebtedness; but was liable for a reasonable interest or income on the investment.³

§ 307. **Legal or stipulated rate applies from date.** A promise to pay interest on money payable at a future day will be construed as an agreement to pay it before, rather than exclusively after, maturity.⁴ Statutes exist in England and in many states of the Union authorizing parties to contract for a greater than the legal rate which is applied in the absence of

¹ *Kelley v. Phenix Nat. Bank*, 17 App. Div. 496, 45 N. Y. Supp. 533.

² *Boyce v. Fisk*, 110 Cal. 107, 42 Pac. Rep. 473.

³ *Lakeside R. Co. v. Duluth Street R. Co.*, 78 Minn. 129, 80 N. W. Rep. 831.

⁴ *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. Rep. 369; *Connors v. Holland*, 113 Mass. 50; *Dewey v. Bowman*, 8 Cal. 145; *Hackenberry v. Shaw*, 11 Ind. 392; *Pittman v. Barret*, 34 Mo. 84; *Ayres v. Hayes*, 13 Mo. 252; *Winn v. Young*, 1 J. J. Marsh. 51, 19 Am. Dec. 52; *Ely v. Witherspoon*, 2 Ala.

131; *Campbell Printing Press & M. Co. v. Jones*, 79 Ala. 475; *Kennedy v. Nash*, 1 Starkie, 152.

A note for a specified sum, with interest, provided for the return of the horse on account of the purchase of which it was given, and for the sale of another horse in lieu of the first, and that a credit should be given on it on account of the exchange. Interest was due on the note from its date, and not merely from the time the second horse was delivered. *Elwood v. McDill*, 105 Iowa, 437, 75 N. W. Rep. 340.

any agreement on money due. When agreements of this kind, or for less than the legal rate, are made in general terms, not specifying when the stipulated rate shall commence, or how long it shall continue, and the principal is payable at a future day, the promise is uniformly held to apply from date to maturity;¹ but whether it shall continue afterwards to operate, if the principal remain unpaid, the adjudications are not harmonious. Some cases hold that the contract operates *ex vigore* only until the debt by the agreement becomes due, and that [542] if it be not then paid the contract has no longer any effect whatever to govern the rate, and the damages for detention afterwards are limited to the ordinary legal rate of interest; other cases hold the contract rate to be *prima facie* the rate after maturity, but subject to be put aside by consideration of whether it be a reasonable rate, or there is a mutual intention to continue it; and a third class that the contract operates by its own vigor after the rate commences until the debt is paid or merged in a judgment or decree.

§ 308. **Whether same rate will apply after debt due.** If the stipulated rate is less than the legal, and the principal is made payable at a distant day, so that it is obvious from this circumstance, or from this and others, that the time of credit expressly given is the whole time of forbearance mutually intended, the creditor would seem, in reason, entitled on the expiration of that period to receive the principal, or have that rate of interest afterwards which the law gives generally upon default in the payment of money. This would appear more especially his right if he, with reasonable promptness, asserts his claim to the money by actual demand or resorts to legal measures for its collection. But silence and inaction after the maturity of the debt might imply acquiescence in the debtor's retention of the money and justify the inference that the cred-

¹ See authorities last cited.

Interest is allowable on a certificate of deposit providing for the payment thereof if the deposit remains a stated time only from the time suit is brought, that being done before expiration of said time, and no previous demand being made.

Beardsley v. Webber, 101 Mich. 88, 62 N. W. Rep. 173.

A note payable in two years after date with interest at the rate of six per cent. per annum from — until paid bears interest from its date, and not merely from date of maturity. Miller v. Cavanaugh, 99 Ky. 377, 35 S. W. Rep. 920, 59 Am. St. 463.

itor is satisfied to prolong the credit on the original terms. A prompt demand, however, or notice that such is not his intention, or any conduct which negatives acquiescence in the delay of payment on the terms which governed before the debt was due, will prevent the old rate being extended by implication from extraneous facts, or otherwise than by necessary legal construction. Where a mortgagee contracted to receive a rate of interest less than the legal rate during the time of credit agreed upon it was held that if he suffers the mortgagor to remain in possession after the mortgage money becomes due, an understanding of the parties will be presumed that the interest shall continue at the same rate until the mortgagee thinks proper to demand payment; but that no such presumption can be raised where the mortgagee attempts to foreclose his mortgage or take possession of the mortgaged premises on [543] the supposition that he has actually acquired the equity of redemption as a substitute for his debt.¹ Two other equity cases in New York seem to hold the rate to be the same absolutely after maturity as before by virtue of the contract fixing it.² In both of these the rate was less than the legal rate. In the latter the vice-chancellor decided that the creditor was not entitled to the legal rate after maturity, though the debtor had regularly paid interest at that rate for over six years after the debt became due. Such payments were held not to be evidence of a continuing agreement to pay more than the rate specified in the bond as the rate before maturity. Later cases have been decided at law in the same manner;³ though the latest expression of the court of appeals assumes the rule to be settled to the contrary.⁴ In a case decided in 1880 it was held that

¹ *Bell v. Mayor*, 10 Paige, 49. See *Lawrence v. Trustees*, 2 Denio, 577.

² *Miller v. Burroughs*, 4 Johns. Ch. 436; *New York L. Ins. & T. Co. v. Manning*, 3 Sandf. Ch. 58.

³ *Andrews v. Keeler*, 19 Hun, 87; *Association v. Eagleson*, 60 How. Pr. 9.

⁴ It is assumed in *O'Brien v. Young*, 95 N. Y. 428 (followed in *Oswego City Savings Bank v. Board of Education*, 70 App. Div. 538, 543, 75 N. Y. Supp. 417), that, in the absence of a stipula-

tion to pay the contract rate until the discharge of the obligation, the legal rate will govern, and that this is according to the weight of authority in that state. Earl J., refers to *Macomber v. Dunham*, 8 Wend. 550; *United States Bank v. Chapin*, 9 id. 471; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Ritter v. Phillips*, 53 id. 586; *Southern Central R. Co. v. Moravia*, 61 Barb. 180.

In *Ferris v. Hard*, 135 N. Y. 354, 365, 32 N. E. Rep. 129, it is said: If an in-

the right to the same rate after maturity, which was fixed by contract before, is a contract right which cannot be impaired by subsequent legislation.¹ In a case in Illinois² there was a stipulation for "five per cent. per month as damages from maturity." The payee, from time to time after maturity, accepted interest at ten per cent. per annum until the death of the maker. It was held that such acceptance of interest evidenced an agreement to substitute ten per cent. per year in place of five per cent. per month, and was a waiver of the higher rate. In a Pennsylvania case³ it was held that a note payable at a future day with three per cent. interest from date carried that rate till the day of payment fixed in the contract,

instalment were not paid when due, the contract was violated, and interest after that upon such instalment could only be recovered as damages, and at the rate of interest authorized by law. *Hewett v. Chadwick*, 8 App. Div. 23, 40 N. Y. Supp. 144.

The law in New York on this subject is not settled, or is not regarded as settled, by the late cases referred to. In *Elmira Iron & Steel Rolling Mill Co. v. Elmira*, 5 N. Y. Misc. 194, 25 N. Y. Supp. 657, the cases are reviewed, and the conclusion stated that *O'Brien v. Young* and *Ferris v. Hard*, *supra*, are not adjudications on the question. Smith, J., said: I have examined carefully the authorities cited by Judge Earl [in *O'Brien v. Young*] from the New York courts, and they do not state to me the rule of law which he seems to derive therefrom. In none of those cases was the question squarely discussed and decided. This question was not before Judge Earl when the opinion was written, and his attention does not seem to have been called to the cases in this state holding a contrary doctrine. In *Ferris v. Hard* Judge Peckham seems to indicate that the interest would be at the statutory rate after the maturity of the contract. But in the case he was dis-

cussing there was no rate specified in the contract. It seems to be settled beyond dispute, where the rate is not specified in the contract, that after maturity interest is to be reckoned at the statutory rate. In *Ferris v. Hard* there was no occasion to present to the court the authorities which I think must control the construction of a contract wherein the rate of interest is specified, and those authorities are not discussed in the opinion. The same remarks apply to *Loos v. Wilkinson*, 113 N. Y. 485, 21 N. E. Rep. 392, 10 Am. St. 495, 4 L. R. A. 353. Reference is made to *Miller v. Burroughs*, 4 Johns. Ch. 436; *Van Beuren v. Van Gaasbeek*, 4 Cow. 497; *Sullivan v. Fostick*, 10 Hun. 81; *Association v. Eagleson*, 60 How. Pr. 9; *Patteson v. Graham*, 16 N. Y. St. Rep. 703, 1 N. Y. Supp. 2, and *Genet v. Kissam*, 53 N. Y. Super. Ct. 43, as holding contrary to the cases first referred to. But see *Oswego City Savings Bank v. Board of Education*, *supra*.

¹ *Association v. Eagleson*, 60 How. Pr. 9. See *Morrisania Savings Bank v. Bauer*, 3 N. Y. L. Bull. 102; *Taylor v. Wing*, 84 N. Y. 471.

² *Bradford v. Hodes*, 66 Ill. 517.

³ *Ludwick v. Huntzinger*, 5 W. & S. 51.

and after that legal interest. A similar rule was laid down in South Carolina,¹ and in Kentucky, the promise being to pay "from date."²

[544] § 309. *Same subject.* A contract for the payment of money at a definite future time, with a stipulation for interest at a specified rate, stands, if not performed after the date fixed for the payment of the principal, simply as a chose in action. It has then no future; the time has elapsed for performance; there remains but a right of action for damages. There is no continuing contract to pay interest in any other sense than there is to pay the principal. The promise was, as to both, to pay at a day which is past.³ If the principal had been loaned for a term of years with an agreement to pay interest semi-annually, this agreement, while it runs, would impose the duty to pay interest only at those half-yearly periods. But no periodicity would be recognized in the obligation to pay interest after the maturity of the debt.⁴ In a suit brought three months after that date there can be no doubt that the creditor would be entitled to a computation of interest for that time, or for any time, to the day of obtaining judgment or decree.⁵ The creditor's claim for such interest could not be defeated by the argument that the interest contract continues by implication until payment of the debt, and by such contract the debtor is bound to pay only once in six months. Such an argument would be entitled to prevail if the interest contract were a con-

[545] tinuing one—if by its own prolonged operation and effect it absolutely regulated the interest *after*, as it did *before*, the debt was due.

Parties may by agreement liquidate damages to be paid in

¹ Langston v. South Carolina R. Co., 2 S. C. 248.

A clause in a bank charter giving the corporation power to make discount at prescribed rate on instruments having less than twelve months to run does not establish a rule as to the rate of interest. Chambliss v. Robertson, 23 Miss. 302; United States Bank v. Chapin, 9 Wend. 471. See Tuffli v. Ohio Life Ins. & T. Co., 2 Disney, 121.

² Sanford v. City Nat. Bank, 15 Ky. L. Rep. 607; McNeil v. Watkins' Adm'r, id. 780.

³ The text is quoted in Palmer v. Laberee, 23 Wash. 409, 421, 63 Pac. Rep. 216.

⁴ But see O'Neill v. Bookman, 9 Rich. 80.

⁵ Wheaton v. Pike, 9 R. L. 132, 11 Am. Rep. 227.

case of a future breach of contract; and may, in like manner and upon the same principle, fix the rate of interest within reasonable limits to be paid after the debt is due.¹ But an agreement in general terms to pay interest on a time debt is primarily for the same time as the agreement for the payment of the principal. The intention of the parties is to be ascertained from its language, and thus ascertained, the debtor intends to pay, and the creditor to receive, the debt, consisting of principal and agreed interest, on the day fixed for such payment. To put any other construction on the agreement is to infer bad faith, or that the parties do not intend what they clearly say. Strictly, therefore, such an agreement does not operate beyond the pay day. Whatever influence it has in determining the interest afterwards is secondary and probative.

If the debtor does not pay when the debt is due, and this omission occurs by his default, the expectation that he will pay interest at the same rate at least as during the period of stipulated credit is natural and reasonable; and the existence of a legal obligation to do so is agreeable to the analogy of other contracts, and by such analogy is liable to be modified by circumstances. The question of interest after maturity is much governed by the equity of the case; circumstances may take away the right altogether. Those which will have this effect will readily occur to the professional mind. Among them is a tender of the debt which puts an end to the default and stops interest;² the continued absence of the creditor from the state in which the debt is payable;³ a state of war which places the debtor and creditor in the relation of alien enemies to each other's government.⁴

So the rate of interest which was obligatory by agreement during the life of the contract may be so low or so high as to negative the intention, when the contract was made, or during the default, that it should continue after the con- [546]

¹ See *Palmer v. Leffler*, 18 Iowa, 125; *Taylor v. Meek*, 4 Blackf. 338.

² §§ 276, 382.

³ *Du Belloix v. Waterpark*, 1 D. & R. 348, n.; *Gage v. McSweeney*, 74 Vt. 370, 52 Atl. Rep. 969.

⁴ *Mease v. Stevens*, 1 N. J. L. 433; *Bean v. Chapman*, 62 Ala. 53.

The rate of interest stipulated for is not affected by the payee's refusal to furnish the payor with a statement of the amount due, no tender being made. *Lamprey v. Mason*, 148 Mass. 231, 19 N. E. Rep. 350.

tract had expired; and that circumstance may influence the court to reject the rate so agreed on as a rule in determining [547] the interest to be allowed as damages.¹ To the rate specified in the contract the parties have thereby given a

¹Henry v. Thompson, Minor, 209. This case is thus succinctly stated by Loomis, J., in Hubbard v. Callahan, 42 Conn. 524, 19 Am. Rep. 564: "The suit was for the recovery of a large number of notes, differing in their terms, and no particular description of them reported; but they were reduced to four general classes in the briefs of counsel: '1st. To pay the principal at a future day, and if not punctually paid, to pay the premium or interest at the rate expressed from the date. 2d. To pay the principal at a future day, with interest at the rate expressed from the date till paid. 3d. To pay the principal at a future day, with a distinct agreement to pay the interest, not stating the time from which or till which it was to run. 4th. To pay the principal at a future day, with interest from the maturity of the note.' The rates of interest stipulated for were in some cases one hundred and twenty per cent. per annum; in others sixty per cent.; and the very lowest was thirty per cent. The statute of Alabama then in force provided 'that any rate of interest or premium for the loan or use of money, wares, merchandise, or other commodity, fairly and *bona fide* stipulated and agreed upon by the parties to such contract, expressed in writing and signed by the party to be charged therewith, shall be legal.' A majority of the judges concurred in refusing to allow the stipulated rates of interest, but they did not agree as to the grounds of the decision. Judges Crenshaw and Minor delivered very able dissenting opinions sustaining the stipulations for interest as valid contracts. The

majority opinions were given by the chief justice and by Judge Safford. Judges Ellis and Gayle concurred with the chief justice in the opinion that the contract on its face fails to show that the consideration was a loan. One reason for giving such a literal application of the statute is stated to be the unparalleled rate of interest. But in the course of the opinion the chief justice says: 'As to the second, third and fourth classes of cases as arranged in the brief and arguments of counsel, I am of opinion that if the consideration had been a fair and *bona fide* loan, the parties had a right to stipulate any rate of interest without limiting it to a future day, or to the maturity of the note, provided the contract for interest be absolute and unconditional.' Judge Safford held (in which Gayle also concurred) that where the rates of interest were exorbitant, and there was no time of forbearance fixed by the contract, they were not within the statute." Bell v. Mayor, 10 Paige, 49.

Cook v. Fowler, L. R. 7 H. of L. Cas. 27, was an action upon a warrant of attorney given to secure the payment of £1,330 "on the 2d day of June next." with interest at five per cent. per month, "judgment to be entered up forthwith." The lord chancellor remarked upon the stipulation for interest up to a certain day, without any mention of subsequent interest upon the face of the instrument. He says: "No doubt, *prima facie*, the rate of interest stipulated up to the time certain might be taken, and generally would be taken, as the measure of interest; but this would not be

sanction by adopting it before maturity; they have admitted it to be a fair compensation for the use of the money. The debtor's omission to pay the debt when due should have the same effect to continue that rate after maturity, on the ground both of intention and admission of its fairness, where it exceeds the legal rate, as the silence and inaction of the creditor where the rate is less.¹ The statutory provis- [548]

conclusive. It would be for the tribunal to look at all the circumstances of the case and to decide what was the proper sum to be awarded by way of damages." The house of lords declined to award damages at the rate of sixty per cent. because it was highly inequitable. The holder not having entered up judgment, nor made any definite claim against the debtor's estate (such debtor having died), for the space of four years and upward, it was held that the tribunal before which the claim at last came was justified in awarding by way of damages such a rate of interest as the holder of the warrant of attorney would have been entitled to, according to the ordinary rule of the court of chancery, had he entered up judgment on the day named in the defeasance to the warrant of attorney, namely, at the rate of four per cent. It was held, also, that there is no rule of law that upon a contract for the payment of money on a certain day, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest is to be implied. *Reeves v. Lane*, 8 N. Z. 44.

In *Brewster v. Wakefield*, 22 How. 118, it was held that such a contract is spent when the day of payment arrives; that there is no stipulation in relation to interest after the debt becomes due; and that if the right to interest depended altogether on contract, and was not given by law in such a case, the creditor would be

entitled to no interest whatever after the day of payment. The contract being entirely silent as to interest, if the notes be not punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision of the contract. Therefore the interest after maturity should be after the rate established by law, where there is no contract to regulate it. There were two notes sued on, one stipulating interest at the rate of twenty and the other twenty-four per cent. per annum. Taney, C. J., said: "Nor is there anything in the character of this contract that should induce the court by *supposed intendment of the parties*, or doubtful inferences, to extend the stipulation for interest beyond the time specified in the written contract. The law of Minnesota has fixed seven per cent. per annum as a reasonable and fair compensation for the use of money; and where a party desires to exact from the necessities of a borrower more than three times as much as the legislature deems reasonable and just, he must take care that the contract is so written in plain and unambiguous terms; for with such a claim he must stand upon his bond."

¹ *Beekwith v. Trustees of Hartford*, etc. R. Co., 29 Conn. 268, 76 Am. Dec. 539. A railroad company issued bonds, by virtue of a statute, bearing interest payable semi-annually at the rate of seven per cent. per annum; the interest coupons were paid up to the time when the princ-

ions, enacted in many states, that judgments shall bear the same rate of interest as that expressed on the face of the contract, or the contract rate, is a legislative sanction of the same rate after as before maturity.¹

pal of the bonds fell due. And the question was submitted to the court whether the bondholders were legally entitled to seven per cent. interest or only to six, the legal rate. Hinman, J., says: "We are of opinion that the plaintiff in this case is entitled to seven per cent. per annum for the detention of his money after the principal became due. Technically speaking, it is no doubt true that the sum recoverable for such detention is treated as damages for the breach of the contract rather than interest for the money loaned, because, strictly speaking, interest can only be claimed under a contract to pay it, either express or implied, and the express contract, of course, ceased on the day when the principal was to be paid, and no implied contract can be raised from a total refusal to pay anything. But damages are recoverable for the breach of the contract; and courts, in order to give to him to whom the money is due what he may fairly be supposed to have suffered by withholding it from him, and at the same time to prevent the borrower from making a profit by the breach of his contract, have regulated the damages for such breach by the usual rate of interest at the place where the money is detained. This, though an arbitrary rule, will generally operate justly and is much more convenient than any other which could be adopted. But the usual rate of interest at any place is itself as arbitrary a provision of law as the damages dependent upon it, and is by no means uniform. It is not only known to differ in different states and countries, generally de-

pending upon positive statutes, but may vary from the ordinary or more general rate by the parties agreeing upon a lesser rate, or if authorized so to do, as in the case under consideration, by their agreement upon a higher rate; or there may be a general statute authorizing a higher rate for money borrowed for some particular purpose, or by a particular class of persons or corporations; . . . and the different rates thus agreed upon become the legal rates of interest in respect to the particular contracts during their existence. And the rates of interest thus established by agreement must be presumed to be just and equitable under the circumstances; that is, a fair compensation in such case for the use of the money between the parties during the time the contract had to run. Then, why should we not presume, as between the same parties, that such continues a fair compensation for its use until the contract is performed; as well after as before the day when the principal was to be paid; and thus permit the rate of interest agreed upon to control the damages to be paid for the detention of the money, as well as the interest for its use. There is no equity in favor of one rate of interest rather than another, where they are both legal and within reasonable limits, and the defendants ought not to complain as long as it is in their power, by paying the principal, to protect themselves from paying what they thought a reasonable rate when they borrowed the money."

¹ *Hand v. Armstrong*, 18 Iowa, 324. See note, *infra*, this section.

In some states the rate stipulated to be paid during the period of credit has no influence in determining the rate afterwards, but the legal rate is uniformly applied. This is so in Minnesota,¹ Kansas,² Kentucky,³ Maine,⁴ Alabama,⁵ Maryland,⁶ Arkansas,⁷ Rhode Island,⁸ South Carolina,⁹ Georgia (according to the understanding of the judge of the federal circuit court),¹⁰ California (in certain cases) by virtue of the code,¹¹ and formerly in Indiana.¹² The same principle is held by the supreme court of the United States,¹³ where the question does not come before it from a state in which the law is settled to the con-

¹ *Talcott v. Marston*, 3 Minn. 339; *Mason v. Callender*, 2 id. 350, 72 Am. Dec. 102; *Kent v. Brown*, 3 Minn. 347; *Chapin v. Murphy*, 5 id. 474; *Lash v. Lambert*, 15 id. 416, 2 Am. Rep. 142; *Moreland v. Lawrence*, 23 Minn. 84.

² *Robinson v. Kinney*, 2 Kan. 184; *Searle v. Adams*, 3 id. 515, 89 Am. Dec. 593.

³ *Gray v. Briscoe*, 6 Bush, 687; *Rilling v. Thompson*, 12 id. 310; *White's Adm'r v. Curd*, 86 Ky. 191, 5 S. W. Rep. 553.

⁴ *Duran v. Ayer*, 67 Me. 145; *Eaton v. Boissonnault*, id. 540, 24 Am. Rep. 52.

⁵ *Kitchen v. Branch Bank*, 14 Ala. 233.

⁶ *Brown v. Harcastle*, 63 Md. 484.

⁷ *Newton v. Kennerly*, 31 Ark. 626, 25 Am. Rep. 592; *Woodruff v. Webb*, 32 Ark. 612; *Pettigrew v. Summers*, id. 574; *Gardner v. Barnett*, 36 id. 476.

⁸ *Pearce v. Hennessy*, 10 R. I. 223.

⁹ *Langston v. South Carolina R. Co.*, 2 S. C. 243; *Maner v. Wilson*, 16 id. 469; *Thatcher v. Massey*, 20 id. 542; *Bell v. Bell*, 25 id. 149.

¹⁰ *Sherwood v. Moore*, 35 Fed. Rep. 109. But see *Daniel v. Gibson*, 72 Ga. 367, 53 Am. Rep. 845; *Trippe v. Wynne*, 76 Ga. 200.

¹¹ Sec. 1917, Civil Code; *Nash v. El Dorado County*, 24 Fed. Rep. 252; *Malone v. Roy*, 107 Cal. 518, 40 Pac. Rep. 1010; *Randall v. Duff*, 107 Cal. 33, 40

Pac. Rep. 20; *Lambert v. Schmalz*, 118 Cal. 33, 50 Pac. Rep. 13. See *Falkner v. Hendy*, 80 Cal. 636, 22 Pac. Rep. 401.

The California statute limiting the rate of interest on judgments does not include claims against solvent estates; hence an allowed claim against such an estate based upon a contract bearing a rate of interest exceeding that which judgments carry, continues to bear the contract rate until it is paid. *Richardson v. Diss*, 127 Cal. 58, 59 Pac. Rep. 197.

Under sec. 1919, Civil Code, a contract providing that deferred instalments of interest shall bear interest at a higher rate than that borne by the principal is void. *Yndart v. Den*, 116 Cal. 533, 48 Pac. Rep. 618, 58 Am. St. 200.

¹² *Burns v. Anderson*, 68 Ind. 202, overruling *Kilgore v. Powers*, 5 Blackf. 22; *Richards v. McPherson*, 74 Ind. 158. *Burns v. Anderson* is overruled by *Shaw v. Rigby*, 84 Ind. 375, 43 Am. Rep. 96.

¹³ *Brewster v. Wakelield*, 22 How. 118; *Burnhisel v. Firman*, 22 Wall. 170; *Holden v. Trust Co.*, 100 U. S. 72.

If the obligation does not specify the rate after maturity and provides that the interest due before it is payable shall be added to the principal, the legal rate will govern thereafter. *Ewell v. Dagg*, 108 U. S. 143, 2 Sup. Ct. Rep. 108.

trary.¹ It has been said of the cases cited that they recognize the principle that if the parties have fixed a rate to be paid up to the time of the extinguishment of the debt, that rate will be respected; this rule was applied where the specified rate was payable until the obligation was paid.² The circuit court for the eastern district of Wisconsin has deemed the rule of the federal supreme court applicable to bonds which have been declared due because of default in the payment of interest coupons. "The stipulation of the trust deed which authorizes the trustee, at its election, to mature the principal upon default in the payment of interest does not purport to abrogate the rate of interest which the obligor agreed to pay during the stated period. The exercise of the election matured the principal, but left untouched the stipulation for interest. The rate was agreed upon by the parties to the contract, and was to continue during a stated period of time, notwithstanding that by the election of the trustee the principal was matured at an earlier date than that specified in the contract." As to the coupons which matured by their own terms, no rate of interest being fixed after their maturity, they carried the legal rate.³

In several of the enumerated states the question is solved according to the intention of the parties. Thus, where the stipulation is for an unusually low rate of interest, there is no presumption that it was contemplated to be continued after maturity, and the legal rate will govern.⁴ A note payable one day after date, with interest in excess of the minimum legal rate, bears the stipulated rate after maturity.⁵ The expressions

¹ *Cromwell v. County of Sac*, 96 U. S. 57 (an Iowa case), the conventional rate was continued; *Ohio v. Frank*, 103 id. 697; *Massachusetts Benefit Ass'n v. Miles*, 137 id. 689, 11 Sup. Ct. Rep. 234; *Vermont Loan & Trust Co. v. Dygert*, 89 Fed. Rep. 123. See *Perry v. Taylor*, 1 Utah, 63.

² *New Orleans v. Warner*, 175 U. S. 120, 147, 20 Sup. Ct. Rep. 120.

³ *Farmers' Loan & Trust Co. v. Northern Pacific R. Co.*, 94 Fed. Rep. 454.

⁴ *Brown v. Hardcastle*, 63 Md. 484.

⁵ *Capen v. Crowell*, 66 Me. 282;

Paine v. Caswell, 38 Me. 80; *Casted v. Walker*, 40 Ark. 117, 48 Am. Rep. 5; *Gray v. Briscoe*, 6 Bush, 687; *White's Adm'r v. Curd*, 86 Ky. 191, 5 S. W. Rep. 553; *Piester v. Piester*, 22 S. C. 139, 53 Am. Rep. 711.

But a note dated in February, payable one day after date, with interest at one per cent. per month from the first of the preceding January, bears only the legal rate after maturity. "The time named from which the interest was to run—something more than a month before the execution of the note—made it possible

of the parties also control, though they fall short of being distinct.¹ In England the stipulated rate before maturity would seem to be *prima facie* the rate afterwards,² but subject to

to count the interest for a 'month' without going beyond its maturity, and excluded the conclusion, otherwise necessary, that the phrase 'per month' could not have its full effect without touching time beyond the maturity of the note." The court remark that "this may look like a small difference to produce such consequences, but we think it is founded on principle and the decided cases." *Smith v. Smith*, 33 S. C. 210, 11 S. E. Rep. 761.

¹A note payable with "ten per cent. per annum from date," and stipulating that if the interest is not paid annually it shall become principal and bear the same rate of interest, continues to carry the contract rate after maturity. *Vaughan v. Kennan*, 38 Ark. 114; *Miller v. Hall*, 18 S. C. 141. And so with a note payable one day after date "with interest from date at the rate of twelve per cent. per annum, interest to be paid annually." *Sharpe v. Lee*, 14 S. C. 341.

A note payable twelve months after date "with interest from date, interest payable annually," was described in a mortgage contemporaneously executed by the same person as a note "with interest thereon at the rate of twelve and a half per cent. per annum until paid." The language of both instruments indicated an indefinite extension of credit and interest at the specified rate. *Mobley v. Davega*, 16 S. C. 73, 42 Am. Rep. 632.

²*Cook v. Fowler*, L. R. 7 H. of L. Cas. 27; *Keene v. Keene*, 3 C. B. (N. S.) 144; *Morgan v. Jones*, 8 Ex. 620; *Das v. Lal*, L. R. 22 Ind. App. 199.

A note conditioned for the payment of the principal sum with in-

terest "until the repayment thereof" means until the day fixed for payment, and is not a contract to pay the agreed rate beyond that time. *In re European Central R. Co.*, 4 Ch. Div. 33. See *Ex parte Fewings*, 25 id. 399.

Where the promise was to pay seven per cent. so long as the principal or any part thereof should remain due, a judgment did not merge the contract in it so as to prevent the creditor from recovering the difference between the judgment and the contract rate. *Popple v. Sylvester*, 22 Ch. Div. 98; *Lowry v. Williams*, [1895] 1 Irish, 274.

The two last preceding cases and *Ex parte Fewings*, *supra*, are discussed in *Usborne v. Limerick Market Trustees*, [1900] 1 Ch. 85. In the last case a mortgagor covenanted to pay the principal sum on a day named, and also, if it should not then be paid, that so long as the same or any part of it was unpaid, he would pay the stipulated rate of interest. A judgment against the mortgagor for principal and interest merged the covenant therein, and the mortgagee was only entitled to recover the legal rate of interest thereafter. To the same effect, *Hanford v. Howard*, 1 N. B. Eq. 241, following *St. John v. Rykert*, 10 Can. Sup. Ct. 278, and *People's Loan & Deposit Co. v. Grant*, 18 id. 362.

"Interest is payable as interest, and not as damages, under a bond having a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, even although no express mention of interest is made in the bond; and I cannot see any just reason for holding that the amount of interest

easier relaxation and broader discretion conceded to the jury¹ than is consistent with the rule established by a preponderance of American authority, which is believed to be that the [550] rate stipulated for in general terms before maturity will be continued until verdict.² This rule has been applied where

recoverable is diminished by reason only of the bond being conditioned for payment of principal and interest up to or at a certain date. The bond may be so framed as to show an intent to limit interest recoverable as up to a specified date; but in my judgment it wants more than the circumstance I have referred to to show such an intent." Haynes v. Dixon, [1899] 2 Ch. 561.

¹ *Du Belloix v. Waterpark*, 1 D. & R. 348, n.; *Cameron v. Smith*, 2 B. & Ald. 305; *Bann v. Dalzel*, Moo. & M. 228; *Page v. Newman*, 9 B. & C. 378; *Arnot v. Redfern*, 3 Bing. 353; *Higgins v. Sargent*, 2 B. & C. 348; *Calton v. Bragg*, 15 East, 223; *Keene v. Keene*, 3 C. B. (N. S.) 144; *Gibbs v. Fremont*, 9 Ex. 25.

² *Evans v. Rice*, 96 Va. 50, 30 S. E. Rep. 463; *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494, 53 Pac. Rep. 291, 75 Am. St. 935; *Hallam v. Telleren*, 55 Neb. 255, 75 N. W. Rep. 560; *Meaders v. Gray*, 60 Miss. 400, 45 Am. Rep. 414; *Tishmingo Savings Inst. v. Buchanan*, 60 Miss. 496; *Hydraulic Co. v. Chatfield*, 38 Ohio St. 575; *Shaw v. Rigby*, 84 Ind. 375, 43 Am. Rep. 96, overruling cases to the contrary; *Kimball v. Burns*, 84 Ind. 370; *Hume v. Mazelin*, id. 574; *Shipman v. Builey*, 20 W. Va. 140; *Brown v. Steck*, 2 Colo. 70; *Buckingham v. Orr*, 6 id. 587; *Broadway Savings Bank v. Forbes*, 79 Mo. 226, affirming 9 Mo. App. 575; *Kerr v. Haverstick*, 94 Ind. 178; *Kellogg v. Laverder*, 15 Neb. 256, 48 Am. Rep. 339, 18 N. W. Rep. 38; *Hager v. Blake*, 16 Neb. 12, 19 N. W. Rep. 180; *Jefferson County v. Lewis*, 20 Fla. 980,

1009; *Borders v. Barber*, 81 Mo. 636; *Bowers v. Hammond*, 139 Mass. 360, 31 N. E. Rep. 729; *Parks v. O'Connor*, 70 Tex. 377, 8 S. W. Rep. 104; *Bressler v. Harris*, 19 Ill. App. 430; *Joiner v. Enos*, 23 id. 224; *Thorn v. Smith*, 71 Wis. 18, 36 N. W. Rep. 707; *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. Rep. 1; *Kohler v. Smith*, 2 Cal. 597, 56 Am. Dec. 369; *Beckwith v. Trustees of Hartford, etc. R. Co.*, 29 Conn. 268, 76 Am. Dec. 599; *Adams v. Way*, 33 Conn. 419; *Hubbard v. Callahan*, 42 id. 524, 19 Am. Rep. 564; *Kilgore v. Powers*, 5 Blackf. 22; *Gordon v. Phelps*, 7 J. J. Marsh. 619; *Pate v. Gray*, Hemp. 155; *Henderson v. Desha*, id. 231; *Spencer v. Maxfield*, 16 Wis. 179; *Pruyn v. Milwaukee*, 18 id. 367; *Marietta Iron Works v. Lottimer*, 25 Ohio St. 621; *Monnett v. Sturges*, id. 384; *Besser v. Hawthorn*, 3 Ore. 129; *Ethyre v. McDaniel*, 28 Ill. 201; *Williams v. Baker*, 67 Ill. 238; *Brewster v. Wakefield*, 1 Minn. 352, 69 Am. Dec. 343; *Van Beuren v. Van Gaasbeck*, 4 Cow. 496; *Montgomery v. Boucher*, 14 Up. Can. C. P. 45; *Pridgen v. Andrews*, 7 Tex. 461; *Hopkins v. Crittenden*, 10 id. 189; *Harden v. Wolf*, 2 Ind. 31; *Engler v. Ellis*, 16 id. 475; *Hand v. Armstrong*, 18 Iowa, 324; *Thompson v. Pickel*, 20 id. 490; *Wilson v. King*, Morris, 106; *Burkhart v. Sappington*, 1 G. Greene, 66; *Guy v. Franklin*, 5 Cal. 416; *Corcoran v. Doll*, 32 Cal. 82; *McLane v. Abram*, 2 Nev. 199; *Overton v. Bolton*, 9 Heisk. 762, 24 Am. Rep. 367; *Warner v. Juif*, 38 Mich. 662; *Cecil v. Hicks*, 29 Gratt. 1, 26 Am. Rep. 391; *Burgess v. Southbridge Savings Bank*, 2 Fed. Rep. 500;

bonds had coupons attached for the annual interest up to maturity, but no coupons therefor after maturity.¹ A mere change in the form of a security does not work a reduction of the interest from the agreed to the legal rate.² If an instru-

Brannon v. Hursell, 112 Mass. 63, 37 Am. Rep. 305; Union Institution v. Boston, 129 Mass. 82; Cromwell v. County of Sac, 96 U. S. 51; Fauntleroy v. Hannibal, 5 Dill. 219; Hovey v. Edmison, 3 Dak. 449, 22 N. W. Rep. 594 (it is so provided in the code); United States Mortgage Co. v. Sperry, 26 Fed. Rep. 727; Gage v. McSweeney, 74 Vt. 370, 52 Atl. Rep. 969.

If the stipulation is for the payment of a rate in excess of the minimum legal rate "until maturity," the latter will be the limit thereafter. Hamer v. Rigby, 65 Miss. 41, 3 So. Rep. 137.

Under statutes to the effect that where there is no express agreement fixing a different rate of interest, bonds, notes, etc., shall bear interest at seven per cent. after they have become due, and that judgments shall bear interest at the rate agreed upon in the contracts upon which they were rendered, a note which bears an agreed rate of interest, but is silent as to the rate after its maturity, carries interest at the stipulated rate. Greenhaw v. Holmes, 68 Pac. Rep. 537 (Arizona), citing Kohler v. Smith, 2 Cal. 597, 56 Am. Dec. 369; Hand v. Armstrong, 18 Iowa, 324; Brannon v. Hursell, 112 Mass. 63; Marietta Iron Works v. Lottimer, 25 Ohio St. 621; McLane v. Abrams, 2 Nev. 199; Phinney v. Baldwin, 16 Ill. 108, 61 Am. Dec. 62; Hopkins v. Crittenden, 10 Tex. 189; Spencer v. Maxfield, 16 Wis. 185; Borders v. Barber, 81 Mo. 636; Warner v. Juif,

38 Mich. 662; Kellogg v. Lavender, 15 Neb. 256, 18 N. W. Rep. 38, 48 Am. Rep. 339; Wyckoff v. Wyckoff, 44 N. J. Eq. 56, 13 Atl. Rep. 662; Cromwell v. County of Sac, 96 U. S. 51.

In Spencer v. Maxfield, 16 Wis. 178, the action was upon a note payable at a future day with interest at the rate of twelve per cent. It was silent as to interest after maturity. The statute in force permitted parties to contract for any rate not exceeding twelve per cent., and seven was the ordinary legal rate. The stipulated rate was held to govern after maturity as a rate legally fixed. Cole, J.: "We have no doubt but the general understanding among business men has been that notes in the form of the one under consideration draw interest at the rate of twelve per cent. after as well as before maturity. Such we believe to be the construction placed upon these contracts by the community, and we think it is the correct one. . . . It seems to be strictly analogous to the case where a tenant holds over, where the law implies an agreement to pay rent according to the terms of the express lease." The contract, on this theory, imports an agreement to pay the same rate of interest after as before maturity. There is supposed to be a *tacit* agreement as distinguished from a *duty or obligation* which is to be enforced on the fiction of a promise; or as distinguished from a measurement of compensation for detaining money, by the standard of

¹ People v. Getzendaner, 137 Ill. 244, 34 N. E. Rep. 297; Prayn v. Milwaukee, 18 Wis. 367; Kendall v.

Porter, 120 Cal. 106, 45 Pac. Rep. 634, 52 Ill. 113.

² Union Mut. L. Ins. Co. v. Shaw, 110 Ill. 35.

ment which is barred by the statute of limitations is revived by a new promise the conventional rate of interest therein specified may be collected, notwithstanding it is higher than that allowed by law when such promise is made.¹

the rate of interest stipulated for its use immediately before such detention.

In *Spaulding v. Lord*, 19 Wis. 533, where the agreement was to pay interest "until the time when the principal sum will be payable," the inference of a contract to pay the specified rate after maturity was repelled by the particular language.

In *Etnyre v. McDaniel*, 28 Ill. 201, suit was brought on a promise to pay money and ten per cent. interest. Breese, J., said: "Here are two rates of interest provided for; one conventional, the other statutory. The ten per cent. rate is expressly stipulated by the parties and must prevail over the statute rate. This contract must be construed like all other contracts, and the intention of the parties must prevail. Now what did the parties intend when making a contract to pay ten per cent.? Can any one doubt it was the intention as well of the maker as of the payer of this note, that ten per cent. should be paid until the note was fully discharged. Such is the common-sense understanding of the contract, and the statutory interest does not control at all. Such contracts are made every day. It is the rate of interest fixed by the parties themselves, and to attach to the debt until it should be fully paid, and so long as it remains a note, conventional, not legal, interest was the contract, and such contracts are sanctioned by law."

The conclusion that the contract rate shall govern after maturity is reached by substantially the same

reasoning in *Wisconsin*, *Illinois* and *Iowa*. The construction of the contract is different from that put upon the notes in *Brewster v. Wakefield*, and on the bonds in *Beckwith v. Trustees*. These cases agree that such contracts for interest do not extend beyond the day fixed for the payment of the principal. In the former (*Brewster v. Wakefield*), for that reason it was held that the conventional interest ceased at maturity; but the *Connecticut* case, while it concedes that the contract operates only to the time when the principal is due, holds nevertheless that the conventional rate of interest should be adopted as the just measure of damages after maturity, having been the conventional rate immediately before, and because if the debtor is unwilling to pay damages at that rate he can avoid them by paying the debt.

In *Montgomery v. Boucher*, 14 Up. Can. C. P. 45, the defendant having made his promissory note payable two months after date, with interest at the rate of twenty per cent. per annum, and having made default in payment thereof at maturity, in an action by the holder thereon the question was submitted to the jury as to the amount they would allow after the note became due, not exceeding twenty per cent. The jury allowed only six per cent. after the note matured. Upon motion to increase the verdict by the difference between six and twenty per cent., it was held that the rate of interest agreed upon by the terms of the note is the amount which should be al-

¹ *Vines v. Tift*, 79 Ga. 301, 7 S. E. Rep. 227.

SECTION 2.

AGREEMENTS FOR INTEREST — "UNTIL PAID."

Agreements for interest at higher than legal rates, [553] both before and after maturity, will be discussed in the next section. Two classes of contracts will receive present attention: first, those which provide expressly for interest from

lowed by the jury, when allowing interest in the nature of damages, from the maturity of the note to the entry of the judgment.

In *Howland v. Jennings*, 11 Up. Can. C. P. 272, on the authority of *Keene v. Keene*, 3 C. B. (N. S.) 144, the court refused to reduce the verdict of a jury which had allowed interest for the whole period from the date at the rate of twenty per cent. per annum, on a promissory note payable one month after date, with interest at that rate. The defendant contended that from the time the note became due only six per cent. should have been allowed; and the judge, at *nisi prius*, gave him leave to move the full court to reduce the verdict, which they refused to do. "On the whole," say the court, "we think the weight of authority is in favor of the interest agreed upon by the parties being the proper amount to be allowed by the jury as interest, when allowing interest in the nature of damages, from the time the note matures to the time the judgment is to be entered. It may also be argued this is the proper mode of estimating the interest or damages to be allowed, as being that which was in the contemplation of the parties when they entered into the contract, according to the doctrine laid down in *Hadley v. Baxendale*, 9 Ex. 341."

It may be doubted whether these cases are to be relied upon as the law of Canada at present. It is held in

St. John v. Rykert, 10 Can. Sup. Ct. 278, following some English cases stated *ante*, n. § 309, that a promise to pay interest until the principal is paid means until the time fixed for the payment of the principal.

In *Keene v. Keene*, 3 C. B. (N. S.) 144, the suit was against the drawer on a bill of exchange payable with interest at ten per cent. per annum. The master computed interest at that rate after maturity to judgment. A motion was made on behalf of the defendant to refer to the master for reconsideration; and it was stated in support of the motion that the acceptor, whose liability measures that of the drawer, is liable only to interest at five per cent. after due. Counsel was interrupted by Willes, J., who said: "That clearly is not so; until maturity of the bill the interest is a debt; after its maturity the interest is given as damages, at the discretion of the jury. Col. Fremont had to pay twenty-five per cent. (the California rate of interest) upon the bills which he drew there on Mr. Buchanan, the secretary of state, at Washington, and which were protested for non-acceptance. *Gibbs v. Fremont*, 9 Ex. 25. The jury saw fit to adopt, as the measure of damages, the rate of interest which the parties themselves have fixed, and the master is substituted for the jury." On the decision of the case, Cockburn, C. J., said: "The master has, as he well might, given in the shape of damages the rate of interest

date at a uniform rate until the debt is paid; and second, those which provide for interest from date, in case the debt, not otherwise bearing interest, shall not be punctually paid, or for interest to commence at maturity, or thenceforth to bear an increased rate in case of default.

§ 310. Agreements for interest from date until debt paid.

Agreements which belong to the first class have, of course, no

the parties themselves have contracted for. I think he has done quite right." Crowther, J., said: "The master would, I think, have acted very unreasonably if he had not assessed the damages by the rate which the parties had stipulated as the value of the money." *Pujol v. McKinley*, 42 Cal. 559.

By statute in Nevada the rate of interest or damages for detention is the same after breach as that fixed by the contract before breach. So that though the statute gives damages at the rate of ten per cent. per annum for withholding money generally, it allows a higher rate corresponding to the contract rate when money is withheld which bore, by contract, a higher rate before maturity. *McLane v. Abrams*, 2 Nev. 199.

Nutting v. McCutcheon, 5 Minn. 332, was a suit on a note for \$1,000, and interest at two and a half per cent. per month, secured by mortgage. When the note became due the maker obtained the privilege of retaining the money longer, upon condition that he would pay interest thereon quarterly at the current rates. No contract for forbearance for any specific time was entered into, nor did the maker, at the beginning of the several extensions that were granted, specially agree to pay any particular rate of interest and no writings were executed in relation to the same; but at the end of each quarter the parties would meet and agree upon the value of money for the past quarter, and the

maker would pay and the payee would receive such amount in satisfaction of the interest accrued, and indorse the same upon the note as payment up to that date, with the consent of the maker. It was held that the absence of a definite contract for forbearance on the one side, and payment on the other, at the beginning of each quarter, did not affect the validity of the payments, as the parties obviated any such difficulty by stipulating the precise terms at the end of the time, and immediately executing them as settled. When a contract lacking the essential feature of mutuality at its inception is subsequently, by the act of the parties, corrected in this particular, and executed, the question of mutuality between the parties is put to rest, although the statute requires that the contract for the payment of such interest shall be in writing; yet where it is made without writing, and executed by the parties, money paid thereunder cannot be recovered back. The rule that where contracts are made in violation of statutory provisions, or in contravention of public policy, they are void, and money paid thereunder may be recovered back, is confined in its application to such contracts as involve, by their subject-matter, some substantial violation of the spirit of the law or policy, and not such as stipulate some matter recognized and permitted by law or policy, but in a manner other than the one prescribed.

other effect than to give interest before maturity, if the rate stipulated is the legal rate, and this will continue until the debt is paid or collected.¹ Where the conventional rate is higher than the ordinary legal rate, but does not exceed that which the parties are authorized by law to stipulate for, the contract is binding according to its terms; that is, until the debt is paid or the contract merged in a judgment or decree,² except in Minnesota. In Iowa the contract rate is computed on the judgment in furtherance of the spirit and intent of the contract;³ but the interest included in the judgment bears interest only at the legal rate.⁴ In Minnesota the statute authorizing parties to contract for any rate of interest is construed strictly; the rate stipulated for does not extend beyond the date fixed for payment. It is held there that interest as damages cannot be increased by contract above the ordinary legal rate; such contracts are treated as providing penalties to secure punctuality of payment, and, consequently, as having no legal effect.⁵

The courts which hold that a general promise of interest before maturity at a given rate will operate afterwards by supposed intention of the parties will and do enforce a continuance of the same rate when that intention appears expressly or inferentially.⁶ And other courts which enforce the same rate after as before maturity, not on the ground mainly of intention, but because the rate adopted by the parties for one

¹ Interest does not cease on the death of a mortgagor because no demand was made, there being no administrator or curator of whom it could be made. *Tatum v. Gibbs*, 19 Ky. L. Rep. 665, 41 S. W. Rep. 565.

² *Augusta Nat. Bank v. Hewins*, 90 Me. 255, 38 Atl. Rep. 156; *Freehold Loan Co. v. McLean*, 8 Manitoba, 116; *Manitoba & Northwest Loan Co. v. Barker*, id. 296; *Fisher v. Bidwell*, 27 Conn. 363; *Palmer v. Löffler*, 18 Iowa, 125; *Pajol v. McKinlay*, 42 Cal. 559; *Taylor v. Meek*, 4 Blackf. 388; *Mead v. Wheeler*, 13 N. H. 351; *Dudley v. Reynolds*, 1 Kan. 287, affirmed in *Young v. Thompson*, 2 Kan. 83; *New*

Orleans v. Warner, 175 U. S. 120, 117, 20 Sup. Ct. Rep. 41.

³ *Wilson v. King*, Morris, 106.

⁴ *Burkhart v. Sappington*, 1 G. Greene, 66.

⁵ *Kent v. Bown*, 3 Minn. 317; *Talcott v. Marston*, id. 339; *Mason v. Callender*, 2 id. 350, 72 Am. Dec. 102; *Daniels v. Ward*, 4 Minn. 168; *Brown v. Nagel*, 21 id. 415; *Holbrook v. Sims*, 39 id. 122, 39 N. W. Rep. 74, 140.

⁶ § 309; *Capen v. Crowell*, 66 Me. 282; *Paine v. Caswell*, 68 Me. 80, 28 Am. Rep. 21; *Hubbard v. Callahan*, 42 Conn. 524, 537, 19 Am. Rep. 564.

period is presumed to be fair and just for another immediately succeeding, will continue that rate when the parties have given a like assurance of its fairness for the whole period that they contemplated the possibility of the money being retained.¹ Wherever the privilege given to parties to stipulate special rates of interest above the general rate is held to apply to the time the debtor retains the money after it is due, it would seem to be matter of course to enforce such agreements, if the agreed rate is the same before and after the specified day of payment.²

§ 311. **Agreements for a different rate after debt due.** [555] The second class of cases comprises those in which interest by agreement is made retrospectively to attach for the period of credit, or prospectively at a severer rate in consequence of the principal not being paid when due. An agreement in advance that if the principal be paid at maturity the debt may be discharged without interest, but otherwise to bear interest from date at a legal rate, is an undertaking conditionally to do something which the parties had a right to stipulate for at first absolutely. Nor is there any intrinsic difference between such an agreement and one for payment of the principal at a certain day with interest, with a proviso that if such principal be punctually paid no interest shall be charged. There can be no other legal objection to making money as interest payable on a contingency, or upon the happening of a default, than to make the principal itself depend on an uncertain event. The question in both cases is whether the payment required on one alternative — the other dispens-

¹ *Beckwith v. Trustees of Hartford, etc. R. Co.*, 29 Conn. 268, 76 Am. Dec. 599.

An obligation stipulating for interest from its date until a specified day draws interest at the legal rate after that day. *Ehrhardt v. Varn*, 51 S. C. 550, 29 S. E. Rep. 225.

² It is obvious that the final decisions in *Brewster v. Wakefield*, 22 How. 118 (see *New Orleans v. Warner, supra*), and *Cook v. Fowler*, 7 H. of L. Cas. 27, turned on the absence of an express agreement fixing or in-

tending to fix the rate after maturity. It was held in both that the agreed rate before is not, in every instance at least, the agreed rate after maturity, and the intimations were that an express agreement to continue the rate after maturity would be effectual. And in *Florence v. Jennings*, 2 C. B. (N. S.) 454, a promise of a guarantor to pay a specified interest after maturity was actually enforced. *Popple v. Sylvester*, 22 Ch. Div. 98. See § 309, n.

ing with it—is a penalty. The fact of there being an alternative or contingency in the contract does not decide the question. A party may have two prices for goods, one for cash, and another and higher price when time is given for payment. A purchaser who is advised of these terms, and chooses to buy on time, would not be heard to object that the time price, or its excess over the cash price, was a penalty. He is as firmly bound for the price at which he purchased as though no opportunity to purchase on other terms had been offered. Either price being legal when the purchaser made his contract, it is binding; and an alternative price, determinable by default, may become absolute and collectible.¹ There is not the same latitude allowed concerning agreements for interest as for prices of property, but there is entire freedom to contract for interest not above legal rates. A party who is a debtor, or who makes a loan, and to whom forbearance for one period is offered without interest, and another and longer period on terms of paying interest, may choose either offer without advantage by way of mitigation of his agreement for hav- [556] ing rejected the other. Nor is a contract any less binding in respect to either alternative, which may become absolute, when one of the parties has a continuing option until the time of performance and may then make his election by performance.²

It is true one of the test rules for distinguishing a penalty from liquidated damages is that if a larger sum is agreed to be paid for default in paying a smaller, the larger is a penalty. A note made payable for a sum certain on a specified day,

¹ “Usury can only attach to a loan of money or the forbearance of a debt. It is well settled that on a contract to secure the price or value of work and labor done or to be done, or of property sold, the contracting parties may agree upon one price if cash be paid, and upon as large an addition to the cash price as may suit themselves, if credit be given; and it is wholly immaterial whether the enhanced price be ascertained by the simple addition of a lumping sum to the cash price or by a percentage thereon. In neither case is the

transaction usurious. It is neither the loan nor the forbearance of a debt, but simply the contract price of work and labor done or property sold.” *Graeme v. Adams*, 23 Gratt. 234, 14 Am. Rep. 130, quoted with approval in *Evans v. Rice*, 96 Va. 50, 54, 30 S. E. Rep. 463; *Garrity v. Cripp*, 4 Baxter, 86; *Brown v. Gardner*, 4 Lea, 157; *Bank v. Mann*, 94 Tenn. 17, 27 S. W. Rep. 1037. But see *Baug v. Windmill Co.*, 96 Tenn. 361, 34 S. W. Rep. 516.

² § 282.

without interest if punctually paid, otherwise, with interest from date, comes within the letter of the rule. If the letter controlled, the stipulation for interest would be held to be a penalty. The rule, however, does not apply to such a case.¹ It is designed to prevent agreements to pay a large sum in consequence of default in paying a small one, which is the actual debt, because interest is the established measure of damages for such default. It does not apply to invalidate any legal rate promised on the event of a default.

No damages for the mere non-payment of money can ever be so liquidated between the parties as to evade the provisions of the law which fixes the rate of interest.² In all such cases the law, having fixed the rate by positive rules, has bounded the measure of damages.³ This is the rule, the other the corollary; because interest is the measure of damages for breach of contract to pay money the law will treat as a penalty any larger sum which a debtor may agree to pay for such a default. But within the bounds of the legal rate of interest parties may liquidate damages for not paying money when it is due.⁴

¹ *Finger v. McCaughey*, 114 Cal. 64, 45 Pac. Rep. 1004.

² *Sedgw. on Dam.* 216.

³ *Orr v. Churchill*, 1 H. Black. 232.

⁴ *Linton v. National L. Ins. Co.*, 44 C. C. A. 54, 104 Fed. Rep. 584; *Thompson v. Gorner*, 104 Cal. 163, 43 Am. St. 81, 37 Pac. Rep. 900; *Sheldon v. Pruessner*, 52 Kan. 579, 35 Pac. Rep. 201; *Havemeyer v. Paul*, 45 Neb. 373, 388, 63 N. W. Rep. 932, overruling *Richardson v. Campbell*, 34 Neb. 181, 57 N. W. Rep. 753; *Connecticut Mut. L. Ins. Co. v. Westerhoff*, 58 Neb. 379, 78 N. W. Rep. 724, 79 id. 731, 76 Am. St. 101; *Hackenberry v. Shaw*, 11 Ind. 392; *Brown v. Maulsby*, 17 Ind. 10; *Gully v. Remy*, 1 Blackf. 69; *Wakefield v. Beckley*, 3 McCord, 480; *Daggett v. Pratt*, 15 Mass. 177. See *Richards v. Marsham*, 2 G. Greene. 217.

In *Alexander v. Troutman*, 1 Ga. 469, judgment had been entered without including the back interest, and this judgment satisfied by exe-

cution; afterwards the judgment was amended, under the order of the court, so as to include the interest from date. *Nesbitt, J.*: "The several assignments of error in this cause resolve themselves into one question, and that is, is the agreement upon the face of the papers to pay interest from date, if the principal sum is not punctually paid at its maturity, in the nature of a penalty? The court below decided it to be an undertaking to pay the back interest as damages for a failure to pay the principal sum at the maturity of the note. . . . If this back interest is stipulated damages, then the plaintiff below is entitled to recover it; if a penalty, he is entitled under the contract to recover whatever, in the proper form of action, he could prove to be the *quantum* of his injury. The parties do not call it either the one or the other; if they did the name they gave to it would

§ 312. Same subject. A rate of interest fixed by [557] statute is entirely arbitrary; but if it fixes an absolute limit which cannot be transcended by any interest contract, while payment is expressly postponed, any agreement for a greater

not change its nature. That is settled by the authorities. Story's Eq., sec. 1318. The amount in this case is liquidated, whether it be penalty or damages; for the agreement is in case of non-payment punctually, then to pay 'interest from date;' that is, the interest which the law allows, to be computed from the date of the note. By referring to the note, and the law of the state, the amount will be ascertained, *id certum est quod certum reddi potest*. One thing is very clear; that is, that neither the courts of Great Britain nor of our Union have established any rule by which it can always with certainty be determined what is a penalty and what liquidated damages. We shall, of course, undertake to establish none. It is settled by the later cases that in order to ascertain whether the sum specified in the agreement is to be considered a penalty or liquidated damages, the court must look at the whole of the agreement; and unless it clearly appear thereby to have been intended by the parties as liquidated damages, it will be considered as a penalty. Tidd's Pr. 877; 6 Barn. & Cress. 216; 11 Mass. 81. In commenting on this subject Mr. Justice Story remarks: 'But we are carefully to distinguish between cases of penalties, strictly so called, and cases of liquidated damages. The latter properly occur when the parties have agreed that in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum as the just, appropriate and conventional amount of the damages sustained by such act of omission. In cases of this sort, courts

of equity will not interfere to grant relief; but deem the parties entitled to their own measure of damages; provided always, that the damages do not assume the character of *gross extravagance*, or of wanton or unreasonable disproportion to the nature or extent of the injury.' Story's Eq. Jur., sec. 1318; Eden on Injunctions, 41.

"Upon a careful review of the authorities, we are prepared to say that this extract affords the best general rule upon a question of no little complexity. We do not see why its application may not, in most cases, determine what is a penalty, and what damages. Its application relieves us from doubt as to what is the law of the case before us. It is a safe general rule not to interfere with the contract which parties have thought proper to make; it is the business of courts of justice not to make, but to enforce, contracts. If the meaning of the parties is reasonably plain, the court will not be astute to find out a different meaning. The parties in this case, and in all others of like character, have the unquestionable right to fix their own measure of damages. They are presumed to know, better than a jury could determine for them, what injury would result from any given act or omission. And if the parties have made their contract, and it is not in contravention of the law, let it even be conceded to be unreasonable, it is right to compel them to abide by it. In *Low v. Peers* (4 Burr. 2279), Lord Mansfield sustains these general views in these words: 'When the precise sum is fixed and agreed upon between the parties, that very sum is

rate after maturity, by reference to that standard, provides for more than compensation. This, however, is the case only in a technical point of view; for the default in paying may occur under such circumstances that the higher rate will be no more

the ascertained damages, and the jury is confined to it.' In that case Peers had in writing bound himself to marry Mrs. Lowe, and in default to pay her one thousand pounds. This was held to be a case of damages. A reason for abiding the damages which the parties have agreed upon is found in the difficulty which a jury would find, in many cases, of ascertaining the amount of the injury sustained. 6 Bing. 141. In the case we are now determining we know of but one criterion which the jury would have by which to fix the damages which the payee sustained, and that is the very one by which the parties themselves ascertained them; to wit, the legal rate of interest on the money. . . . On the other hand, it may be considered as settled, that where a larger sum is stipulated to be paid in order to secure the prompt payment of a lesser, it is a case of penalty. 2 Bos. & Pul. 346. So, too, where a specified sum is agreed upon to cover different breaches, and would be in some cases too large, and in others too small, that is a case of penalty. 6 Barn. & Cress. 216. In all cases where the damages are excessive they are held to be penalty. Story's Eq., sec. 1318. Such was the case read from Alabama determined by the supreme court of that state. There the back interest reserved ranged from two and a half to ten per cent. per month."

After showing that the facts fulfill the other conditions of Judge Story's rule in respect to liquidated damages, the opinion continues: "The benefits of these contracts upon time, contrary to the received opinion, accord-

ing to the legal view of them are reciprocal. When A. sells property or lends his money to B. and takes his note at twelve months, the possession of the property or the money passing at the time to B., the legal inference is that the price of the property or money is enhanced by the interest on the cash price of the property, or the actual sum loaned for twelve months. This interest is added to the note. Now if there be a stipulation that in case of non-payment at maturity the note shall bear interest from date, and it is not paid and the back interest is collected, the common opinion is that A. in the above case realizes sixteen per cent. upon this contract. But is this true? It is true that he does in fact receive sixteen per cent., but eight per cent. of that interest is offsetted by the use of the property or the money in the hands of B., the use being worth eight per cent. to him. The consequence is that in cases where the damages thus stipulated do not exceed eight per cent. the payee realizes only eight per cent. upon his money or the price of his property. Then the result of such a contract as the one before us, enforced, is that the payee gets eight per cent., the lawful interest upon money. Now is such an amount otherwise than just? We think not. And if just it is not *grossly extravagant* or wanton, or unnecessarily disproportioned to the injury.

"We know that in point of fact the giving of time does often enhance the price of property or money far beyond eight per cent., as stated. But how do we judicially know that to be the case here? We reason from

than just compensation. Treating a sum agreed to be [558] paid at a future day as representing the actual debt due on that day, and the credit or forbearance to that time as having been in some way fully compensated in the transaction in which the debt originated, an agreement to pay an additional sum, whether under the name of interest or not, in case of default in not paying that debt when it becomes due, is essentially an agreement for a penalty; but unless the statute arbitrarily fixes a rate not to be exceeded, it cannot be said that any rate is so perfectly a compensation that any larger rate would be more than that. If a debtor owing a sum certain agrees to pay it [559] at a future day, with interest at a given rate, he should be deemed to have discharged his precise legal duty and obligation by paying when due that sum, together with interest computed at that rate. An additional provision in the agreement that if he makes default in paying such principal and interest when due he shall pay a higher rate of interest from date is an agreement that by its terms, if literally enforced, would [560] make the debtor liable on the day following the maturity of his debt for an extra sum which would be greatly disproportioned to the interest for one day;¹ still, could it be treated as

the record. The reasonableness and justness of the damages may be variously illustrated. We refer only to the instance of administrators whose notes are taken at twelve months, and very often with the condition found in this note. It is of serious importance to the estate which he represents that the debts thus contracted be promptly paid. At the expiration of twelve months he is liable not only to be called upon but to be sued, if the estate which he represents, which is very generally the case, has no resources to pay its debts but the proceeds of sales; and the debts contracted on account of such sales are not promptly met; then he is put to great inconvenience, and the estate of his intestate injured. He is compelled, perhaps, to borrow money at exorbitant rates; to submit to be sued and pay costs, or to sue upon the notes in his hands and pay com-

mission for collecting. In this case eight per cent. for twelve months cannot be considered unjust or excessive as damages." This opinion seems to rest on the fallacious assumption that though agreements to pay on time the price of property or a loan where the interest is added to the principal when the promise is made, the debtor really pays no interest for that time because he obtains as equivalent or more in the possession of the property or money, and that therefore the retrospective interest made payable on the face of the note for want of punctuality in paying the debt when due, consisting by concession of principal and interest, is the only interest in the transaction.

¹ *Billingly v. Chubb*, 7 Ind. 181; *Wernwag v. Motherhead*, 3 Blackf. 401.

penalty if it would not be such had the same rate been adopted absolutely in the contract? Where additional interest, depending on default, is stipulated, and this higher rate does not exceed the legal rate, or is a reasonable one not exceeding any limit below which parties are authorized to contract for any rate, it should probably be legally assumed that the consideration was deemed by the parties, when contracting, as equivalent to the higher rate; or that such increased rate is no more than a just indemnity for the disappointment and injury occasioned by the default; that they have made, and intended to make, an alternative contract as to interest to secure punctuality of payment; or in case of default, to give the creditor the rate he was authorized to claim and demanded for forbearance.¹ Contracts of the nature indicated are different from those which provide that in default of the payment of the semi-annual interest instalment the whole debt shall bear interest at a higher rate than it would by its terms otherwise bear. Such a contract is in the nature of a penalty for non-payment of the instalment of interest, and does not provide for the payment of a contract rate for the use of money borrowed.²

Where, looking at the substance of the contract rather than the particular collocation of words by which it is expressed, the damages or pecuniary consequences stipulated to result from default do not contravene any statutory provision, nor transcend what the parties might legitimately and reasonably agree shall be paid without default, or during a prolonged period of credit, there would seem to be no legal impediment to adjudging that the very contract which they have made shall be enforced. Contracts for a higher rate of interest after maturity than the debt had previously borne, and higher than [561] the ordinary rate fixed by law, have been upheld and enforced according to their terms. Though there is some conflict of decision, it is believed that, according to the decided preponderance of authority, such contracts are valid unless the rate exceeds that which the statute authorizes to be stipulated for; and also subject, in extreme cases, to having the rate cut

¹ *Pass v. Shine*, 113 N. C. 284, 18 S. E. Rep. 251. See *Mead v. Wheeler*, 13 N. H. 351; *Wilkinson v. Daniels*, 1 G. Greene, 179.

² *Connecticut Mut. L. Ins. Co. v. Westerhoff*, 58 Neb. 379, 78 N. W. Rep. 224, 79 id. 731, 76 Am. St. 101.

down because it is so disproportioned to the actual value of money that it should be regarded as in the nature of a penalty.¹ Contracts for very large rates of interest have been sustained; as three dollars per month for the detention of thirty;² five dollars per week for detention of four hundred and thirty-two dollars;³ and other instances of rates from twenty to one hundred and twenty per cent. per annum.⁴

SECTION 3.

AGREEMENTS FOR MORE THAN LEGAL RATE BEFORE MATURITY.

§ 313. **Effect of usury found.** It is not proposed to discuss what constitutes usury; but the effect of usury found on the amount of recovery, or of agreeing to pay interest before maturity of the debt exceeding the limit fixed by statutes. The early statutes in this country have been generally moulded after the statute of Anne;⁵ first, forbidding the taking of interest above a certain rate; and second, declaring void agreements and securities for greater rates. The taking of usury has sometimes also been made a criminal offense. Under such legislation the important question is the existence of usury. It is not a favored plea; though a legal defense to which, when established, the courts have given effect, it has been judicially denounced as unconscionable.⁶ Courts require parties

¹ Wernwag v. Mothershead, 3 Blackf. 401; Latham v. Darling, 2 Ill. 203; Young v. Fluke, 15 Up. Can. C. P. 360; Witherow v. Briggs, 67 Ill. 96; Davis v. Rider, 53 Ill. 416; Young v. Thompson, 2 Kan. 83; Gould v. Bishop Hill Colony, 35 Ill. 324; Wilkinson v. Daniels, 1 G. Greene, 179; Taylor v. Meek, 4 Blackf. 388; Phinney v. Baldwin, 16 Ill. 108; Palmer v. Leffler, 18 Iowa, 125; Reeves v. Stipp, 91 Ill. 609; Downey v. Beach, 78 Ill. 53; Lawrence v. Cowles, 13 Ill. 577; Smith v. Whitaker, 23 Ill. 367; Blair v. Chamberlain, 39 Ill. 521, 89 Am. Dec. 322; Miller v. Kempner, 32 Ark. 573; Badgett v. Jordan, id. 154; Portis v. Merrill, 33 id. 416; Bailey v. McClure, 73 Ind. 275; White v. Iltis, 24 Minn. 43; Me-

Kay v. Belknap Savings Bank, 27 Colo. 50, 54, 59 Pac. Rep. 745; Lynde v. Thompson, 2 Allen, 456; Finger v. McCaughey, 114 Cal. 64, 45 Pac. Rep. 1004; Rogers v. Sample, 33 Miss. 310, 69 Am. Dec. 349; Rumsey v. Matthews, 1 Bibb, 242; Eccles v. Herriek, 15 Colo. App. 350, 62 Pac. Rep. 1040; Close v. Riddle, 40 Ore. 592, 67 Pac. Rep. 932; Draper v. Horton, 22 R. I. 592, 48 Atl. Rep. 945. But see Newell v. Holton, 22 Minn. 19.

² Latham v. Darling, 2 Ill. 203.

³ Wernwag v. Mothershead, 3 Blackf. 401.

⁴ Taylor v. Meek, 4 Blackf. 388.

⁵ 12 Anne. St. 2 ch. 10.

⁶ Merrill v. Law, 9 Cow. 65; Marsh v. Lacher, 13 N. J. Eq. 244.

who would avail themselves of it to pursue correct practice in the first instance; if they err, their defense will not be treated with indulgence.¹

It is deemed equitable that the creditor should receive the principal and legal interest; but it is an imperfect equity; the creditor cannot himself assert it by an action or suit based upon it; on the contrary, usury is as fatal to his suits in equity to enforce usurious demands as at law; and if the debtor has paid usury otherwise than voluntarily² he may recover it. It

¹ *Beach v. Fulton Bank*, 3 Wend. 573; *Lovett v. Cowman*, 6 Hill, 223; *Woolcott v. McFarlan*, id. 227; *National Fire Ins. Co. v. Sackett*, 11 Paige, 660; *Collard v. Smith*, 13 N. J. Eq. 43; *Remer v. Shaw*, 8 id. 355; *McCauley v. Ward*, 2 Marvel, 183, 42 Atl. Rep. 446; *Turner v. Hamilton*, 88 Fed. Rep. 467; *McCready v. Phillips*, 56 Neb. 446, 76 N. W. Rep. 885.

A local statute requiring that a defendant who pleads usury must tender the principal sum is not applicable to a case arising under and governed by the usury laws of a foreign state. *Maynard v. Hall*, 92 Wis. 565, 66 N. W. Rep. 715.

² When voluntarily paid usury cannot be recovered. *Smith v. Coopers*, 9 Iowa, 376; *Nicholls v. Skeel*, 12 id. 300; *Shelton v. Gill*, 11 Ohio, 417; *Graham v. Cooper*, 17 id. 605; *Moseley v. Smith*, 21 Tex. 441; *Manny v. Stockton*, 34 Ill. 306; *Carter v. Moses*, 39 Ill. 539; *Tompkins v. Hill*, 28 Ill. 519; *Dykes v. Wyman*, 67 Mich. 236, 34 N. W. Rep. 561; *Kendall v. Davis*, 55 Ark. 318, 18 S. W. Rep. 185.

Nor can the debtor charge the excess of payments above the legal rate against the principal debt. *Pettis v. Ray*, 12 R. I. 344. See *Bond v. Jones*, 8 Sm. & M. 368.

In New Hampshire payments of usurious interest are excepted from the general rule that payment of an illegal claim with full knowledge of its illegality is irrevocable, being re-

garded as made under duress. *Peterborough Savings Bank v. Hodgdon*, 62 N. H. 300; *Albany v. Abbott*, 61 id. 157; *Cross v. Bell*, 34 id. 82; *Willie v. Green*, 2 id. 333.

The rule that usurious interest voluntarily paid cannot be recovered has no application if the transaction has not been closed; if the note sued on is a renewal of a prior note upon which such interest has been paid, the debtor may have all such payments applied upon the principal debt. *Harris v. Bressler*, 119 Ill. 467, 10 N. E. Rep. 188.

Under sec. 5198, R. S. of U. S., a national bank which stipulates for usury upon a note to become due forfeits the entire interest, and can recover only the face of the note, less the interest charged or included therein. If that is collected in advance the person paying it or his legal representatives may, in an action in the nature of debt, recover twice the amount of interest paid. This must be done in the manner provided in the statute. *National Bank v. Deering*, 91 U. S. 29; *Barnet v. National Bank*, 98 id. 555. The usurious interest cannot be set off and applied in satisfaction of the note. *Driesbach v. National Bank*, 104 U. S. 52.

In an action upon a note given to such a bank the maker cannot set off or obtain credit for usurious interest paid upon the renewal of it.

is a passive equity which the debtor must recognize and perform only when he asks equity. Accordingly, when he asks a favor in practice, by invoking the equitable power of the court by motion,¹ and when he appeals to a court of equity for relief against the usurious contract, or the effect of any legal assertion of the debt, or to procure its aid to establish the fact of usury, as by discovery, he will be obliged to submit to the condition of paying the principal and lawful interest.² But where

Haseltine v. Central Bank, 183 U. S. 132, 22 Sup. Ct. Rep. 50.

A national bank which makes a loan upon a note that embraces usury, which note is renewed from time to time, forfeits the entire interest. First Nat. Bank v. Grimes, 49 Kan. 219, 30 Pac. Rep. 474.

An agreement to pay usury for any part of the time that a note may run, whether by its terms or by indulgence, forfeits all interest, whether it accrues before or after the maturity of the note. Alves v. National Bank, 9 S. W. Rep. 594 (Ky.); Shafer v. First Nat. Bank, 53 Kan. 614, 36 Pac. Rep. 998; First Nat. Bank v. Stauffer, 1 Fed. Rep. 187; Danforth v. National State Bank, 48 id. 271, 1 C. C. A. 62, 17 L. R. A. 622; Maynard v. Hall, 92 Wis. 565, 66 N. W. Rep. 715 (construing the statute of Illinois).

¹ Beach v. Fulton Bank, 3 Wend. 573; Remer v. Shaw, 8 N. J. Eq. 355.

² Tenny v. Porter, 61 Ark. 329, 33 S. W. Rep. 211; Hiner v. Whitlow, 66 Ark. 121, 49 S. W. Rep. 353, 74 Am. St. 74; Scott v. Williams, 100 Ga. 540, 62 Am. St. 340, 28 S. E. Rep. 243; Bush v. Bank of Thomasville, 111 Ga. 664, 36 S. E. Rep. 900; Mason v. Pierce, 142 Ill. 331, 31 N. E. Rep. 503; Crawford v. Nimmons, 180 Ill. 143, 54 N. E. Rep. 209; Faison v. Grandy, 128 N. C. 438, 38 S. E. Rep. 897; Hill v. Alliance Building Co., 6 S. D. 160, 55 Am. St. 819, 60 N. W. Rep. 752; Parker v. Bethel Hotel Co., 96 Tenn. 252, 31 S. W. Rep. 299, 31 L. R. A. 706; Roberts v. Coffin, 22 Tex. Civ. App.

127, 53 S. W. Rep. 597; Dickenson v. Bankers' Loan & Investment Co., 93 Va. 498, 25 S. E. Rep. 548; Smith v. McMillan, 46 W. Va. 577, 33 S. E. Rep. 283; Greer v. Hale, 95 Va. 533, 28 S. E. Rep. 873, 64 Am. St. 814; Wenham v. Mallin, 103 Ill. App. 609; Bang v. Windmill Co., 96 Tenn. 361, 34 S. W. Rep. 516; Crim v. Post, 41 W. Va. 397, 23 S. E. Rep. 613; Livingston v. Tompkins, 4 Johns. Ch. 415, 8 Am. Dec. 598; Rogers v. Rathbun, 1 Johns. Ch. 367; Tupper v. Powell, id. 439; Fanning v. Dunham, 5 id. 122, 9 Am. Dec. 283; Fitzroy v. Gwillim, 1 T. R. 153; Mason v. Gardiner, 4 Bro. Ch. 436; Schermerhorn v. Talman, 14 N. Y. 93; Conner v. Myers, 7 Blackf. 337; Cooper v. Tappan, 4 Wis. 362; Platt v. Robinson, 10 id. 128; Miller v. Ford, 1 N. J. Eq. 358; Legoux v. Wante, 3 Har. & J. 184; Jordan v. Trumbo, 6 Gill & J. 103; McRaven v. Forbes, 6 How. (Miss.) 569; Noble v. Walker, 32 Ala. 456; Ruddell v. Ambler, 18 Ark. 369; Taylor v. Smith, 2 Hawks. 465; Pearson v. Bailey, 23 Ala. 537; McGeehe v. George, 38 Ala. 323; Wilson v. Hardesty, 1 Md. Ch. 66; Ballinger v. Edwards, 4 Fred. Eq. 449; Thomas v. Doub, 8 Gill. 1; Boyers v. Boddie, 3 Humph. 666; Hudnit v. Sach, 16 N. J. Eq. 550; Eshava v. Crampton, 61 Ala. 507; Cook v. Patterson, 104 N. C. 147, 9 S. E. Rep. 492; Escman v. Gallaher, 24 Neb. 79, 37 N. W. Rep. 941; Cuyver v. Brady, 104 N. C. 219, 10 S. E. Rep. 565.

the maker was unsuccessful in an action to enjoin the collection of a note because it was void for the want of consideration, and the transferee brought the note into court, and by his cross-bill asked to have it enforced, it was adjudged void, it appearing that it was usurious.¹ By entering his appearance in a cause and consenting that judgment be entered against him a debtor waives the defense of usury. Such a judgment is not within a statute declaring that a usurious contract and any mortgage, pledge or other lien, or conveyance executed to secure the performance of the same may be annulled and canceled.² But it is otherwise as to a judgment confessed upon warrant of attorney or a judgment note which formed a part of the contract upon which the judgment was confessed, and by reason thereof was tainted with usury.³

[563] § 314. Who may take advantage of usury. As usury is a defense personal to the debtor and those standing in relations of privity to him, it is not an illegal element when the usurious debt becomes a principal in the undertaking of a third party, as between him and the creditor, upon a new consideration.⁴ This principle is of general application; it will

But it is otherwise under a statute in Minnesota. *Scott v. Austin*, 36 Minn. 460, 32 N. W. Rep. 89, 864; *Exley v. Berryhill*, 37 Minn. 182, 33 N. W. Rep. 567. And in North Carolina. *Moore v. Beaman*, 112 N. C. 558, 564, 7 S. E. Rep. 676.

¹ *Bang v. Windmill Co.*, 96 Tenn. 361, 34 S. W. Rep. 516.

² *Bell v. Fergus*, 55 Ark. 536, 18 S. W. Rep. 931.

³ *Brown v. Toell's Adm'r*, 5 Rand. 543; *Fanning v. Dunham*, 5 Johns. Ch. 122, 9 Am. Dec. 283; *Wardell v. Eden*, 2 Johns. Cas. 258; *Page v. Wallace*, 87 Ill. 84; *Hindle v. O'Brien*, 1 Taunt. 413; *Roberts v. Goff*, 4 B. & Ald. 92.

⁴ *Bank of Newbury v. Sinclair*, 60 N. H. 100, 49 Am. Rep. 307; *Essley v. Sloan*, 116 Ill. 391, 6 N. E. Rep. 449; *Gathercole v. Young*, 61 N. H. 563; *Sullivan Savings Inst. v. Copeland*, 71 Iowa, 67, 32 N. W. Rep. 95; *Jeffries v. Allen*, 29 S. C. 501, 7 S. E. Rep.

823; *Cheney v. Dunlap*, 27 Neb. 401, 5 L. R. A. 465, 43 N. W. Rep. 178; *Log Cabin, etc. Ass'n v. Gross*, 71 Md. 456, 18 Atl. Rep. 896; *Griel v. Lehman*, 59 Ala. 419; *Lee v. Feamster*, 21 W. Va. 103, 45 Am. Rep. 549; *Palmer v. Call*, 2 McCrary, 522; *Burlington Mutual L. Ass'n v. Heider*, 55 Iowa, 424, 5 N. W. Rep. 578, 7 id. 686; *Mason v. Searles*, 56 Iowa, 532, 9 N. W. Rep. 370; *First Nat. Bank v. Bentley*, 27 Minn. 87, 6 N. W. Rep. 422; *Pence v. Christman*, 15 Ind. 287; *Stephens v. Muir*, 8 Ind. 352.

Where the debtor is insolvent and there is a fund in court to be distributed, equity will allow one creditor to suggest usury as to a co-creditor, and if the debtor is insolvent will compel the usurious creditor to write off his usury and only give him his principal and legal interest. *Brooks v. Todd*, 79 Ga. 692, 4 S. E. Rep. 156.

The sole heir of a deceased bor-

prevent deductions for usury to which, as between the creditor and the debtor, the latter is entitled to under various statutes, when such deductions are asked for or against other persons who have novated or paid the usurious debt at the debtor's request.¹ The rule that the right to plead usury is a privilege personal to the debtor does not embrace his sureties, guarantors, heirs, devisees and personal representatives; these are permitted to set up usury on the ground of privity or common interest.² An attaching creditor of the mortgagor is a privy in representation and may interpose the defense of usury against the claim by the mortgagee to the attached property.³ "It would seem that an assignee under a deed of trust for the benefit of creditors, or an assignee in bankruptcy, would fall within the exception and could plead usury to a debt which was entitled to participate in the assets conveyed to them on the ground of privity in estate."⁴ Under a statute declaring that usurious contracts shall be deemed to be for an illegal consideration as to the excess beyond the principal sum, the plea of usury to an action on negotiable paper brought by a *bona fide* holder for value, who acquired it before maturity, cannot be sustained.⁵ The person who is the substantial debtor may plead usury.⁶ It may be pleaded by the mortgagor, though he has sold the mortgaged premises, if he is liable for a deficiency judgment.⁷

§ 315. When contracts not void for usury. In the statutes of several of the states, and in some charters for commercial

rower who has paid a usurious debt to release his inheritance may recover the usury paid. *Pope v. Marshall*, 78 Ga. 635, 4 S. E. Rep. 116.

¹ *Brinkerhoff v. Foote*, 1 Hoff. Ch. 261; *Thurston v. Prentiss*, 1 Mich. 193; *Shirley v. Spencer*, 9 Ill. 583. But see *Totten v. Cooke*, 2 Met. (Ky.) 275; *Stevens v. Davis*, 3 Met. (Mass.) 211.

² *Denton v. Butler*, 99 Ga. 264, 25 S. E. Rep. 624; *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 34 S. W. Rep. 200; 31 L. R. A. 706; *Cole v. Hills*, 44 N. H. 227; *Loomis v. Eaton*, 32 Conn. 59; *Goodhue v. Palmer*, 13 Ind. 568; *Cramer v. Lepper*, 26 Ohio St. 59, 20

Am. Rep. 756; *Merchants' Exchange Nat. Bank v. Commercial Warehouse*, 49 N. Y. 635.

³ *Coleman v. Cole*, 158 Mo. 253, 59 S. W. Rep. 106.

⁴ *Parker v. Bethel Hotel Co.*, *supra*, citing *Stein v. Swensen*, 44 Minn. 218, 222, 46 N. W. Rep. 360; *Nanco v. Gregory*, 6 Lea, 343.

⁵ *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 22 S. E. Rep. 487, 50 Am. St. 860, 29 L. R. A. 827.

⁶ *Fulton v. Grundy*, 128 N. C. 408, 38 S. E. Rep. 897.

⁷ *Male v. Wink*, 61 Neb. 748, 86 N. W. Rep. 472.

corporations, there has been a simple prohibition of interest above a certain rate, but no provision that agreements and securities for such interest should be void. Under such legislation it has been made a question whether such agreements and securities are to be treated as wholly void,—whether the reservation of interest above the legal rate renders the whole contract, as an entire thing, illegal,—so that the principal as well as interest is to be regarded as involved in an unlawful venture, or whether such agreements are void only to the extent of the illegal interest. On this question there is some conflict of decision. In a case in the national supreme court, where usury in the transfer of a promissory note was complained of by the maker, the court said that the taking of interest by the bank, beyond the sum authorized by its charter, would doubtless be a violation of the latter, for which a remedy might be applied by the government; but as the act did not declare that it shall avoid the contract, it was not perceived how the defendant could avail himself of this ground to defeat a recovery. The statute containing no express provision that usurious contracts should be utterly void, the contract was to be deemed valid, at least in respect to persons who were strangers [564] to the usury.¹ In a later case that court held that a contract made in violation of the same charter fixing a limit of interest, where the usury was set up by the other party to the usurious contract, was void *in toto*. The decision was put upon the naked prohibition in the charter, expressly laying out of view the general statute on the subject of interest. It was so held void by a majority of the court on general principles. The reservation of interest in the contract at a rate the taking of which would be a violation of the charter vitiated the contract for both principal and interest, and rendered it utterly void.² This decision was followed at the circuit by a case de-

¹ Fleckner v. Bank, 8 Wheat. 338.

² Bank v. Owens, 2 Pet. 527. The language of the charter was: "The bank shall not be at liberty to purchase any public debt whatever; nor shall it take more than six per cent. per annum for or upon its loans or discounts." It was held that an agreement "corruptly and usuri-

ously" to loan depreciated bills, taking therefor a note on time, bearing illegal interest, was a violation of the charter. Johnson, J., said: "To understand the gist of the question, it is necessary to observe that, although the act of incorporation forbids the taking of a greater interest than six per cent., it does not declare

cided by Taney, C. J., upon a simple constitutional pro- [565] hibition of interest above a specified rate, which was exceeded in the contract that was the subject of the action.¹ The Maryland interest law, as modified by the act of 1845, prohibited, in the language of the statute of Anne, the taking of more than six per cent. per annum, but by that act the lender was entitled, notwithstanding the contract exceeded that limit, to recover the principal and six per cent. This law was in force when the constitution of 1850 took effect. That instrument contained a clause in these words: "The rate of interest in this state shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded; and the legislature shall provide by law all necessary forfeitures and penalties against usury." Before any legislation under the constitution this case arose upon a bill of exchange to which a plea of usury was interposed. On demurrer, Taney, C. J., following the doctrine of the supreme court, held that the prohibition in the constitution was inconsistent with and abrogated the provision of the act of

void any contract reserving a greater sum than is permitted. Most, if not all, the acts passed in England, and in the states, on the same subject (1829), declare such contracts usurious and void. The question, then, is whether such contracts are void in law, upon general principles." In a previous part of the opinion he said: "Some doubts have been thrown out whether, as the charter speaks only of *taking*, it can apply to a case in which the interest has only been *reserved*, not received. But on that point the majority are clearly of opinion that reserving must be implied in the word *taking*, since it cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. . . . When the restrictive policy of a law alone is in contemplation, we hold it to be a universal rule that it is unlawful to contract to do that which it is unlawful to do." The contract being held to be within the prohibition, the opinion is that such

contracts are void upon general principles. The authorities cited are wholly English, and unquestionably sound on both sides of the Atlantic. They may be distinguished, however, from the case decided in this important particular: the fundamental purpose for which the contracts in question, in the cases cited, were made, or to which they were ancillary, was illegal; *malum in se* or *malum prohibitum*. In the Owens case the principal purpose of the transaction—the loan and promise of interest—was lawful; making loans for interest was one of the main objects of the corporation; the illegality complained of was an incidental violation of the charter. There is the difference between the case decided and those cited to support it, of an incident being impressed with the character of the principal, and the principal being infected by the vice of the incident.

¹ Dill v. Elliott, Taney, 238.

1845 giving the lender the principal and six per cent. interest. And he declared that, "as the constitution has forbidden the taking or demanding of more than six per cent., no contract made in this state can be enforced where a higher rate of interest is taken or demanded by the contract." "A court of justice cannot lend its aid to him to recover it (the money loaned), because the contract for the loan is one entire thing, and consequently is altogether invalid or void, and it would be contrary to the duty of a court of justice to assist a party in consummating an act which the law forbids." The absence of any penalty was held no argument in support of the action.¹ But the supreme court of Maryland arrived at a different conclusion.² It, in effect, held that the absolute prohibition in the constitution was not inconsistent with the act of 1845 in respect to allowing the creditor to recover upon a usurious contract the principal and legal interest. No penalty, forfeiture or other punishment was prescribed. The question has also been [566] decided in Indiana. Usury there was made an offense punishable on indictment by a fine of double the amount of the usury. The decision was based on the authority of the case cited from the supreme court of the United States.³

¹ Dill v. Ellicott, Taney, 233.

A constitutional provision declaring contracts which provide for a rate of interest in excess of a named sum and which require the legislature to provide penalties to prevent and punish usury is self-executing so far as to render a contract thereafter made for a prohibited rate invalid. *Watson v. Aiken*, 55 Tex. 536; *Hemphill v. Watson*, 60 id. 679.

² In *Bandel v. Isaac*, 13 Md. 202.

³ *Fowler v. Throckmorton*, 6 Blackf. 326.

In other states, where usury has not been made a criminal offense, and contracts tainted with it not declared by statute to be utterly void, they have been held invalid only to the extent of the usury, or at most as to the contract for interest.

Alabama: *Saltmarsh v. Planters'*,

etc. Bank, 17 Ala. 761; s. c., 14 Ala. 668.

Arkansas: The statute declares securities tainted with usury to be void. *Jones v. McLean*, 18 Ark. 456. But as to the effect of usury in cases not within that statute, see *Alston v. Brashears*, 4 Ark. 422, where the principal of the usurious contract was held recoverable.

Connecticut: A corporation having power to loan money under certain restrictions, having afterwards taken a note as security on terms which were, in respect to interest, a violation of the charter, it was held in a suit *on the note, with the money counts*, that although there could be no recovery on the note, the money loaned, with the legal interest, might be recovered. *Philadelphia Loan Co. v. Towner*, 13 Conn. 249. See *Sheldon v. Steere*, 5 Conn. 181.

The constitution of Texas provides that all contracts for a greater rate of interest than ten per cent. per annum shall be deemed usurious, and the first legislature after this amendment is adopted shall provide appropriate pains and penalties to pre-

Georgia: Contract void only to the extent of the usury. *Dillon v. McRae*, 40 Ga. 107.

Iowa: A contract tainted with usury is void only to the extent of the usury, and may be enforced for the residue. *Richards v. Marshman*, 2 G. Greene, 217; *Shuck v. Wight*, 1 id. 128; *Haggard v. Atlee*, id. 41; *Gower v. Carter*, 3 Iowa, 244, 66 Am. Dec. 71; *Ficklin v. Zwart*, 10 Iowa, 387; *Drake v. Lowry*, 14 id. 125; *Garth v. Cooper*, 12 id. 364; *Wight v. Shuck*, *Morris*, 425; *Wilson v. Dean*, 10 Iowa, 431.

Michigan: The effect of usury is not to avoid the contract, but to reduce the amount; the usurer is entitled to recover the amount actually loaned and legal interest (*Thurston v. Prentiss*, *Walk*, Ch. 529; *Craig v. Butler*, 9 Mich. 21), which is construed to be the highest rate the law permits to be stipulated for. *Smith v. Stoddard*, 10 Mich. 148, 31 Am. Dec. 778.

Illinois: The statute which fixes the legal rate at six per cent. allows "any person who shall pay or deliver any greater sum or value for any loan, discount or forbearance" to "recover threefold the amount of money so paid" from the person so receiving; but does not invalidate the contract reserving an illegal rate of interest. *Hansbrough v. Peck*, 5 Wall. 497; *McGill v. Ware*, 5 Ill. 21; *Lucas v. Spencer*, 27 id. 15; *Mapps v. Sharpe*, 32 id. 13; *Cushman v. Sutphen*, 42 id. 256; *Conkling v. Underhill*, 4 id. 388; *Ferguson v. Sutphen*, 8 id. 547; *Hunter v. Hatch*, 45 id. 178.

Missouri: In *Farmers' & T. Bank v. Harrison*, 57 Mo. 593, *Lewis, J.*,

said: "Hitherto . . . when the defense (of usury) was successful courts have habitually rendered judgment for the principal sum and ten per cent. interest, setting apart the interest to the county school fund;" and it was here held that the same rule would apply to a corporation restrained by its charter from taking interest above a specified rate, in actions by it upon contracts providing for a greater rate.

Ohio: In *Bank of Chillicothe v. Swayne*, 8 Ohio, 257, is a history of the legislation of the state on the subject of interest. The act of 1799 fixed the rate at six per cent., but inflicted no penalty for taking or reserving a greater rate. It did not declare any such contract void, nor create any forfeiture of the principal sum, but forfeited the entire interest. It expressly provided that the lender might recover the principal after deducting payments on account of interest. The act of 1804 fixed the rate at six per cent. and provided as to persons taking more that "such persons shall forfeit the whole amount of the debt on which the illegal interest was charged or received," one-half to the informer prosecuting, and one-half to the county treasury; said to be substantially, if not literally, the same as the Pennsylvania statute, and probably copied from it. Act of 1824: "All creditors shall be entitled to receive interest on all money after the same shall have become due, either on bond, bill, promissory note or other instrument of writing; on contracts for money or property, on all balances due on settlement between parties thereto; on all moneys withheld

vent the same. Such legislature enacted laws of the designated character which were limited to written contracts. One of the courts of civil appeals has held that the penalty prescribed in the statute reaches a contract the written part of which

by unreasonable and vexatious delay of payment; and on all judgments obtained from the date thereof; and on all decrees obtained in any court of chancery for the payment of money from the day specified in the said decree for the payment thereof, or if no day be specified, then from the day of entering thereof, until such debt, money or property is paid at the rate of six per cent. per annum and no more." Although this statute provided only that all creditors should be entitled to interest at six per cent. per annum *and no more* "on all money *after the same shall become due*," it was held and finally settled, up to 1850, that the rate could not be raised by agreement before or after due by reason of the prohibition in the act. Hitchcock, J., said: "From 1804 to the present period (1838), there has been no time in which an individual might not recover the principal sum of money loaned, together with lawful interest, notwithstanding by the terms of the loan he was to have received a greater rate of interest." In this case, however, a like prohibition in the charter of a bank limiting its right to charge interest to a specified rate was held to render a contract exceeding this limit wholly void on the ground of its want of power to make it. For criticism on this distinction, see *McLean v. Lafayette Bank*, 3 *McLean*, 589; and *Farmers' & T. Bank v. Harrison*, 57 *Mo.* 503; *Lafayette Benefit Society v. Lewis*, 7 *Ohio*, 81.

Pennsylvania: Usurious agreements not wholly void. The creditor is entitled to recover the sum loaned and legal interest. *Wycoff v. Longhead*, 2 *Dall.* 92; *Turner v. Cal-*

vert, 12 *S. & R.* 46; *Kupfert v. Guttenberg Building Ass'n*, 30 *Pa.* 465; *Philadelphia, etc. R. Co. v. Lewis*, 33 *id.* 33, 75 *Am. Dec.* 574. See *Evans v. Negley*, 13 *S. & R.* 218.

Mississippi: Taking or reserving illegal interest is not a punishable offense, nor does it render the contract into which it enters void; by statute it causes a forfeiture of all interest. *Wallace v. Fouché*, 27 *Miss.* 266; *Newman v. Williams*, 29 *id.* 212; *M'Alister v. Jerman*, 32 *id.* 142; *Brown v. Nevitt*, 27 *id.* 801.

Kentucky: An agreement to set the hire of a negro woman worth £22 per year against the interest of £125 is so far void as to let in the borrower to redeem, but does not vitiate the whole contract. *Reed v. Landsdale, Hardin*, 6. But see *Richardson v. Brown*, 3 *Bibb*, 207; *Wells v. Porter*, 5 *B. Mon.* 416; *Denham v. Stone*, 7 *J. J. Marsh.* 176.

"The express contract being void, no implied obligation can arise from it. It cannot be divided into separate and distinct contracts, so that one obligation shall be given for the money actually loaned, and another for the excessive interest. Each obligation is part of the same contract, and both are void. Neither can a promise to pay any part of a usurious debt, for the same reason, be enforced without consent, so long as the original contract which supports it remains unrevoked. The taint of usury in the old contract infects the new promise. This is not true of usurious contracts to pay a pre-existing valid debt. That debt is not destroyed by the usury. It may be recovered on the strength of the contract which created it. But where

stipulated only for lawful interest, while a contemporaneous parol contract provided for a rate in excess thereof.¹ Another of these courts has declined to assent to such conclusion. "If it could be maintained that a contemporaneous oral agreement for usurious interest made in connection with a written instrument is included within the" statute, "it could not affect this case for the reason that the written contract was made prior to the verbal agreement, and its validity could not be affected by the subsequent oral agreement." The failure of the legislature to include oral contracts simply necessitated a falling back on the constitution to obtain the rule to be followed in passing upon usurious oral contracts. "When we do this we merely have a provision declaring interest above a certain rate illegal, no penalty being attached for violation of the provision." Hence the contract as evidenced by the note was not affected by the oral agreement for usurious interest.² An oral agreement to pay such interest on a note is merely void as to the excess over the lawful rate.³

Though one who loans money upon a usurious agreement will not be entitled to any relief,⁴ it is otherwise with one who has purchased valid securities, and subsequently, upon such an agreement, extended the time of payment, lent more money and took new securities. The taint of the subsequent illegal contract does not relate back to or affect the original contract.⁵

the contract on which it depends in the beginning for existence is usurious, there never was anything to give it life, and to support an action for its enforcement. But if the debt be for money loaned and actually received by the debtor, there is an equitable and moral duty to pay it, which, while the law will give it no effect, may be made the consideration for a new promise. The parties can cancel and destroy the old contract, purge the consideration of usury, and make it the basis of a new obligation, and thereby bind the borrower, in law and equity, to pay the money actually received, and a legal rate of interest." *Garvin v. Linton*, 62 Ark. 370, 35 S. W. Rep. 430, citing *Hammond v. Hop-*

ping, 13 Wend. 505, 511; *Early v. Mahon*, 19 Johns. 147, 10 Am. Dec. 201; *Miller v. Hull*, 4 Denio, 104; *Phillips v. Columbus City Building Ass'n*, 53 Iowa, 719, 6 N. W. Rep. 121.

¹ *Dunman v. Harrison*, 41 S. W. Rep. 499.

² *Quinlan's Estate v. Smye*, 21 Tex. Civ. App. 156, 50 S. W. Rep. 1068, citing this section.

³ *Roberts v. Coffin*, 22 Tex. Civ. App. 127, 53 S. W. Rep. 597.

⁴ *Tribble v. Nichols*, 53 Ark. 271, 13 S. W. Rep. 790, 22 Am. St. 190.

⁵ *Humphrey v. McCauley*, 55 Ark. 113, 17 S. W. Rep. 713; *Nichols v. Fearson*, 7 Pet. 104; *Tillman v. Thatcher*, 56 Ark. 534, 19 S. W. Rep. 968; *Rountree v. Robinson*, 98 N. C. 107.

All that is meant according to any legal usage by a statute which declares a usurious contract to "be void and of no effect for whole premium or rate of interest only" is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited. Such a contract is not so far void that the repeal of the statute which forbade it, no saving clause being embodied in the repealing act, will not operate to cut off the defense of usury in an action upon it.¹

[567] Subjecting the usurer to a fine, or to loss of all interest on the debt by a separate prosecution, does not of itself render [568] the contract into which the usury enters wholly void. Where it is not declared void for usury by the statute, and [569] there are no specific provisions for a different adjustment of the amount which may be recovered, the contract as [570] to interest is held void when it stipulates for a rate forbidden by law; then the principal sum may be recovered with ordinary interest.² If a note is declared voidable only to the extent of the usury included in it an innocent purchaser for value, before maturity and without notice, is unaffected by the fact that an unlawful rate of interest is secretly included as principal.³ Where usury is punished by the forfeiture of interest the counsel fee stipulated for in a note may, according

¹ *Ewell v. Daggs*, 103 U. S. 143, 2 Sup. Ct. Rep. 408.

² *Bunn v. Kinney*, 15 Ohio St. 40. By an act passed in 1850 parties were allowed in Ohio to "stipulate for interest at any rate not exceeding ten per cent. yearly." In an action on a note at four months, which included interest at nearly twenty per cent., it was held usurious and void to the extent of interest above six per cent. from date. There was no mention of interest on the face of the note, except "after due;" the usury was included with the principal. The interest agreement implied by putting interest and principal together, in the amount for which the note was given, was enforced to the

extent of six per cent. between its date and maturity; for if the interest agreement were wholly void, no interest whatever could be recovered for that time.

A statute expressing that the taking of usurious interest shall be deemed a forfeiture of the entire interest makes void the agreement as to interest. *Ward v. Sugg*, 113 N. C. 489, 18 S. E. Rep. 717, 24 L. R. A. 280.

³ *Hamilton v. Fowler*, 40 C. C. A. 47, 99 Fed. Rep. 18, citing *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 37 S. W. Rep. 88; *McBroom v. Scottish Mortgage & Land Investment Co.*, 153 U. S. 318, 14 Sup. Ct. Rep. 852; *Norris v. Langley*, 19 N. H. 423; *Converse v. Foster*, 32 Vt. 828.

to the federal circuit court for South Carolina, be recovered,¹ though the supreme court of the state had previously ruled otherwise on the ground that the debtor was only liable for the sum actually received.² The penal laws of a state will not be enforced by the courts of another state. Hence where the usury statute of a state declares that the usurer shall forfeit his right to interest a forfeiture of the principal will not be adjudged by the courts of another state in an action on the usurious contract because another statute of the first-mentioned state makes the taking of usury a misdemeanor and provides for the punishment of the guilty party by fine and imprisonment.³

In many cases the construction of such statutes has been influenced by antecedent legislation indicating some legislative policy. And the history of legislation upon this subject shows the progress and tendency of popular thought; the gradual subsidence and final disappearance of the old prejudice against not only interest, but usury. The common law is flexible enough to accommodate itself by degrees to deliberate popular convictions; and it has done so in respect to interest and usury. Very high rates of stipulated interest which transcend statutory limits are abated and brought to the standard which the law fixes; and when no limit is fixed by statute such stipulated rates are sometimes mitigated as the law mitigates penalties; but in both cases the excessive interest is treated as free from the taint of crime. Usury, as a crime, is rapidly disappearing from the statutes everywhere.

§ 316. Recoveries under usury statutes. Under [571] statutes where the rates allowed by law have been exceeded in the contract, and the principal sum or a part of it remains collectible, various questions have arisen affecting the amount the creditor is entitled to recover. The forfeiture of interest or principal declared by statute for usury inures to the debtor, and may operate in reduction of the debt where such forfeiture is not exclusively to be adjudged in a separate proceeding, or to be adjudged in the creditor's suit to a public fund. The

¹ Union Mortgage, Banking & Trust Co. v. Hagood, 98 Fed. Rep. 779.

² White v. Bartlett, 53 Mo. App. 378; Kendrick v. Kyle, 78 Minn. 273.

³ Land Mortgage Co. v. Gillam, 49 S. C. 345, 26 S. E. Rep. 990, 29 id. 203.

288, 28 So. Rep. 951.

interest contract which violates a statute is of course wholly void;¹ but in many instances the statute goes further, and by way of penalty declares a forfeiture of all interest, or a forfeiture of double or treble the amount of the interest or usury, and sometimes also a portion of the principal. If the forfeiture is to be worked out by a criminal proceeding or a *qui tam* action, it is not to be deducted from the valid portion of the debt.² In Ohio, under the act of 1804, which provided for forfeiture of the whole debt, the creditor was entitled, nevertheless, to recover it from the debtor with legal interest; for the statute excluded him from the benefit of the forfeiture by awarding one-half to the informer and devoting the other half to the county treasury. So the Iowa act of 1839 abated the interest to the legal standard between the debtor and creditor, and made the latter subject to a forfeiture to the county of the usurious part of the interest and twenty-five per cent. interest thereon.³

Under a statute in Indiana⁴ which limited the rate of interest and provided that in actions upon contracts by which, directly or indirectly, a higher rate was contracted for, taken or reserved, the plaintiff, besides losing costs, should only recover the principal, deducting interest paid; notes containing a promise of such interest were, to the extent of it, without consideration. Whether it was openly expressed, stealthily added to the principal or taken in advance without reducing the sum stated in the note, there was, to the extent of the interest, a [572] want of consideration.⁵ Where, however, a note bearing usurious interest was given for a precedent debt, the "principal" allowed to be recovered included not only the original principal, but such interest as had legally accrued thereon up to the time of giving the usurious note.⁶

¹ Where a note was given in discharge of other notes and a mortgage securing it was executed, only one of the notes being tainted with usury, the renewal and secured note was void only *pro tanto*. *Smith v. Neeley*, 2 Indian Ty. 651, 53 S. W. Rep. 450.

² *Richards v. Marshman*, 2 G. Greene, 217.

³ *Ficklin v. Zwart*, 10 Iowa, 387; *Drake v. Lowry*, 14 id. 125; *Sheldon v. Mickel*, 40 id. 19.

⁴ *Gavin & Hord*, 408, § 4.

⁵ *Musselman v. McElhenney*, 23 Ind. 4, 85 Am. Dec. 445; *Cross v. Wood*, 30 Ind. 378; *Hays v. Miller*, 12 Ind. 187.

⁶ *Pratt v. Wallbridge*, 16 Ind. 147.

The Massachusetts act of 1825, as modified by the act of 1826, and the Illinois act of 1845 are similar in respect to the consequences to the creditor of usury, in an action upon the usurious contract. The creditor must pay costs and forfeit threefold the amount of the whole interest reserved, discounted or taken; he is entitled to judgment and execution for the balance only which may remain due upon the contract or assurance after deducting the forfeiture. In the former state this statute has been regarded in her own courts in respect to these and other accompanying provisions as such a mitigation of the law previously in force that it is remedial rather than penal.¹ So that the debtor as plaintiff, seeking equitable relief by bill in equity to redeem by payment of the amount equitably due upon the usurious debt, may claim the same benefit of the forfeiture and have the debt reduced by it, as when he is defendant at law, if the creditor asserts his rights under the contract by his answer.²

In Illinois, however, there is no provision for recovering usury voluntarily paid; the right to deduct it from the debt on which it was paid in actions therefor is the only remedy.³ The statutes, through successive changes, are and have been penal by reason of the forfeiture of interest; and the debtor who seeks equity is required to do equity by paying principal and legal interest.⁴ But while the transaction remains unsettled and suit is brought for the recovery of the usurious debt, or any part of it, the debtor had a right, prior to 1867, to reduce it by applying all the usury paid. Where usury had been contracted for the statute was express that the creditor was entitled to recover only the principal due, or only the balance after deducting the forfeiture.⁵ The [573] usury received was considered as having been extorted by

¹ *Hart v. Goldsmith*, 1 Allen, 145; *v. Anderson*, 35 Ill. 66; *McGuire v. Gray v. Bennett*, 3 Met. 522. *Campbell*, 58 Ill. App. 188.

² *Id.*; *Gerrish v. Black*, 101 Mass. 400; *Minot v. Sawyer*, 8 Allen, 78; *Smith v. Robinson*, 10 Allen, 130. ⁴ *Mapps v. Sharpe*, 32 Ill. 13; *Snyder v. Griswold*, 37 Ill. 216; *Cushman v. Sutphen*, 42 Ill. 256. But see *Johnson v. Thompson*, 28 Ill. 372.

³ *Reinback v. Crabtree*, 77 Ill. 182; *Saylor v. Daniels*, 37 Ill. 331, 87 Am. Dec. 250; *Farwell v. Meyer*, 35 Ill. 40; *Lucas v. Spencer*, 27 Ill. 15; *Parmer v. Lawrence*, 44 Ill. 405. ⁵ *Driscoll v. Tunnock*, 76 Ill. 154; *Reinback v. Crabtree*, 77 Ill. 182; *Farwell v. Meyer*, 35 Ill. 40. *Booker*

the creditor and should be applied in part payment of the principal of the debt.¹ If a usurious note is delivered to the maker and a new note is executed for a new principal, the time of payment being extended, and, intermediate the execution of the original note and the later one, the law in force when the former was executed is repealed and a new statute enacted declaring a different penalty for usury, the new note will be regarded as a new contract and be governed by the law in effect when it was made, it also being usurious.²

§ 317. *Same subject.* Under those statutes, as under all others, the parties may free the debt of the usurious taint, and rescue it from the frowns of the law. The courts do not shut the door in the face of the penitent.³ The debt will usually be so divested of the vice with which usury infects a contract, if the usury is deducted from the debt, and a new contract made for the payment of so much of the original principal alone as remains unpaid, with only lawful interest.⁴ But in Illinois the debt, so long as it remains against the same debtor who has paid usury, would seem to be subject to a deduction for all the usury paid; merely striking out the usury from the debt unpaid and substituting a new agreement or new securities bearing lawful interest for the same debt will not suffice.⁵ In the

¹ *Id.*

² *Purvis v. Woodward*, 78 Miss. 923, 29 So. Rep. 917; *Story v. Kimbrough*, 33 Ga. 21; *Webb v. Bishop*, 101 N. C. 99, 7 S. E. Rep. 698; *Watson v. Mims*, 56 Tex. 451. Compare *Hunter v. Hatch*, 45 Ill. 178. See § 370.

³ *De Wolf v. Johnson*, 10 Wheat. 367; *Moseley v. Rambo*, 106 Ga. 597, 32 S. E. Rep. 638.

⁴ *Chalhbourn v. Watts*, 10 Mass. 121, 6 Am. Dec. 109; *Clark v. Phelps*, 6 Met. 296; *Smith v. Stoddard*, 10 Mich. 148, 81 Am. Dec. 778; *Collins Iron Co. v. Burkam*, 10 Mich. 283; *Craig v. Butler*, 9 Ill. 21; *Barnes v. Hedley*, 2 Taunt. 184; *Kilbourn v. Bradley*, 3 Day. 356, 3 Am. Dec. 273; *Postlethwait v. Garrett*, 3 T. B. Mon. 345; *Fowler v. Garret*, 3 J. J. Marsh. 682.

⁵ In *Mitchell v. Lyman*, 77 Ill. 525,

a usury debt was, by a new agreement, so freed of usury as to subsequently bear legal interest; but it was the same debt, and so divested of its original character as to cut off the right to deduct the usury paid while in a usurious state. A person borrowed \$3,000, gave his note for that amount, payable in one year, with interest at ten per cent.; but the lender retained out of the \$3,000 five per cent., so that the borrower actually received no more than \$2,850. At the end of the year all interest was paid, and a new note given for \$3,000 with interest at ten per cent., with personal security, and the mortgage which had been made to secure the first note discharged. In an action upon the second note, it was held that although the same

District of Columbia usurious interest cannot be made the subject of set-off or counter-claim unless within twelve months after suit brought for the principal claim.¹ In Michigan, [574] where only the excess above the highest rate which may be stipulated for is usury, and where only that excess can be abated, or, after having been paid, can be deducted in actions for the principal, this remedy of recoupment does not exist, if the parties have made new securities which include nothing but the actual loan, and are not meant to be mere evasions;² nor if they have adjusted the debt by applying credits and payments so that usury contained in the items adjusted is not contained as an integral part of the debt in its final form.³

Statutes providing for a forfeiture of threefold the amount of the whole interest reserved or taken were in force in several states for many years. Under them the interest was computed, for the purpose of determining the amount of the forfeiture, on the basis of the contract, up to the time the amount due was ascertained by the verdict.⁴ And in Massachusetts threefold the amount of the whole interest, usurious

debt was secured by the second as by the first note, and, therefore, was subject to be reduced by the interest paid on the first note, yet the last note was not usurious, and the plaintiff was entitled to interest upon it. This case was governed by the law of 1857, which provides that if any person or corporation shall contract to receive a greater rate of interest than ten per cent. upon any contract, *written or verbal*, such person shall forfeit the whole of the interest, and shall be entitled only to recover the principal sum. The language of this statute is peculiar.

In *Reinback v. Crabtree*, 77 Ill. 182, a loan of \$450 was made, and a note given calling for ten per cent. interest; there was also a verbal agreement made at the same time to pay six per cent. more, and payment made pursuant to that agreement. This verbal agreement was held to make the transaction usurious, and

that, although usurious interest once paid cannot be recovered back, it is settled in that state that this rule does not apply where the transaction has not been settled, and the lender brings his action for the balance. In such action the borrower may defend by claiming a credit for whatever usurious interest he has paid in the same transaction. *Saylor v. Daniels*, 37 Ill. 331, 87 Am. Dec. 250.

The fact that new notes have, from time to time, been given does not change the case. *Farwell v. Meyer*, 35 Ill. 40; *Parmelee v. Lawrence*, 44 Ill. 405; *Booker v. Anderson*, 35 Ill. 66.

¹ *Lawrence v. Middle States Loan, Building, etc. Co.*, 7 D. C. App. Cas. 161.

² *Smith v. Stoddard*, 10 Mich. 148, 81 Am. Dec. 778.

³ *Collins Iron Co. v. Burkam*, 10 Mich. 283.

⁴ *Parker v. Biglow*, 14 Pick. 436.

as well as lawful,¹ and in New Hampshire threefold the sum above the lawful interest,² was deducted. On usurious contracts in Iowa the creditor is entitled only to the principal; ten per cent. is adjudged against the debtor for certain public funds; this is computed upon the amount of the contract up to the rendition of the judgment,³ and in the same way against a surety.⁴ Where there have been partial payments the computation should be made as between debtor and creditor;⁵ and if the principal of a usurious debt has been paid, and the action is brought for the usurious interest, on the defense of usury, the judgment for the penalty to the school fund cannot be rendered.⁶

In Virginia if the debtor has applied payments made upon a usurious contract to the interest, or that has been done with his assent, the application will not be disturbed unless within one year thereafter a suit be brought by the debtor for its recovery, in which he may set it off against the demand for which he is sued.⁷

Where usury does not wholly invalidate the debtor's contract to pay the principal, but it is subject to be reduced by deduction of the usury, or interest paid or reserved, whether single or multiplied, the benefit of that defense is of course confined to actions upon the usurious contract, or in some form for the collection of the usurious debt. The defense is available in suits for the foreclosure of mortgages, as well as in personal actions upon the contract.⁸ The usurious debt, originally a gross sum, or made so by the consolidation of a series of transactions, is often divided to be paid by instalments secured in one instrument or in several. When so divided, and a part only is sued for, the residue being either paid, or for other reasons not in issue — perhaps belonging to another party — may the entire deduction to which the debtor

¹ *Brigham v. Marean*, 7 Pick. 40.

⁶ *Easley v. Brand*, 18 Iowa, 132.

² *Gibson v. Stearns*, 3 N. H. 185.
See *Rev. St. N. H.*, ch. 190, § 3;
Divoll v. Atwood, 41 N. H. 419.

⁷ *Crabtree v. Old Dominion Building & Loan Ass'n*, 95 Va. 670, 29 S. E. Rep. 741, 64 Am. St. 818; *Munford v. McVeigh*, 92 Va. 446, 23 S. E. Rep. 857.

³ *Ficklin v. Zwart*, 10 Iowa, 387, 77 Am. Dec. 108; *Drake v. Lowry*, 14 Iowa, 125.

⁸ *Minot v. Sawyer*, 8 Allen, 78; *Cowles v. Woodruff*, 8 Conn. 35.

⁴ *McIntosh v. Likens*, 25 Iowa, 555.

⁵ *Sheldon v. Mickel*, 40 Iowa, 19;
Smith v. Coopers, 9 Iowa, 376.

is entitled for usury be made from the portion sued for? In Maine the debtor is entitled to an abatement of the usurious interest, and to have such usury as he has paid on a debt deducted from the collectible portion when it is sued for.¹ In that state where a usurious debt is divided and separate notes given for it each note is held to contain the same proportion of the usury as the entire debt; and subject to abatement by application of a like proportion only of any usurious interest that had been paid on the whole debt.²

In New Hampshire usury was for a long time punished by obliging the creditor to lose three times the sum above the lawful interest taken, to be deducted from the sum found lawfully due. Where a usurious debt was secured by two notes, and one had been paid, it was held in an action upon the other that the payment of one could not affect the defendant's right to the deduction allowed by the statute [576] any more than if the whole sum had been put into one note and the amount paid had been indorsed upon it; the balance still due upon the last note is the balance of the money upon which the usurious interest was secured and paid; and to subject it only to a proportionate abatement would be an evasion of the spirit and letter of the statute.³

In Texas if a note sued upon is usurious and was given as a renewal of another usurious obligation, and embraced usury in the principal sum, there may be a recovery only of that part of the latter sum which would remain after deducting all interest embraced in the note, and, in addition, ten per cent. on the principal thus ascertained, less the payments made upon the note. Any such payments should not be applied to existing usurious interest, but to the lessening of the legal demand. Payments made and directed to be applied to other notes should not be treated as payments on the note in suit unless they constituted a part of the same usurious contract, and were executed for usurious interest. If they were executed alone for that purpose, such payments should be applied to the extinguishment of the legal demand.⁴

¹ *Loud v. Merrill*, 45 Me. 516.

³ *Farr v. Chandler*, 51 N. H. 545.

² *Pierce v. Conant*, 25 Me. 33; *Darling v. March*, 22 Me. 184; *Ticonic Bank v. Johnson*, 31 Me. 414.

⁴ *Sturgis Nat. Bank v. Smith*, 9 Tex. Civ. App. 540, 30 S. W. Rep. 678.

SECTION 4.

AGREEMENTS FOR MORE THAN LEGAL RATE AFTER MATURITY.

§ 318. *Not usury, but penalty.* This subject has been, to a considerable extent, considered in the preceding pages, but attention has not been called to the distinct question of the effect of stipulating for rates of interest, exceeding those allowed by law, to be paid after maturity. The question may practically arise under statutes regulating interest in two ways: first, by providing that the interest on money shall be at a given rate, and no more; second, by prescribing a general rate, and that parties may agree on any other not exceeding a specified higher rate. Reserving a greater sum for interest before maturity than the rate fixed by statute, or than is authorized to be stipulated for, renders the contract usurious. But agreeing for the prohibited rates to be computed after maturity is not usury.¹

¹ *Keys v. Lardner*, 55 Kan. 331, 40 Pac. Rep. 644; *Pawtucket Mut. F. Ins. Co. v. Landers*, 5 Kan. App. 623, 47 Pac. Rep. 621; *Brown v. Cory*, 9 Kan. App. 702, 59 Pac. Rep. 1097 (the rule has been changed by statute in Kansas); *Home F. Ins. Co. v. Fitch*, 52 Neb. 88, 71 N. W. Rep. 940; *Havemeyer v. Paul*, 45 Neb. 373, 63 N. W. Rep. 932, overruling *Richardson v. Campbell*, 31 Neb. 181, 51 N. W. Rep. 753; *Sanford v. Lichtenberger*, 62 Neb. 501, 87 N. W. Rep. 305; *Sumner v. People*, 29 N. Y. 337; *Green v. Brown*, 22 N. Y. Misc. 279, 49 N. Y. Supp. 163; *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. Rep. 103; *Law Trust Society v. Hogue*, 37 Ore. 544, 62 Pac. Rep. 380; *Ramsey v. Morrison*, 39 N. J. L. 591; *Cridder v. San Antonio Real Estate, Building & Loan Ass'n*, 89 Tex. 597, 35 S. W. Rep. 1047; *Lloyd v. Scott*, 4 Pet. 225; *Taylor v. Hiestand*, 46 Ohio St. 343; *Warrl v. Cornett*, 91 Va. 676, 22 S. E. Rep. 494, 49 L. R. A. 550; *Scottish-American Mortgage Co. v. Wilson*, 24 Fed. Rep. 310; *Stansbury v. Stansbury*, 24 W. Va. 634; *Chaffe v. Landers*, 46 Ark. 364; *Weyrich v. Hobleman*, 14 Neb. 432, 16 N. W. Rep. 436; *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. Rep. 1 (if the agreement is made after the interest has become due); *Lawrence v. Cowles*, 13 Ill. 577; *Gould v. Bishop Hill Colony*, 35 Ill. 324; *Davis v. Rider*, 53 Ill. 416, 85 Am. Dec. 368; *Witherow v. Briggs*, 67 Ill. 96; *Wilday v. Morrison*, 66 Ill. 532; *Cutler v. How*, 8 Mass. 257; *Call v. Scott*, 4 Call, 402; *Wilson v. Dean*, 10 Iowa, 432; *Gower v. Carter*, 3 Iowa, 244, 66 Am. Dec. 71; *Moore v. Hylton*, 1 Dev. Eq. 433; *Campbell v. Shields*, 6 Leigh, 517; *Gambril v. Doe*, 8 Blackf. 140, 44 Am. Dec. 760; *Fisher v. Otis*, 3 Pin. 78; *Wight v. Shuck*, *Morris*, 425; *Shuck v. Wight*, 1 G. Greene, 128; *Fisher v. Anderson*, 25 Iowa, 28, 95 Am. Dec. 761; *Jones v. Berryhill*, 25 Iowa, 289; *Rogers v. Sample*, 33 Miss. 310, 69 Am. Dec. 349; *Roberts v. Trenayne*, *Cro. Jac.* 507; *Floyer v. Edwards*, 1 Cowp. 112;

The reason given is that the debtor can relieve himself by at once paying the debt; he is no longer bound to keep the money that it may earn interest for the creditor. By [577] paying the debt the debtor can prevent its increase by the

Wells v. Girling, 1 Brod. & Bing. 447; Bac. Abr., title "Usury," letter c; Caton v. Shaw, 2 Har. & G. 13.

Under the Tennessee statute which provides that "interest is the compensation which may be demanded by the lender from the borrower, or creditor from the debtor, for the use of money," a rate in excess of that fixed by law is usurious, though it is not payable until after the maturity of the obligation. Richardson v. Brown, 9 Baxter, 242.

Where there is no restriction as to the rate of interest which may be contracted for, an increased rate may be collected after the obligation promising it has matured: it is not a penalty. If the increased rate is payable monthly the payee waives his right to it by accepting interest at the rate stipulated for before maturity for such time as the latter is accepted, but not for any subsequent time. Thompson v. Gorner, 104 Cal. 168, 37 Pac. Rep. 900, 43 Am. St. 81.

It is said by Simonton, Circuit Judge, in a recent case, that the principle seems to be this: If, from the contract, it appears that the parties, when making it, understood that the words of the note were not peremptory, but that the maker would be indulged provided he paid the increased rate of interest, this would be usury; but if the threat of increased interest was held out to enforce prompt payment, and if the increased rate was penalty for the default, it would not be usury. The note before the court contained these words: "with interest thereon, after maturity, until paid, at the rate of ten per cent. per annum, payable annually; value received." The court

observed that the promise to pay interest after maturity at an unlawful rate was incorporated in, and formed part of, the original contract: that it was one of the terms of that agreement, and that the consideration was sufficient to all its terms; that the words "payable annually" express a contract on the part of the promisor, and its acceptance on the part of the promisee. The note was usurious. Union Mortgage, Banking & Trust Co. v. Hagood, 97 Fed. Rep. 360. The opinion in the foregoing case is quoted from in Law Trust Society v. Hogue, 37 Ore. 544, 557, 62 Pac. Rep. 380.

In South Carolina one who sues on a contract not originally usurious forfeits all interest by subsequently charging and receiving thereon interest at a rate in excess of that fixed by statute. Ehrhardt v. Varn, 51 S. C. 550, 29 S. E. Rep. 225.

A statute to the contrary was enacted in 1887 in Minnesota. Chase v. Whitten, 51 Minn. 485, 53 N. W. Rep. 767. Such statute merely works a forfeiture of the interest reserved, and does not render the contract void *in toto*. Chase v. Whitten, 62 Minn. 498, 65 N. W. Rep. 84.

A statute which defines interest as "the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or *detention* of money" changes the rule. "The detention of money arises in a case when a debt has become due and the debtor withhold its payment without a new contract giving him a right to do so." Parks v. Lobbcock, 92 Tex. 635, 51 S. W. Rep. 322.

accumulation of interest. This reasoning overlooks the possibility that for want of money the debtor will be unable to avail himself of this relief; this is the very inability, with its distressing consequences, from which it is deemed humane and politic by statutes against usury to shield him. The right to stop interest by paying the principal, without the ability to make such payment, is just equivalent to the right a person has to borrow money when no person having it will lend to him. If the creditor's power over the necessitous to extort oppressive terms at the lending is deserving of legal check, why limit that restriction to the period of credit? High rates of interest to commence at the end of that period are as likely to be oppressive as when applied before, and more likely to be assented to. But the further reason is given that higher than legal rates agreed to for interest after maturity are in the nature of a penalty, and therefore only the actual damages are recoverable; and as these damages are for the non-payment of money they are measured by the legal rate of interest. The doctrine thus limited is correctly stated thus: An agreement to pay more than the legal rate of interest by way of penalty for not paying the debt is not usurious because the debtor may at any time relieve himself by paying it with lawful interest if he is able to do so; and even if he incurs the penalty, this may be reduced to the actual debt reckoned in the same manner.¹ No agreement is valid for a greater rate of interest to be paid after maturity than may be legally stipulated to be paid before. This rule is founded upon principle and authority. Parties may contract absolutely or conditionally, as we have seen, for any rate within a statute fixing interest limits. When a rate above those limits is agreed to be paid before maturity it is usurious; not collectible; if it is agreed to be paid after maturity it is in the nature of a penalty and has no effect; then the legal rate will govern as though no agreement had been made.²

¹ 3 Parsons on Cont. 116.

² Shuck v. Wight, 1 G. Greene, 128; Wight v. Shuck, Morris, 425; Gower v. Carter, 3 Iowa, 244, 66 Am. Dec. 71; Wilson v. Dean, 10 Iowa, 432; Cutler v. How, 8 Mass. 257; Conrad v. Gib-

bon, 29 Iowa, 120; Clark v. Kay, 26 Ga. 403; Claypool v. Sturgess, 10 Ohio St. 440; Taul v. Everet, 4 J. J. Marsh. 10; Jackson v. Shawl, 29 Cal. 267; Burnhisel v. Firman, 22 Wall. 170; Bunn v. Kinney, 15 Ohio St. 40; Caton

§ 319. Same subject; when debtor relieved in Illinois. In Illinois, however, this rule does not appear to be recognized. A remedy in equity has sometimes been abstractly acknowledged as one that might be available in case of

v. Shaw, 2 Har. & G. 13; Sexton v. Murdock, 36 Iowa, 516; Pyke v. Clark, 3 B. Mon. 262; Brockway v. Clark, 6 Ohio, 45.

In *Gower v. Carter*, *supra*, the action was brought on an agreement to pay a sum of money by a certain day, and more than legal interest afterwards, by way of penalty, if the debt be not punctually paid. Stockton, J., said: "The defendants' agreement to pay two and one-half per centum per month, in default of payment of the promissory notes at maturity, is not essentially different from an agreement to pay a gross sum as such penalty. Nor do we perceive that either of the notes sued on is essentially different from a penal bond by which the obligor binds himself to pay the obligee a certain sum, with the condition appended, by which the first obligation is to be void on the payment of the lesser sum to the obligee by a day certain. The real nature and essence of the agreement is always disclosed by the condition of the bond or undertaking.

"In the present case the condition of the contract was to pay the note, with interest, by a certain day. If not paid punctually when due, the defendants promise to pay as a penalty for the default two and a half per centum per month from maturity until paid. Are the plaintiffs entitled to enforce this penalty against the defendants on their failure to pay the notes at their maturity? We must first remark, however, that on examination of the petition we find that it does not set forth any breaches on the part of the defendants, as on a penal bond. It does not aver what amount is claimed by plaintiffs as

due from defendants, nor does it pray judgment for the amount of the penalty. We refer to this in connection with the question made by the defendants in their assignment of errors, viz.: whether the court should have rendered judgment for the penalty of two and a half per centum per month, and if not, for what amount should judgment have been rendered?

"The consideration of this question renders it advisable to inquire to some extent into the nature and history of actions for penalties sued on penal obligations. In an action of debt on a penal bond for condition broken, the amount which the plaintiff was entitled to recover was originally the penalty. The action could not be relieved against by payment or tender. This severe rule of the common law was only mitigated by the practice of the courts of chancery, which interposed and would not allow the creditor to take more than in conscience he ought. Sedgw. on Dam. 393. From the time that it became settled in equity that the condition of the bond was the agreement of the parties, the obligor was relieved from the penalty. Very soon arose the practice, enforced by legislation, requiring the plaintiff to assign breaches in his declaration, and the jury on the trial assessed such damages for the breaches assigned as the plaintiff on the trial might prove. And it is enacted by the code of Iowa, section 1818, that in actions on penal bonds the petition must set forth the breaches, and the judgment rendered thereon must be for the actual damages only. It may therefore be laid down as a settled rule, that no

[580] an interest contract of an oppressive character.¹ While the statute limited the rate which might be stipulated for to ten per cent. per annum a note was given to which was added this clause: "and if the same is not paid when due, to pay her

other sum can now be recovered under a penalty than that which shall compensate the plaintiff for his actual loss. The penalty is in no sense the measure of compensation; and the plaintiff must show the particular injury of which he complains, and have his damages assessed by a jury. Such damages, it is further held, are not necessarily nominal, and the jury may give substantial damages if they see fit. Sedgwick on Dam. 396, 397.

"In the case of a loan of money, although in point of fact the creditor may suffer the most serious inconvenience for the want of punctual payment of his debt, as happens every day, and a subsequent payment of principal and interest may be a very inadequate compensation for the original disappointment, it may be stated as a general rule that a promise of paying a penalty beyond the amount of legal interest cannot be enforced. Pothier on Obligations, Appendix, 87. Where the penalty has been incurred, the ends of justice may be arrived at by reducing the penalty to the actual debt. 2 Parsons on Contracts, 393. The case of *Groves v. Groves*, 1 Wash. (Va.) 1, was an agreement for the payment of a debt at a certain day, and, if not paid punctually, then for the payment of a larger sum; the court held that a contract to pay a larger sum at a future day was not usurious, and that the increased sum should be considered as a penalty against which equity ought to relieve, on compensation being made. So in *Brockway v.*

Clark, 6 Ohio, 45, the supreme court of Ohio held that where a money-lender takes from a borrower an obligation for a greater amount than the money lent and stipulated interest, with an undertaking on his part to receive a less sum in discharge of the obligation, if punctually paid, equity may relieve against the excess as a penalty, on the same principle upon which parties are ordinarily relieved from penalties. The same was granted at law in Massachusetts in the case of *Cutler v. How*, 8 Mass. 257. After a verdict by the jury, for the plaintiff, assessing the damages, the court directed a certain amount of the penalty, which it deemed oppressive, to be deducted from the amount of the verdict, and judgment was entered on the verdict as amended.

"In *Shuck v. Wight*, 1 G. Greene, 128, the note was for the sum of \$300, payable two years after date, and to bear interest after maturity, if not paid, at the rate of fifty per centum per annum. Suit being brought by the holder of the note to foreclose a mortgage given to secure its payment, the petition prayed judgment for the amount of the note with such interest as the court should deem just and proper. Judgment was given for the plaintiff for the amount of the note and interest at six per centum per annum. This judgment was affirmed by the supreme court (1 G. Greene, 129), and we may consider that the principle was thereby settled so far as the authority of this court could settle it, that the plaintiff was

¹ *Could v. Bishop Hill Colony*, 35 Ill. 324.

twenty-four per cent. interest thereon from the time the same is due until paid." The supreme court held, as it had done before and as it did repeatedly afterwards, that such agreements for interest are not usurious unless given on such short time as to induce the belief that they were designed to evade the statute against usury.¹ Such contracts do not come within the rule that a greater sum is a penalty when it is made payable on failure to pay a smaller sum. Where that rule applies, the greater sum becomes due at once, in case of non-payment at the day, and is strictly a penalty from which a court [581]

not entitled to judgment for the penalty of fifty per centum per annum, but for six per cent. only.

"In another class of cases where the parties have agreed upon a sum certain as the measure of damages, in order as far as possible to avoid all future questions as to the amount of damages which may result from the violation of the contract, and where a definite sum was named as settled and liquidated, if the construction of the phraseology would work oppression the use of the term 'liquidated damages' did not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties. No damages for the non-payment of money can ever be so liquidated between the parties as to evade the provisions of the law which fix the rate of interest. Sedgw. on Dam. 400. In *Orr v. Churchill*, 1 H. Black, 232, Lord Loughborough said: 'There can only be an agreement for liquidated damages where there is an agreement for the performance of certain acts, the not doing of which would be injurious to one of the parties; or to guard against the performance of acts which if done would also be injurious. But in cases like the present, the law having fixed by positive rules the rate of interest, has bounded the measure of damages.' In the case of *Gray v. Crosby*, 18 Johns. 219, where

a party covenanted on a certain contingency to pay to another a sum of money, with a proviso that if he failed or refused then he would pay a larger sum as liquidated damages, the supreme court of New York say: Such facts constitute no right to recover beyond the money actually due. Liquidated damages are not applicable to such a case. If they were they might afford a secure protection for usury, and countenance oppression under the forms of law."

¹ *Id.*; *Lawrence v. Cowles*, 13 Ill. 577; *Smith v. Whitaker*, 23 Ill. 367; *Bishop Hill Colony v. Edgerton*, 26 Ill. 54; *Davis v. Rider*, 53 Ill. 416; *Wilday v. Morrison*, 66 Ill. 532; *Witherow v. Briggs*, 67 Ill. 96; *Bane v. Gridley*, *id.* 388.

In a case in which thirty per cent. per annum was stipulated to be paid after maturity the court, referring to its previous decisions, said it could hardly have decided all these cases without passing upon both of these questions, namely, whether such interest was of the nature of a penalty, or usurious, and evidently did not regard a merely increased rate of interest in consequence of non-payment at maturity as a penalty in the sense in which a gross sum is a penalty when it is to be paid at a particular day. *Bane v. Gridley*, 67 Ill. 388.

of chancery will relieve on slight grounds. The courts of that state, in common with other courts, pronounce such excessive interest a penalty to ensure punctuality, but it is not there strictly a penalty against which courts of chancery will relieve except for cogent reasons. On the contrary, these penalties are enforced for the full amount agreed to be paid.¹

SECTION 5.

INTEREST AS COMPENSATION.

§ 320. **Scope of section.** Under previous heads we have discussed interest resulting from or connected with agreements therefor. It is now proposed to consider the subject in a broader sense:—the liability for interest where there is no actual agreement to pay it, not only in connection with obligations *ex contractu* to pay the principal, but also where the liability is founded in tort. A liability for interest may result from a tacit agreement to pay it; and the law in many instances implies a duty to pay it on the principle of *quantum meruit*. It is also almost² invariably chargeable as damages in cases of default in the payment of a liquidated debt; and upon damages for violation of contracts where such damages are determinable by some certain standard. In cases of tort [582] interest is allowed not only upon money, but the value of property wrongfully taken, converted, or lost by culpable neglect. It is recoverable, also, upon pecuniary elements of damage although the principal injury may involve a claim for unliquidated damages.

§ 321. **Right not absolute.** It will appear more fully hereafter that the right to interest as compensation is not absolute, as it is where there are agreements made to pay it. In some jurisdictions the allowance of it is discretionary with the jury,³

¹ Downey v. Beach, 78 Ill. 53; Reeves v. Stipp, 91 Ill. 609.

² In Maryland a subscription for stock in a corporation, the amount subscribed being payable in fixed instalments, is not such a contract as interest is recoverable on as matter of right. Frank v. Morrison, 55 Md. 399. The jury may allow it. Musgrove v. Morrison, 54 id. 161.

Interest on a note given as a subscription to a railroad company and payable one year after the completion of the road, in the absence of an agreement, is due only from the time payment is demanded. Stevens v. Corbitt, 33 Mich. 458.

³ District of Columbia v. Camden Iron Works, 15 D. C. App. Cas. 198, 222.

and in others it cannot be allowed in a numerous class of cases as interest, though the lapse of time between the origin of the cause of action and the time of trial may be considered by the jury in estimating the damages.¹ In cases where the right to recover interest is not absolute the plaintiff may properly be deprived of it if he has been guilty of laches in making his demand or in prosecuting his action, either for the time anterior to judgment or for such other period as the jury may find that his laches continued.²

A valuable contribution to the discussion of some of the features of interest as compensation has recently been made by Justice Dodge of the supreme court of Wisconsin. After

¹ See §§ 336, 1256.

In the absence of a contract, interest is recoverable only upon the subjects specified in the statute. *Hurlburt v. Dusenbury*, 26 Colo. 240, 57 Pac. Rep. 860; *Vietti v. Nesbitt*, 22 Nev. 390, 41 Pac. Rep. 151.

Interest can only be allowed by virtue of some contract express or implied, or by virtue of some statute, or on account of the default of the party liable to pay, and then it is allowed as damages for the default. *Matter of Trustees of New York & Brooklyn Bridge*, 137 N. Y. 95, 32 N. E. Rep. 1054.

In Manitoba interest cannot be recovered before action brought unless there was a contract to pay it, or the nature of the case is such that a contract may be implied, unless the money was payable by virtue of a writing, and a demand was made with notice that interest would be claimed. *Nichol v. Goshier*, 12 Manitoba, 177, 182.

⁴ *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 171, 3 Sup. Ct. Rep. 570; *Bann v. Dalzell*, 3 C. & P. 376; *Newell v. Keith*, 11 Vt. 214; *Adams Exp. Co. v. Milton*, 11 Bush, 49; *Bartels v. Redfield*, 27 Fed. Rep. 286, 23 Blatch. 486; *Stewart v. Schell*, 31 Fed. Rep. 65; *United States v. Sanborn*, 135 U. S. 271, 10 Sup. Ct. Rep. 812; *Brinkly*

v. Willis, 22 Ark. 9; *Clark v. Hershy*, 52 id. 473, 12 S. W. Rep. 1077; *Culmer v. Caine*, 22 Utah, 216, 230, 61 Pac. Rep. 1008; *Jourolmon v. Ewing*, 26 C. C. A. 23, 80 Fed. Rep. 604; *Redfield v. Bartels*, 139 U. S. 694, 701, 11 Sup. Ct. Rep. 683; *Burroughs v. Abel*, 105 Fed. Rep. 366; *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. Rep. 372, 23 L. R. A. 231.

A party who claims damages for a tort, liability for which has been denied, may defer bringing an action until a pending case involving the same question is settled. *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126, 4 N. E. Rep. 620.

Laches on the part of state officers in demanding payment of license fees from foreign corporations will not bar the right of the state to collect such fees and interest on them. *State v. Fricke*, 102 Wis. 107, 77 N. W. Rep. 732, 78 id. 455.

The state is not estopped from recovering interest on deposits of public moneys received by its treasurer because of general knowledge of the custom of its treasurers to retain such interest to their own use, nor by the acquiescence of the state authorities for many years in such custom. *State v. McFetridge*, 84 Wis. 473, 523, 54 N. W. Rep. 1, 998, 20 L. R. A. 223.

referring to the former disinclination to allow interest, except where it was specifically contracted for, he noticed the changes made in the terms of statutes, which formerly guardedly permitted express contracts for limited rates of interest; while now they allow its recovery upon the forbearance of any money, goods or things in action, as well as upon money due upon note or other contract. "Such a change in the statute is certainly significant, and may well justify a difference in states where it is in force as to the class of demands which draw interest without express agreement therefor." After noticing the conflict in several Wisconsin cases respecting the allowance of interest as compensation, and the rule prevailing in New York, it was observed: The true principle, which is based on the sense of justice in the business community and on our statute, is that he who retains money which he ought to pay to another should be charged interest upon it. The difficulty is that it cannot well be said one ought to pay money unless he can ascertain how much he ought to pay with reasonable exactness. Mere difference of opinion as to amount is, however, no more a reason to excuse him from interest than difference of opinion whether he ought legally to pay at all, which has never been held an excuse. When one is held liable, say on a promissory note, to which his defense has raised a doubtful question of law, he must pay the interest with it, because, theoretically at least, there was a fixed standard of legal obligation, which, if correctly applied, would have made his duty clear. So if there be a reasonable standard of measurement by the correct application of which one can ascertain the amount he owes, he should equally be held responsible for making such application correctly and liable for interest if he does not. The New York courts have adopted as designation of such a standard "market value," and in a broad use of the term this is perhaps the safest test to apply. It must not, however be restrained to definite quotations on a board of trade, or to such degree of certainty that no difference of opinion could exist. If one having a commodity to purchase or certain services to hire can by inquiring among those familiar with the subject learn approximately the current prices which he would have to pay therefor, a market value can well be said to exist, so that no serious inequity will result from the

application of the foregoing rule to those who desire to act justly; especially in view of the other rule of law that a debtor can always stop interest by making and keeping good an unconditional tender, thus giving him a substantial advantage over a creditor, who has no such option.¹

The rate of interest allowed as compensation is that provided by law when the liability is established.²

§ 322. **Tacit agreement to pay interest on accounts.** As will be presently seen more at large interest is not allowed upon open running accounts. Where there is no definite credit, the parties deal upon the assumption,— by the debtor, that although he has no claim to forbearance, yet payment will be requested; and, on the part of the creditor, that the account has no time to run and will be paid on demand. Hence interest is not payable before demand for the same reason that it is never payable, except by agreement, while the debtor has a right to retain the money; in such cases it is not payable on the ground of default until the creditor has put the debtor under a present duty to pay by rendering the account or requesting payment. Where, by the custom of a place, of a trade or of a particular dealer, moneys owing on account are to carry interest after a certain period, whether demanded or not, persons who contract debts at that place, in that trade or to that dealer, with notice of that custom at the time of contracting, tacitly acquiesce in it, and by a natural implication tacitly agree to the liability which it imposes.³ In the absence of any agreement the price of

¹ Laycock v. Parker, 103 Wis. 161, 79 N. W. Rep. 327.

² First Nat. Bank v. Fourth Nat. Bank, 89 N. Y. 412; Sanders v. Lake Shore & M. S. R. Co., 94 id. 611; State v. Guenther, 87 Wis. 673, 58 N. W. Rep. 1105.

³ Smith v. Butler, 176 Mass. 38, 57 N. E. Rep. 322; Wilnot v. Gardner, [1901] 2 Ch. 548; Anzerals v. Naglee, 74 Cal. 60, 15 Pac. Rep. 371; Hummel v. Brown, 24 Pa. 310; Watt v. Hoch, 25 id. 411; Newell v. Griswold, 6 Johns. 45; Barclay v. Kennedy, 3 Wash. C. C. 350; Loring v. Gurney, 5 Pick. 15; Raymond v. Isham, 8 Vt.

258; Consequa v. Fanning, 3 Johns. Ch. 587; Wood v. Smith, 23 Vt. 706; Esterly v. Cole, 1 Barb. 235, 3 N. Y. 502; Knight v. Mitchell, 3 Brev. 506; Wills v. Brown, 3 N. J. L. *548; Dickson v. Surginer, 3 Brev. 417; Black v. Reybold, 3 Harr. 528; Higgins v. Sargent, 2 B. & C. 349; McAlister v. Reub, 4 Wend. 483; Reub v. McAlister, 8 id. 109; Veiths v. Hagge, 8 Iowa, 163; Knox v. Jones, 2 Dall. 193; Farmers', etc. Co. v. Mann, 4 Robert. 356; McKnight v. Dunlop, 4 Barb. 26.

In Meech v. Smith, 7 Wend. 515, an action upon the account of a forwarding merchant, on the trial the

goods is payable on their delivery,¹ and if the purchaser is notified on the face of each bill sent him that the terms are thirty days, his assent thereto will be implied if he has kept silent.

plaintiff proved an account of about \$34 for the transportation of a quantity of flour by him for the defendant from R. to N. Y. in 1827. The plaintiff claimed interest on his account and offered to prove the universal custom of forwarding merchants to charge interest upon such accounts; that such custom was well known to the defendant when he contracted with the plaintiff, and that he had settled several accounts of a similar description with the plaintiff in which interest was charged without objection. Exception was taken upon the rejection of this testimony. Savage, C. J., said: "On the question of interest, I think the court erred. Interest is always properly chargeable where there is either an express or implied agreement to pay it. The facts offered to be proved are sufficient, in my judgment, to authorize a jury to infer that there was an agreement to pay interest; it was the uniform custom of all those engaged in the same business to charge interest; it was the custom of the plaintiff to charge it; he had charged it in former accounts against the defendant, and it had been paid without objection, before the contract was made on which this suit is brought. In *Trotter v. Grant*, 2 Wend. 415, there was no evidence that the defendant *knew* the plaintiff's custom to charge interest, nor had he ever settled an account in which interest was charged; there were in that case no sufficient facts from which an agreement to pay interest could be implied, and, the account being unliquidated, interest could not be recovered." See *Liotard*

v. Graves, 3 Cal. 226; *Williams v. Craig*, 1 Dall. 313; *Dodge v. Perkins*, 9 Pick. 368; *Rayburn v. Day*, 27 Ill. 46; *Harrison v. Handley*, 1 Bibb, 443; *Von Hemert v. Porter*, 11 Met. 210; *Warren v. Tyler*, 81 Ill. 15.

In *Koons v. Miller*, 3 W. & S. 271, the court say: "The practice of the merchants of Philadelphia to charge interest on their accounts after six months has endured more than half a century; and it is so universal that their customers deal with them avowedly on the basis of it. It is so notorious as to be recognized abroad; as may be seen in *Bispham v. Pollock*, 1 McLean, 411, in which the circuit court of the United States for the district of Indiana left its existence, as the existence of any foreign law must be left, to the jury. Its existence is so notorious at home, however, that we are bound to take notice of it as part of the law. That it has not been sooner recognized by judicial decision has arisen from the fact that it has not before been thought a subject of dispute; but the principle is as well known and observed in the collection of merchants' debts as any other custom peculiar to the state." To the same effect are *Watt v. Hoch*, 25 Pa. 411; *Adams v. Palmer*, 30 id. 346.

In *Fisher v. Sargent*, 10 Cush. 250, *assumpsit* was brought for goods sold and delivered. The plaintiffs were traders in Boston, and at the trial offered testimony tending to prove a custom among merchants and traders there to charge interest on their accounts after a credit of four or six months; but offered no evidence as to the credit given in

¹ *Chester v. Jumel*, 125 N. Y. 237, 254, 26 N. E. Rep. 297.

"The fact that in subsequent statements interest was not charged was evidence that the plaintiff was then willing to waive its legal right to interest; but in the absence of a settle-

this particular transaction, or that payment had been demanded. The jury were instructed that they might, upon this evidence, allow interest after six months—to which exceptions were taken. These were overruled. Bigelow, J., said: "Ordinarily, in the absence of any evidence of usage, or of a special agreement between the parties, interest cannot be recovered upon an open running account for goods sold and delivered, when there was no specific term of credit agreed upon between the parties. This is the general rule; but it may be varied by proof of the usage of a particular trade or business to charge interest after the expiration of a certain period. In such cases, parties having knowledge of the usage are presumed to contract with reference to it, and will be as much bound by it as if it entered specially into the agreement of bargain and sale. Such usage may be shown by proof of the practice among merchants and traders generally in a town or city, or by evidence of the mode of dealing in a particular branch or class of trade. It is undoubtedly true that in order to render the usage of a particular trade or place binding upon a party, so as to make it part of a contract, it must be made to appear that it was known to the party who is to be affected by it. But this knowledge may be established by presumptive as well as direct evidence.

"It may be inferred from the uniformity and long continuance of the usage; from the fact that a party has for some time been in the particular trade to which it relates; from the previous dealings between the parties, or from any other facts

tending to show its general notoriety. Whether such facts exist in any particular case is a proper question for a jury. In the case at bar there was evidence tending to prove the usage, and its knowledge by the defendant, from which it was competent for the jury to infer a contract to pay interest on the articles as charged by the plaintiff."

In *Adriance v. Brooks*, 12 Tex. 279, Hemphill, C. J., said the act of 1840 undertook to regulate the subject of interest; and unlike the English statute of 37 Henry 8, it gave an affirmative and not an indirect and negative sanction to its allowance. It differed also from the English statute by dividing interest into two classes, viz: that which is allowed by law, and that which may be agreed upon by the parties; and there was the further distinction, not known to the earlier English statutes, that the contracts on which the law provided that interest should be recovered, or in which the parties might stipulate for interest, should be written contracts. But though provision is made for recovery of interest on written contracts, yet there is no prohibition of a stipulation for the payment of interest on a verbal agreement, or on a contract not in writing. And if such an agreement be not criminal, or contrary to good morals or public policy, it would seem that it should be binding. And accordingly, in *Fridgen v. Hill*, 12 Tex. 374, a suit on an account upon which the party had agreed to pay interest, it was held that such agreement was valid and might be enforced in law. In the previous cases of *Cloud v. Smith*, 1 Tex. 102; *Close v. Fields*, 2 Id. 241;

ment upon the statement it would not deprive it of its right in this suit to recover interest according to the terms of the original contract."¹

[583] This interest is a part of the debt, a compensation for forbearance, not damages for withholding money due. A tacit agreement is of the same nature and force as an actual one, but not being expressed, it is, of course, to be established [584] by circumstances. Contracting a debt with a custom in view which contemplates the payment of interest before steps have been taken to liquidate an account or to obtain payment, affords one example of such intent. Dealing with knowledge of such a custom, making no objection to it, or proceeding [585] after objection without any waiver of the custom by the creditor, is a consent to pay interest as the custom requires.²

Crook v. McGreal, 3 id. 487; *Davis v. Thorn*, 6 id. 486; *Wetmore v. Woodhouse*, 10 id. 33, the question of a verbal, distinct, positive agreement to pay interest on a debt acknowledged to be due was not presented; and although there are expressions in the opinions in those cases which would seem to restrict the recovery of interest to debts on written contracts, and such is the general rule under the statute, yet we deem it no departure from the principle of those decisions, with reference to the facts then before the court, to hold, when a new fact is presented, viz.: an agreement to pay interest, that it shall be enforced, though it be not in writing; nor the debt on which it was stipulated, in writing; such agreement not being prohibited by law, nor subversive of sound policy or good morals. . . . But the subject is one which may be, and as we have seen, has been, regulated by statute. This has provided for the stipulation and recovery of interest on written contracts. And, on the grounds stated, we have also supported verbal agreements to pay interest. But this case is neither upon a written contract, nor was there any agreement to pay interest.

The ground upon which it is claimed is the fact that the defendant had previously paid interest on similar accounts. This we deem insufficient. Had the contract been in writing, the statute would have allowed interest; or had he verbally agreed to pay, we would not have permitted him to violate his engagement. Thus far we will go beyond the cases expressly provided for by the statute. But we will not go further, and scrutinize the acts of the parties to judge whether an implied obligation to pay interest, as an incident of the debt, has been created."

¹ *Lambeth Rope Co. v. Brigham*, 170 Mass. 518, 49 N. E. Rep. 1022.

² Where a statute does no more than prohibit a recovery of interest beyond the legal rate on a contract not in writing, interest in excess of that rate may be included in an account stated and recovered. The rate, being known and assented to by the debtor, and not being in violation of positive law, affords a sufficient consideration for the promise involved in such an account. *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. Rep. 371; *Marye v. Strouse*, 6 Sawyer, 205.

And a continuance of the dealing after paying one account containing such interest is to furnish by this circumstance additional evidence of such consent in the subsequent transaction.¹ Whether there is in a given case such an agreement is for the jury.² Though an account consisting of items of debit and credit is an unliquidated, running account, which will not carry interest in the absence of an agreement, yet from the time of the last item on the debit side of such an account, it must be regarded as closed, and an implied agreement exists to pay interest on the balance due thereafter.³ But if statements of account for goods sold do not include interest, and if the debtor has made payments from time to time, interest cannot be recovered on the balance due prior to the commencement of suit.⁴ A statute requiring a settlement of accounts before liability for interest shall exist does not apply to accounts stated monthly and assented to by the debtor.⁵

The custom to which reference has been made is an evidentiary fact to show the intention of the parties. It has no other effect. It does not alter the law. It derives all its force from being sanctioned and adopted by the parties. It can have no validity to bind the debtor to pay interest or fix a rate or mode of computation; nor will his acquiescence or tacit consent bind him to a liability which he could not by express agreement legally assume.⁶ It is a legal usage of merchants to cast interest on the items of their mutual accounts and strike a balance at the end of the year, and make that balance the first item of principal for the ensuing year; but the law does not make it binding on the debtor except under a specific agreement after the mutual dealings [586]

¹ Warren v. Tyler, 81 Ill. 15.

² See Ayers v. Metcalf, 39 Ill. 307; Fisher v. Sargent, 10 Cush. 250; Cole v. Trull, 9 Pick. 325.

³ Bell v. Mendenhall, 78 Minn. 57, 67, 80 N. W. Rep. 813.

⁴ Ryan Drug Co. v. Hvambsohl, 92 Wis. 62, 65 N. W. Rep. 873.

⁵ McCuish v. Smail, 13 S. D. 397, 83 N. W. Rep. 426.

⁶ Where parties accept the custom of banks to charge eight per cent. on overdrafts, and close their account,

including such charges, by giving their note, they are bound to pay the rate of interest charged. But where a note is given the bank cannot collect more than seven per cent. on such overdrafts, as no custom of the bank can contravene the law forbidding the collection of more than seven per cent. unless there is an agreement in writing to pay eight. Loan & Exchange Bank v. Miller, 39 S. C. 175, 17 S. E. Rep. 592.

are passed.¹ A learned English text writer² says: "Where parties have acquiesced in a course of dealing in which interest was exacted, they will be assumed to have contracted to pay it.³ And in this way even compound interest may be charged as long as the accounts remain open.⁴ But although compound interest may be charged by means of half-yearly rests, where such a practice is assented to, it is not sufficient to show that such has been the usage of the plaintiff without proving that the defendant was acquainted with it.⁵ And even in the case of merchants' accounts where this system prevails, the plaintiff can recover no more than the principal upon the *last* balance, in which there is no new account, and no new transaction, however long it may be before the action is brought to recover the balance, and the jury cannot give interest, still less compound interest, upon the balance;⁶ and the same rule applies between banker and customer. Accounts which are made up with yearly or half-yearly rests, while the relationship continues, only bear simple interest from the time it is terminated by death or otherwise."⁷

Where accounts are settled without charging interest the settlement will not be opened for the purpose of allowing it, in the absence of a mistake.⁸ Transactions anterior to it and included therein are not interest-bearing.⁹

§ 323. Interest where payment unreasonably and vexatiously delayed. Under some statutes interest is due on any instrument in writing, on the settlement of accounts, from the

¹ Von Hemert v. Porter, 11 Met. 210; Marrs v. Southwick, 2 Port. 351; Jones v. Ennis, 18 Hun, 452.

² Mayne on Dam. (6th ed.), pp. 162, 163.

³ Ex parte Williams, 1 Rose, 399.

⁴ Bruce v. Hunter, 3 Camp. 467; Newell v. Jones, 4 C. & P. 124; Eaton v. Bell, 5 B. & Ald. 34; Ferguson v. Fyffe, 8 Cl. & F. 121; Mosse v. Salt, 32 Beav. 269.

⁵ Dawes v. Pinner, 2 Camp. 486, n.; Moore v. Voughton, 1 Stark. 487. And see Williamson v. Williamson, 1 L. R. 7 Eq. 542, where acquiescence in a banker's charge of 500*l.* for a half-year's commission on an over-

drawn account was held not to entitle the banker to make the same charge as of right in the subsequent half years; also Crosskill v. Bower, 32 Beav. 86.

⁶ Attwood v. Taylor, 1 M. & G. 301; Waring v. Cunliffe, 1 Ves. 99; Ex parte Bevan, 9 Ves. 223; Ferguson v. Fyffe, 8 Cl. & F. 121.

⁷ Per Lord Selborne, C., Barfield v. Loughborough, L. R. 8 Ch. 7.

⁸ Martin v. Beckwith, 4 Wis. 219; Hodges v. Hosford, 17 Vt. 614; Chandler v. People's Savings Bank, 61 Cal. 410.

⁹ Chandler v. Bank, *supra*.

day of liquidating them between the parties and ascertaining the balance, and on money withheld by an unreasonable and vexatious delay of payment. Interest is not allowable under the last clause by reason of the debtor's mere delay or his defense of a suit to collect the debt. To make the delay unreasonable and vexatious he must throw obstacles in the way of the creditor or by some means induce him to postpone the commencement of proceedings for the collection of his demand.¹ An exception seems to be made against an officer who refuses to pay over funds in his hands and compels the bringing of a suit therefor.² One is not liable for interest under that clause because he refuses to perform a condition in a contract which is open to question as to its meaning,³ nor because he refuses to pay in good faith, with an honest belief in his non-liability.⁴ A contractor for a public improvement is not entitled to interest where the delay in payment arises from the fact that the special assessments out of which it is to be made are not collected as soon as they should be.⁵ Where one party constantly claimed a sum largely in excess of what was equitably due and was refused payment of any amount approaching that to which he was entitled, there was such delay as justified the allowance of interest on the aggregate sum due from the time the master's report was filed.⁶ If there has been un-

¹ *Imperial Hotel Co. v. Claflin Co.*, 175 Ill. 119, 51 N. E. Rep. 610; *Kelley v. Caffrey*, 79 Ill. App. 278; *Pieser v. Minkota Milling Co.*, 94 id. 595; *Hatterman v. Thompson*, 83 id. 217; *Nixon v. Cutting Fruit Packing Co.*, 17 Mont. 90, 42 Pac. Rep. 108; *Carson v. Neatheny*, 9 Colo. 212, 11 Pac. Rep. 82; *Keys v. Morrison*, 3 Colo. App. 441, 34 Pac. Rep. 259; *Mueller v. Northwestern University*, 195 Ill. 236, 257, 63 N. E. Rep. 110; *West Chicago Alcohol Works v. Sheer*, 104 Ill. 586. See further, *Bedell v. Janney*, 9 id. 193; *Hitt v. Allen*, 13 id. 596; *Kennedy v. Gibbs*, 15 id. 406; *Newlan v. Shafer*, 38 id. 379; *McCormick v. Elston*, 16 id. 204; *Aldrich v. Dunham*, id. 403; *Daniels v. Osborn*, 75 id. 615; *Jassoy v. Horn*, 64 id. 379;

Chapman v. Burt, 77 id. 615; *Devino v. Edwards*, 10 id. 138.

A general allegation of vexatious and unreasonable delay is insufficient as against a demurrer or motion, but is not so defective that evidence cannot be received; it will support a judgment for interest. *Keys v. Morrison*, 3 Colo. App. 441, 34 Pac. Rep. 259.

² *Jefferson County v. Lineberger*, 3 Mont. 231.

³ *Ulrich v. Livergood*, 25 Ill. App. 640.

⁴ *Franklin County v. Layman*, 145 Ill. 138, 33 N. E. Rep. 1091; *Felt v. Smith*, 62 Ill. App. 647.

⁵ *Vider v. Chicago*, 104 Ill. 354, 45 N. E. Rep. 720.

⁶ *Thomas v. Peoria, etc. R.*, 36 Fed. Rep. 808, per Harlan, J.

reasonable and vexatious delay in paying a just claim the debtor cannot be relieved by paying anything less than interest on it from the time it became due.¹ If the facts creating a liability to pay at a specified time are not denied and no testimony is offered to show the ground for refusal the court will determine whether the case is within the statute.²

§ 324. *Quantum meruit claim to interest.* Where one person requests another to perform service, supply goods or pay money, and the request is complied with, nothing further being said or done to indicate his intentions, it is a very simple transaction; the law interprets it according to the ethics of fair dealing; the request, acceded to, imports an agreement so definite and so certain to be understood by both [587] parties in the same sense that they deem it quite superfluous to state it. And when a remedy is sought on such transactions the common law requires in pleading no greater certainty or particularity. The party making the request, by necessary intendment, promises the party complying with it to pay him so much as he reasonably deserves. For benefits conferred upon request, or enjoyed under various circumstances which are tantamount to a request, there is a legal duty to make compensation; this is measured by the standard of reciprocal justice. The party in whose favor such duty is implied is legally entitled to recover so much as he reasonably deserves. Interest is in many cases allowed upon this principle. It is almost an axiom in American jurisprudence that he who has the use of another's money, or money he ought to pay, should pay interest on it.³ A bank which pays the money of a depositor upon his check bearing a forged indorsement is liable for interest from the time of payment though the depositor received no interest on his deposits,⁴ if he is bound

¹ *Chicago v. Tebbetts*, 104 U. S. 120; *Barker v. Turnbull*, 51 Ill. App. 226.

² *Sanderson v. Read*, 75 Ill. App. 190.

³ *Burke v. Claughton*, 12 D. C. App. Cas. 182; *Momsen v. Atkins*, 105 Wis. 557, 81 N. W. Rep. 647; *Laycock v. Parker*, 103 Wis. 161, 79 N. W. Rep. 327; *Healy v. Fallon*, 69 Conn. 228, 37 Atl. Rep. 495; *Port Royal v. Graham*, 81 Pa. 426; *Jones v. Williams*, 2 Call, 102; *Fasholt v. Reed*, 16 S. &

R. 266; *Miller v. Bank of Orleans*, 5 Whart. 503, 34 Am. Dec. 571; *Rapelie v. Emory*, 1 Dall. 349; *Lewis v. Bradford*, 8 Ala. 632; *Perrin v. Parker*, 126 Ill. 201, 9 Am. St. 571, 18 N. E. Rep. 747, 2 L. R. A. 336; *Goodnow v. Litchfield*, 63 Iowa, 275, 19 N. W. Rep. 226; *Goodnow v. Plunbe*, 64 Iowa, 672, 21 N. W. Rep. 133.

⁴ *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74, 43 Am. Rep. 655.

to make sufficient additional deposits to keep his account intact.¹ The claim of corporate directors for interest on a sum due them as remuneration for services, payable out of the net profits of the concern, will be disallowed if they have acted in bad faith in transferring money from the suspense account to the profit account.²

§ 325. **Allowed on money loaned.** Interest on money loaned is recovered not on the ground that it is due the lender and the borrower is in default for not repaying from the moment of receiving it, but on the principle that the use of money is worth the legal rate of interest, and therefore money borrowed should bear interest from the date of the loan.³ This rule applies where cash is loaned by a corporation to one of its stockholders although there may be in the treasury undeclared dividends due the borrower in excess of the sum loaned.⁴ A bailee of money for safe-keeping is chargeable with interest if the owner permits him to use it in his business.⁵ In Massachusetts if there is no contract to pay interest on money borrowed, and in the absence of usage, fraud, or an earlier demand, interest will be allowed from the date of the writ only.⁶

¹ *German Savings Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 70 N. W. Rep. 769, 63 Am. St. 399.

² *In re Peruvian Guano Co.*, [1894] 3 Ch. 690.

³ 1 Am. Lead. Cas. 518; *Butler v. Butler*, 10 R. I. 501; *Hodges v. Hodges*, 9 id. 32; *Reid v. Rensselaer Glass Factory*, 3 Cow. 393; *Rensselaer Glass Factory v. Reid*, 5 id. 589.

In England the rule is not to give interest on money lent. Lord Ellenborough said no case had occurred in fifty-two years in which, upon a simple contract of lending, without any agreement for the payment of the principal at a certain time, or for interest to run immediately, or special circumstances from which a contract for interest was to be inferred, had interest ever been given.

In *Harris v. Benson*, 2 Str. 910, it is said that interest had never been allowed for money lent without a

note. In *Robinson v. Bland*, 2 Burr. 1077, it was held that interest was recoverable on money lent from the time when it was agreed to be paid. Some American cases recognize the same doctrine. *Murray v. Ware*, 1 Bibb, 325, 4 Am. Dec. 637; *Bell v. Logan*, 7 J. J. Marsh. 593. But see *Chaney v. Cooke*, 5 T. B. Mon. 248.

⁴ *Seattle Trust Co. v. Pitner*, 18 Wash. 401, 51 Pac. Rep. 1048.

⁵ *Gravenstine's Estate*, 18 Phila. 9.

⁶ *Gay v. Rooke*, 151 Mass. 115, 21 Am. St. 458, 23 N. E. Rep. 833, 7 L. R. A. 392.

In *Hubbard v. Charlestown Branch R. Co.*, 11 Met. 124, Shaw, C. J., said: "The only question now raised on this bill of exceptions is whether the defendants were chargeable with interest upon the amount overdrawn by them from the time of such overdraft. The court are of the opinion that the direction of the judge was

Money voluntarily placed in the hands of a person for an illegal purpose is not loaned, and the person who placed it cannot recover interest until its return is demanded.¹

[588] § 326. *Allowed on money paid.* From the date of the payment of money by one person for the benefit of another, at the latter's express or implied request, the debt is of the same nature as a loan, and the right to interest is based upon the same reason. The cases on this point are numerous. Where three persons were interested in a cargo sent abroad, money paid for general average was held to bear interest from the time it was advanced. Interest was deemed demandable in every case where one man had used or been benefited by the application of the money of another, paid under such circumstances as to imply a request. It would be inequitable to allow interest only from the time when the principal was demanded, in such a transaction happening in a foreign country, where it is long before the plaintiff can be advised of his having a claim (this language is not to be regarded as a limitation upon the right to interest in such cases, because a demand is not necessary), and longer still before he can know exactly what he is entitled to demand.² It is, therefore, a general

not correct in point of law, when he instructed the jury that if the amount was actually paid to the defendants then the jury should add interest from the time of the overdraft, without instructing them to take into consideration the other circumstances of the case. If money were fraudulently or wrongfully obtained from a bank, it might be recovered back with interest. *Wood v. Robbins*, 11 Mass. 504, 6 Am. Dec. 182. Perhaps the evidence might have been properly left to the jury to find whether the money was wrongfully drawn or not. But we think an overdraft on a bank is not necessarily wrongful; it may be made in conformity with some mutual agreement or understanding. A draft on a bank, by one who has no funds, or beyond his funds, and a payment made in pursuance of it,

constitute a loan of money; and supposing it to be made without any stipulation for interest at the outset, it does not necessarily draw interest until neglect or refusal of payment, after demand made, or some other default. . . . In general, when there is a loan without any stipulation to pay interest, and when one has the money of another, having been guilty of no wrong in obtaining it, and no default in returning it, interest is not chargeable." See *Etheridge v. Binney*, 9 Pick. 272; *Dodge v. Perkins*, id. 368; *Hunt v. Nevers*, 15 id. 500, 26 Am. Dec. 616.

¹ *Baldwin v. Zadig*, 104 Cal. 594, 38 Pac. Rep. 367, 722; *Parker v. Otis*, 130 Cal. 322, 21 Pac. Rep. 571, 927.

² *Sims v. Willing*, 8 S. & R. 103; *Gibbs v. Bryant*, 1 Pick. 118; *Ilsey v. Jewett*, 2 Met. 168; *Weeks v. Hasty*, 13 Mass. 218.

rule that interest is recoverable on money paid by one person for the benefit of another at his request, express or implied.¹ It may be recovered by a surety who pays his principal's [589] debt.² Though a surety discharge a debt bearing a high rate of conventional interest, he is not entitled to charge his principal thereafter the same, but only the legal, rate.³ So a surety obtaining contribution from a co-surety is entitled to interest.⁴ But if the plaintiff has securities from the principal in his hands for the payment of the debt, which were expected to yield the means therefor, the co-surety is entitled to notice of any deficiency. His liability extends only to a moiety of the deficiency; as that is contingent, both as to time and amount, he should not be charged with interest until he is at least informed that he is a debtor.⁵ Such information would be manifestly essential to make out an equitable title to charge interest; such a notice would place the co-surety at once in default if he did not then pay his contribution; such notice is necessary to establish his consent to accept forbearance. A party paying money for another cannot recover for interest paid which accrued in consequence of his own negligent delay in making the payment.⁶ An agent or factor is

¹ *Harris v. Mercur*, 202 Pa. 318, 51 Atl. Rep. 971; *Allen v. Fairbanks*, 45 Fed. Rep. 445; *Gibbs v. Bryant*, *Weeks v. Hasty*, *supra*; *Liotard v. Graves*, 3 Cal. 226, *Milne v. Rempubliam*, 3 Yeates, 102; *Hastie v. De Peyster*, 3 Cal. 190; *Thompson v. Stevens*, 2 N. & McC. 494; *Buckmaster v. Grundy*, 8 Ill. 626; *Aikin v. Peay*, 5 Strobb. 15, 53 Am. Dec. 684; *Blaney v. Hendricks*, 2 W. Black. 761; *Trelawney v. Thomas*, 1 H. Black. 304; *Craven v. Tickell*, 1 Ves. 60; *Chamberlain v. Smith*, 1 Mo. 718; *Gillet v. Van Rensselaer*, 15 N. Y. 397; *Morris v. Allen*, 14 N. J. Eq. 44; *Cobbey v. Knapp*, 28 Neb. 158, 44 N. W. Rep. 101.

² *Newman v. Newman*, 29 Mo. App. 649; *Sims v. Goudelock*, 7 Rich. 23; *Sollee v. Menry*, 1 Bailey, 629; *Miles v. Bacon*, 4 J. J. Marsh. 458; *Breckinridge v. Taylor*, 5 Dana, 114; *Knight*

v. Mantz, Ga. Dec. 22; *Winder v. Diffenderffer*, 2 Bland, 166.

A statute providing that when a bond, bill or note shall not be paid by the principal according to its terms and shall be paid by the "surety," that the principal shall refund the amount or value with interest thereon, does not include joint debtors. *McGee v. Russell*, 49 Ark. 104, 4 S. W. Rep. 284.

³ *McGee v. Russell*, *supra*; *Memphis, etc. R. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. Rep. 482; *Bushong v. Taylor*, 84 Mo. 660; *Newman v. Newman*, *supra*; *Smith v. Johnson*, 23 Cal. 62. See *Fisk v. Brunette*, 30 Wis. 102.

⁴ *Hsley v. Jewett*, 2 Met. 168; *Aikin v. Peay*, 5 Strobb. 15, 53 Am. Dec. 684.

⁵ *Goodloe v. Clay*, 6 R. Mon. 236.

⁶ *Somers v. Wright*, 115 Mass. 292.

also entitled to interest on advances for his principal.¹ An insurer who pays a loss to insured and takes an assignment of the claim for damages against one who negligently destroyed the property insured may recover interest on the sum paid.² A taxpayer who has paid more than his share of the public expense is entitled to interest on the excess.³

[590] § 327. *Same subject.* Where one of two parties, having contiguous tenements, refused to unite with the other in erecting a new party-wall, or to contribute anything to the expense, he denying the right of the plaintiff to prostrate the old wall or to charge him with any portion of the cost of the new, the court held him liable; the expense was an equitable charge on the wall and on the owner for the time being. The question being raised whether the plaintiff was entitled to interest, and from what time, the chancellor said it was a case of money expended for the use of the defendant, and upon every sound principle the plaintiff ought to receive interest after a moiety of the joint expense had been demanded and refused; adding that it is the settled law of the state that money received or advanced for the use of another carries interest after a default in payment, and it is a very reasonable and just rule. Interest was claimed from the time of the advance of the money to build the wall; it was allowed from the date of the demand and refusal on the general principle that a party is liable for interest after a default; and by implication it was considered that the plaintiff was not entitled, on any other principle, to interest from the date when it had been advanced.⁴ The defendant could not be considered as in default until demand; he was under no duty to repay moneys

¹ *Taylor v. Knox*, 1 Dana, 391; *Cheeseborough v. Hunter*, 1 Hill (S. C.), 400; *Smetz v. Kennedy*, Riley, 218; *Walters v. McGirt*, 8 Rich. 287; *Howard v. Behn*, 27 Ga. 174.

A factor who guarantees his principal the cost of goods consigned and who furnishes the principal money to secure part payment of their value is not entitled to interest thereon; but if there is guaranty, and the advancement is made as a loan, the factor will be entitled to

interest. *Wittkowski v. Harris*, 64 Fed. Rep. 712.

² *Texarkana, etc. R. Co. v. Hartford Ins. Co.*, 17 Tex. Civ. App. 498, 44 S. W. Rep. 533.

³ *Boston & M. R. v. State*, 63 N. H. 571; *Amoskeag Manuf. Co. v. Manchester*, 70 N. H. 336, 348, 47 Atl. Rep. 74.

⁴ *Campbell v. Mesier*, 6 Johns. Ch. 21.

In such a case interest is due from the date of default in paying the sum due under the contract, the party

expended by the plaintiff against his will for the common benefit until informed of the amount, and an opportunity thus given to discharge the indebtedness. The principal claim was not one which the debtor acknowledged; it was, however, maintained against him;¹ but subsequently the doctrine on which it was founded was doubted and overruled.² Senator Colden,³ referring to this case, said: "The circumstances of that case were very peculiar. The defendant was liable to contribute to the rebuilding of a party-wall. He not only refused to contribute, but forbid the prostration of the old wall. The complainant erected a new one at a much greater expense than the re-establishment of the old one required. It could not be ascertained till the new wall was appraised and it was estimated what it would have cost to restore the old [591] wall how much the defendant ought to have paid. When the appraisement and estimate were made and the extent of the defendant's liability was thereby settled the complainant demanded the amount. The chancellor decided that the defendant should pay interest from that time. Here was a case very different from an advance of specific sums of money. It is true the demand is considered in the court of chancery as a demand for money advanced; but it was more like a demand for unliquidated damages, which never carries interest. The defendant could not have discharged the principal till after the appraisement and estimate had settled how much he was liable to contribute to the party-wall."⁴

against whom it is claimed having bound himself to pay one-half the value of the wall at the time he used it. *Huston v. de Zeng*, 78 Mo. App. 522.

¹ *Campbell v. Mesier*, 4 Johns. Ch. 334, 8 Am. Dec. 570.

² *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Sherred v. Cisco*, 4 Sandf. 480.

³ In *Rensselaer Glass Factory v. Reid*, 5 Cow. 598.

⁴ The case of *Rensselaer Glass Factory v. Reid* raised the question whether cash advances made by an agent, charged in an account not re-

ported to his principal, but where the circumstances indicated that the latter must have known that the advances were made, should bear interest. The case was very thoroughly considered. Senator Colden, in the prevailing final opinion, said generally of the subject of interest: "As often as the question of interest has been before a court, the judges seem to have considered it as depending on general equitable principles; and, in most instances, to have decided each case in reference to its particular circumstances, without attempting to give any rule which might be gener-

Interest may likewise be allowed on money advanced by trustees for the benefit of the trust. The law requires of [592] trustees diligence and good faith; and they will not be entitled to interest on advances made necessary by their defaults. As a general rule an administrator is not entitled to interest on money advanced by him beyond the funds of the estate in his hands, because it is in his power to put himself in cash from the estate, and it is not his duty to advance his own funds for its benefit.¹ If, however, such special circumstances exist as to justify advances by him, and he makes them judiciously, he will be entitled to interest.² Where the advance by an administrator or other like trustee is meritorious, or where an executor for the benefit of the estate has paid his own money for taxes, necessary expenses, repairs, and debts which carried interest, he is entitled to interest.³ A trustee is not obliged, when the exigencies of his trust require advances, to raise money at a loss to himself. When property is in his hands as security, and he is restricted by its nature and situation from selling it, and, to keep it in good order, must borrow money, he may resort to banks or other usual modes of raising

ally applicable." And again: "However it may be with respect to money lent, or as to money had and received, or in regard to merchandise sold and delivered; or, however it may be where advances are made in pursuance of an express agreement in which nothing is said about interest, I think the above authorities will admit of no other conclusion than that it is now a well established general rule of law, that where a person advances money for the use of another, under an implied authority, he who makes the advance is entitled to interest from the time it is made." In the exhaustive dissenting opinion of Senator Spencer he says: "Probably the rule of easiest application would be this: where money has been lent, advanced or expended by request, and under an agreement to pay at a specific time, or where it has been had and received under a like agree-

ment, then the allowance of interest may be safely referred to the principle of an implied contract to pay interest on default; and so, also, where the money is not to be refunded at a particular time, but a default arises from a demand or notice, the same principle will apply. But where no time of payment is fixed, and where the duty to pay arises from the relative situation of the parties, it seems it should be referred to a jury to determine whether damages shall be given by the allowance of interest."

¹ *Storer v. Storer*, 9 Mass. 37; *Evarts v. Nason's Estate*, 11 Vt. 122.

² *Rix v. Smith*, 8 Vt. 365.

³ *Mann v. Lawrence*, 3 Bradf. Sur. 424; *Liddell v. McVickar*, 11 N. J. L. 44, 19 Am. Dec. 369; *Jennison v. Hapgood*, 10 Pick. 79; *Hayward v. Ellis*, 13 Pick. 272. See *Aldridge v. McClelland*, 36 N. J. Eq. 288.

it upon his credit. And in such cases he is entitled to full indemnity.¹ But the right of a trustee to interest will cease whenever the funds of the estate are sufficient to pay the debt.²

The general rule that interest can be allowed only by virtue of contract, express or implied, or by virtue of some statute, or on account of the default of a party liable to pay when it is allowed as damages for the default, has some exceptions, at least in courts of equity. Where an instrument of compromise was made under the authority of a court by the receiver of an insolvent bank, with its trustees, who had been sued for waste and mismanagement of its assets, which instrument transferred to the trustees certain real estate of the bank in consideration of their paying a certain percentage of its debts, gave them a power of sale, and provided that they should be reimbursed for their outlay before accounting to the receiver for any surplus, they were entitled on such accounting to interest on advances made for the debts of the bank and upon their expenses incurred in the management of the property before a sale of it was made by them, although the instrument was silent as to interest. Such allowance was justified by the nature of the transaction or by usage and custom, and was a proper exercise of equitable discretion.³

§ 328. **Quantum meruit claim to interest between vendor and purchaser.** Where a purchaser obtains possession of the land purchased while the contract is pending, such possession may oblige him to pay interest when otherwise he would be entitled to retain the purchase-money without being so liable. Before the time fixed for payment he is not liable to pay interest unless it is required by the contract. It frequently happens, however, that when the time arrives for payment

¹ In *Barrell v. Joy*, 16 Mass. 221, compound interest was allowed a trustee under the circumstances stated in the text, as a mode of compensation for the interest he was obliged to pay to provide himself with the necessary means to keep the trust property in good order. In a note the reporter says: "The trustee in this case could only claim an indemnity, and ought not to be al-

lowed compound interest unless he could show that he was in the discharge of his duty obliged to pay it." *Evertson v. Tappen*, 5 Johns. Ch. 517. See *Lessee of Dilworth v. Sinderling*, 1 Bin. 494.

² *Sebring v. Keith*, 2 Hill (S. C.), 340.

³ *Woerz v. Schumacher*, 161 N. Y. 530, 56 N. E. Rep. 72, 37 App. Div. 374, 56 N. Y. Supp. 8.

[593] the seller is not prepared to fulfill the concurrent condition of making title; on that account the purchaser would be under no obligation to part with his money; and being in no default, interest could not be exacted; but if he has taken and enjoys the possession while the vendor is precluded from demanding the money on account of the state of the title, and he finally makes title so as to have a right to performance of the contract of purchase, he will be entitled to interest on the purchase-money if the purchaser had possession of the estate.¹ This rule, however, is not absolute; it rests upon equitable [594] grounds, and is subject to the modifying effect of other equitable circumstances for the consideration of a chancellor

¹ *Minard v. Beans*, 64 Pa. 411; *Lang v. Moore*, 31 N. J. Eq. 413; *Breckenridge v. Hoke*, 4 Bibb, 272; *Cleveland v. Burrill*, 25 Barb. 532; *Cullum v. Branch Bank*, 4 Ala. 21, 37 Am. Dec. 425; *Selden v. James*, 6 Rand. 465; *Rutledge v. Smith*, 1 McCord Ch. 399; *Boyce v. Pritchett's Heirs*, 6 Dana, 231; *Hepburn v. Dunlop*, 1 Wheat. 179; *Brockenbrough v. Blythe's Ex'r*, 3 Leigh, 619; *Steenrod v. Railroad Co.*, 27 W. Va. 1. See vol. 1, *Warvelle on Vendors* (2d ed.), § 180.

McKenna v. Sterrett, 6 Watts, 162, was an action for purchase-money on tender of title; purchaser in possession. *Rogers, J.*: "At the time of the contract both parties were aware that Sterrett had no title; notwithstanding which McKenna was to take immediate possession, as appears from that clause which stipulates that if McKenna is deprived of the property Sterrett will pay him for all the improvements, either in buildings or otherwise. With a full knowledge of all the facts Sterrett agrees to sell McKenna ten acres of land, with the allowance, for \$45 per acre, and Sterrett agrees to give him a clear title. The payments are to be one-half in hand, *as soon as he makes him a right for the ten acres of land*, and the remaining half in three yearly payments. Now, noth-

ing can be clearer than that until tender of title the vendor is not entitled to payment of the purchase-money; and it is a general principle that interest is not demandable of right until the debt is due, except in pursuance of the terms of an express contract; and no contract is here alleged. But the argument is that the vendor took possession, and as he enjoys the profits he ought to pay interest. And this is true in ordinary cases, where a time is fixed for the payment of the purchase-money; but the right to take immediate possession was part of the contract; and the vendee having taken possession cannot affect the construction of that clause in the agreement on which the debt is only recoverable after a clear title is made. A different construction would render the vendor careless of obtaining and tendering a title, as he would be sure of legal interest from the time the vendee took possession. Why this extraordinary delay took place we have not been informed; but there is nothing which leads us to believe that it arose from the fault of the vendee. The court are therefore of opinion that interest is only demandable from the time of the tender of the title." See *Beeson v. Elliott*, 1 Del. Ch. 368.

in equity or of a jury at law.¹ Where the contract gave the vendee possession and placed on the vendor certain duties which were conditions precedent to the right to receive the purchase-money, there being no stipulation respecting interest, and mutual advantage resulted from the immediate possession given the vendee, and the delay in completing the sale was due solely to the wilful and excuseless conduct of the vendor, his right to interest was denied in a suit for the specific performance of the contract.² A vendee may avoid liability for inter-

¹ *Letcher v. Woodson*, 1 Brock. 212; *Brockenbrough v. Blythe*, 3 Leigh, 619. See *Davis v. Parker*, 14 Allen, 104.

In *Dias v. Glover*, Hoff. Ch. 71, it was held that though the general rule is to allow interest from the time when the contract should have been fulfilled, and to give the purchaser the rents and profits, yet if the vendor caused the delay and interest exceeded the rent, the purchaser should be permitted to elect to pay the interest or relinquish his right to the rents.

In *Selleck v. Tallman*, 11 Daly, 141, judgment was given the plaintiff for the specific performance of a contract to sell land he had bargained for, for the purpose of making improvements upon it. No rent or other profits were derivable from it in the condition it was in. He was kept out of possession and sustained large damages which could not be compensated. The vendor was charged with interest and taxes accruing prior to the delivery of his deed.

² *Atchison, etc. R. Co. v. Chicago, etc. R. Co.*, 162 Ill. 632, 654, 44 N. E. Rep. 823. In this case the right to interest in suits for specific performance was thus expounded: First, where the contract contains no provision as to possession or interest, if the vendee takes possession he must pay interest from that date. *Calcraft*

v. Roebuck, 1 Ves. 221; *Fludyer v. Cocker*, 12 id. 25; *Powell v. Martyr*, 8 id. 146; *Ballard v. Shutt*, 15 Ch. Div. 122; *Attorney-General v. Christ Church*, 13 Sim. Ch. 214; *Rutledge v. Smith*, 1 McCord, 231; *Wilson v. Herbert*, 76 Md. 489, 25 Atl. Rep. 685; *Boyle v. Roward*, 3 Desauss. 555; *Bostwick v. Beach*, 103 N. Y. 414, 9 N. E. Rep. 41; *Phillips v. South Park Com'rs*, 119 Ill. 626, 10 N. E. Rep. 230; *Steenrod v. Railroad Co.*, 27 W. Va. 1; *Stevenson v. Maxwell*, 2 N. Y. 408; *Binks v. Lord Rokeby*, 2 Swanst. 223; *Gibson v. Clark*, 1 V. & B. 500; *Rhys v. Dare Valley R. Co.*, L. R. 19 Eq. 93; *Lang v. Moole*, 31 N. J. Eq. 413; *Cleveland v. Burrill*, 25 Barb. 532; *Huntley v. Lyons*, 5 Munf. 342, 7 Am. Dec. 685; *Mouro v. Taylor*, 8 Hare, 51; *Phillips v. Silvester*, L. R. 8 Ch. 173; *Railroad v. Gesner*, 20 Pa. 240; *Pomeroy on Contracts*, see 430. Second—where the contract contains no provision as to possession, but provides a date for performance and for the payment of interest thereafter, if either party is in wilful default equity will refuse to enforce the terms of the agreement for the benefit of the defaulting party. *De Visme v. De Visme*, 1 Maen. & G. 336; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477, 75 id. 271; *Jones v. Mudd*, 4 Ru. Ch. 122; *Monk v. Huskinson*, id. 122, note a; *Leggett v. Metropolitan R. Co.*, L. R. 5 Ch. 716; *Lofland v. Maull*,

est if he is unable to pay on account of the default of the vendor, by setting aside the purchase-money and notifying the latter that it is awaiting his acceptance.¹ A vendor who conveys wild land to which he has no title cannot claim interest on the purchase price on the subsequent accrual of title by the act of a third party for any time anterior to that event, though the vendee was in possession, the benefits resulting to him therefrom being produced by his own improvements.²

Where there has been wilful and vexatious delay by the fault or gross laches of the vendor, in consequence of which the purchase-money has lain idle and unproductive, it may be left to the jury to say whether he shall receive interest.³ On the rescission of a contract of sale where the vendee has been in possession, in the absence of proof to the contrary, his use of the land will in equity be deemed equivalent to that of the price paid, and interest ought not to be given.⁴ So where the vendor in a verbal contract refuse to perform it, the vendee is entitled, in addition to the purchase-money paid, to receive interest thereon only from the time the former asserts his rights.⁵ Whether the vendee be entitled to have the con-

1 Del. Ch. 359; *Riley v. Streetfield*, 34 Ch. Div. 388; *Tewart v. Lawson*, 3 Sm. & G. 307; *King v. Ruckman*, 24 N. J. Eq. 556. Third — where the contract provides a time for performance, with a provision for prior possession, and an express agreement for interest from a day named, and the vendor merely neglects or is unable to perform, in such case the vendee shall have the rents and profits and pay interest from the time fixed by the contract. *Birch v. Joy*, 3 H. of L. Cas. 565; *Brockenbrough v. Blythe*, 3 Leigh, 619; *McKayer v. Melvin*, 1 Ired. Eq. 73; *Baxter v. Brand*, 6 Dana, 296; *Cowper v. Bakewell*, 13 Beav. 421.

¹ *Steenrod v. Railroad Co.*, 27 W. Va. 1; *Bostwick v. Beach*, 103 N. Y. 414, 9 N. E. Rep. 41; *Calcraft v. Roebuck*, 1 Ves. 221; *Robert's v. Massay*, 13 id. 561; *Kershaw v. Kershaw*, L. R. 9 Eq. 56.

If a note for the purchase price of land is payable at a designated bank, and the maker is ready at the agreed time and place to pay it, but is unable to do so because the note is not in the bank's possession, he is not liable for interest subsequently accruing unless he realized it from the use of the money. *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. Rep. 493.

³ *Toms v. Boyes*, 59 Mich. 386, 26 N. W. Rep. 646.

² *McCormick v. Crall*, 6 Watts, 207; *Kester v. Rockell*, 2 W. & S. 365; *Stevenson v. Maxwell*, 2 Sandf. Ch. 274, 2 N. Y. 408.

⁴ *Talbot v. Sebree's Heirs*, 1 Dana, 56; *Wickliffe v. Clay*, id. 585.

The vendee will be allowed interest only from the time he gave up the possession. *Ankeny v. Clark*, 20 Pac. Rep. 583, 1 Wash. 549.

⁵ *Fox's Heirs v. Longly*, 1 A. K. Marsh. 388.

sideration refunded upon rescission of the sale, or to damages on the basis of the sum paid for a total or partial breach of the covenants for title, interest will be withheld for so much of the time as he enjoyed the possession without liability for *mesne* profits.¹ The doctrine is that possession is equivalent to interest on the consideration; and where the bargain is given up, or the title fails and the purchase-money must be refunded, interest will not be added in either case to a purchaser who has [595] had possession unless there is a liability to the superior owner for rents and profits, and then only to the extent of that liability.² The reason assigned is if the occupant shall recover interest on the value of the land when he has obtained the equivalent of that interest in the use thereof, he will have re-

¹ *Staats v. Ten Eyck*, 3 Cai. 111, 2 Am. Dec. 254; *Pitcher v. Livingston*, 4 Johns. 1, 4 Am. Dec. 229; *Bennet v. Jenkins*, 13 Johns. 50; *Baldwin v. Munn*, 2 Wend. 399, 20 Am. Dec. 627; *Dunnick v. Lockwood*, 10 Wend. 142; *Caulkins v. Harris*, 9 Johns. 324; *Kane v. Sanger*, 14 id. 89; *Baxter v. Ryerss*, 13 Barb. 267; *Flint v. Steadman*, 36 Vt. 216; *Rich v. Johnson*, 2 Pin. 88, 52 Am. Dec. 144; *Noonan v. Hsley*, 21 Wis. 138; *Patterson v. Stewart*, 6 W. & S. 527, 40 Am. Dec. 586; *Fernander v. Dunn*, 19 Ga. 497, 65 Am. Dec. 607; *Harding v. Larkin*, 41 Ill. 413; *Thompson v. Jones*, 11 B. Mon. 365; *Hale v. New Orleans*, 13 La. Ann. 499; *Bach v. Miller*, 16 id. 44; *Clark v. Parr*, 14 Ohio, 118, 45 Am. Dec. 529; *Whitlock v. Crew*, 28 Ga. 289; *Collier v. Cowger*, 52 Ark. 322, 12 S. W. Rep. 702.

² *Point Street Iron Works v. Turner*, 14 R. I. 122; *Crockett v. Gray*, 39 Kan. 659, 18 Pac. Rep. 905; *Ware v. Lippincott*, 45 N. J. Eq. 320, 16 Atl. Rep. 654; *Whitlock v. Crew*, 28 Ga. 289.

If a *bona fide* purchaser in possession is allowed the value of his improvements against the owners of the land he will not be entitled to in-

terest thereon. *Boykin v. Ancrum*, 28 S. C. 486, 13 Am. St. 698, 6 S. E. Rep. 305.

Where the purchaser of chattels gave his note to the seller for part of the price and a chattel mortgage to a third party who loaned him money to make a cash payment, the understanding being that the sale might be rescinded within sixty days, the seller was not liable to such third party for interest during the time the other retained possession. *Kildea v. Washington Liquor Co.*, 22 Wash. 385, 60 Pac. Rep. 1118.

Where the son and one of the executors of decedent had bought from the latter a farm on credit, and an agreement was made between the former and the other executor and others interested in the estate for a return of the farm on condition that the value of the improvements should be paid the purchaser before making distribution of the estate, the latter was denied interest on their value because for years he had, as executor, neglected to pay the interest or debt, it not appearing that he could not have done so. *Sutton's Estate*, 13 Pa. Super. Cl. 492.

ceived and his vendor will have lost more than the value of what was given for it; and as the occupant is liable to the evictor for *mesne* profits for the period of limitation preceding the eviction, for that period he should not be entitled to interest on the consideration which he paid for the land.¹ This doctrine is further illustrated by the case of a tenant by the curtesy conveying in fee with warranty. The grantee has been held entitled to recover from his estate on the covenant only the purchase-money, with interest from the time of his death.² So where an eviction is only by the claim of a tenant in dower, the measure of damages is the present value of an annuity equal to interest at the legal rate on one-third of the consideration money for the time the tenant in dower has a probable expectation of life according to approved tables of life annuities.³ The purchaser must sometimes submit to equitable terms when in default in order to obtain relief by specific performance. In such cases, in order fully to indemnify the seller, the court, according to the circumstances, may decree a larger amount of interest than such vendor could recover as plaintiff; as by compounding the interest with rests at short intervals.⁴ [596] When a vendee has a right to recover a deposit of a part or the whole of the purchase-money because of the vendor's inability to make title he can also recover interest from the time it was paid though there was no express agreement to pay it,⁵ or after a demand for the return of the deposit.⁶ One who buys land under a decree stipulating that deferred payments

¹ Cogswell's Heirs v. Lyon, 3 J. J. Marsh. 40. In this case the deed was avoided, although the entire consideration had been paid, on the ground of fraud on creditors, and the court say: "As a general proposition, it is plainly just and reasonable that the vendee, after losing the benefit of his purchase, should be restored to the price which he gave, and its annual interest. But if he shall have already received the interest or its equivalent in the enjoyment of the profits of the land, he has no right, in conscience, to compel the vendor to pay it again. And surely, if he must have the interest, the vendor should have rents.

But, in equity, the interest on the price and the use of the land are considered equivalent, and, therefore, there need be no account of the profits, as they should be set off against the interest." See Bartlett v. Blanton, 4 J. J. Marsh. 426.

² House v. House, 10 Paige, 158.

³ Wager v. Schuyler, 1 Wend. 553.

⁴ Cleveland v. Burrill, 25 Barb. 532; Morris v. Hoyt, 11 Mich. 10.

⁵ Flinn v. Barber, 64 Ala. 200; Bennett v. Latham, 18 Tex. Civ. App. 403, 45 S. W. Rep. 934.

⁶ Hellman v. Merz, 112 Cal. 661, 44 Pac. Rep. 1079.

are to bear interest is liable for interest though he gave no notes and understood that the price was to be taken out of his share of the estate.¹ If the plaintiff in an action to recover money paid demands that it be deposited in court subject to his order, and it is so deposited, and, pursuant to his motion, it is directed to remain on deposit, the money is, in legal effect, paid into court, and the plaintiff can recover no greater rate of interest than it earned.² On the breach of an oral agreement to convey or devise real estate to one who has made advances on the faith thereof, there may be a recovery of simple interest from the dates of the several advances.³

§ 329. Interest allowed from time when money ought to be paid. Interest is imposed by law as damages for not discharging a debt when it ought to be paid. In this country the principle has long been settled that if a debt ought to be paid at a particular time, and is not then paid through the default of the debtor, compensation in damages equal to the value of money, which is the legal interest upon it, shall be paid during such time as the party is in default.⁴ The impor-

¹ McNairy v. McNairy, 1 Tenn. Cas. 329.

² Warren v. Banning, 140 N. Y. 227, 35 N. E. Rep. 428.

³ Morrissey v. Morrissey, 180 Mass. 480, 62 N. E. Rep. 972.

⁴ Padley v. Catterlin, 64 Mo. App. 629, citing the text; McCuish v. Smail, 13 S. D. 397, 83 N. W. Rep. 426, citing the text; 1 Am. Lead. Cases, 498; Day v. Brett, 6 Johns. 24; Hunt v. Jucks, 1 Hayw. 173, 1 Am. Dec. 555; Coughlin v. McElroy, 74 Conn. 397, 50 Atl. Rep. 1025; James Leffel & Co. v. Platt, 126 Mich. 413, 86 N. W. Rep. 65; Sullivan v. Nicolin, 113 Iowa, 76, 83, 84, N. W. Rep. 978; Mullally v. Dingman, 62 Neb. 702, 87 N. W. Rep. 513; Happy v. Prickett, 24 Wash. 590, 64 Pac. Rep. 528; Broughton v. Mitchell, 64 Ala. 210; Plinn v. Barber, id. 200; Milton v. Blackshear, 8 Fla. 161; Bishop Hill Colony v. Edgerton, 26 Ill. 51; Cheek v. Waldrum, 25 Ala. 155; Purdy v. Philips, 11 N. Y. 406; People v. New York, 5 Cow. 331;

Dodge v. Perkins, 9 Pick. 368; Williams v. Sherman, 7 Wend. 109; Ten Eyck v. Houghtaling, 12 How. Pr. 523; Van Rensselaer v. Jewett, 2 N. Y. 135; Maltman v. Williamson, 69 Ill. 423; Swett v. Hooper, 62 Me. 54; Wenman v. Mohawk Ins. Co., 13 Wend. 267; French v. French, 126 Mass. 360; McMahon v. New York, etc. R. Co., 20 N. Y. 463.

In the last case the court held that interest may be charged on the ground of the debtor's default although the amount of the demand neither has been nor can readily be ascertained.

A debtor is not excused from paying when the money is due where the contract under which it is claimed fixes the price of the work, though the amount of material furnished under it was uncertain and the claim was disputed in good faith. Louisville v. Henderson's Trustee, 11 S. W. Rep. 111.

tant practical inquiry, therefore, in each case in which interest is in question is, what is the date at which this legal duty to pay, as an absolute present duty, arose. This date does not always coincide with that at which the demand is legally due and suable. Where a sum certain is payable at a particular time, either immediately after the debt is contracted or in the future, the debtor should pay at that time; otherwise, he is at once in default and liable for interest. In such cases it is his duty to pay at the very time when the debt is legally and technically due.¹ It is upon the ground stated that statutes

¹ *Martin v. Ede*, 103 Cal. 157, 37 Pac. Rep. 199; *Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. Rep. 312; *Hines v. Miller*, 126 Cal. 683, 59 Pac. Rep. 142; *Ryland v. Heney*, 130 Cal. 426, 62 Pac. Rep. 616; *Healy v. Fallon*, 69 Conn. 228, 37 Atl. Rep. 495; *Hartshorn v. Byrne*, 147 Ill. 418, 35 N. E. Rep. 622; *Luetgert v. Volker*, 153 Ill. 385, 39 N. E. Rep. 113; *Crumrine v. Estate of Crumrine*, 14 Ind. App. 641, 43 N. E. Rep. 322; *Willey v. St. Charles Hotel Co.*, 52 La. Ann. 1581, 1602, 28 So. Rep. 182; *Donahue v. Partridge*, 160 Mass. 336, 35 N. E. Rep. 1071; *Hazelet v. Holt County*, 51 Neb. 716, 71 N. W. Rep. 717; *Myers v. Bolton*, 157 N. Y. 393, 52 N. E. Rep. 114; *Haight v. Price*, 10 App. Div. 470, 42 N. Y. Supp. 303; *Kelley v. Phenix Nat. Bank*, 17 App. Div. 496, 45 N. Y. Supp. 533; *Irlbacker v. Roth*, 25 App. Div. 290, 49 N. Y. Supp. 538; *Wasatch Mining Co. v. Crescent Mining Co.*, 7 Utah, 8, 24 Pac. Rep. 586; *Land, Log & Lumber Co. v. Oneida County*, 83 Wis. 649, 53 N. W. Rep. 491; *Laycock v. Parker*, 103 Wis. 161, 79 N. W. Rep. 327; *Richmond & I. Const. Co. v. Richmond, etc. R. Co.*, 15 C. C. A. 289, 68 Fed. Rep. 105, 34 L. R. A. 625; *District of Columbia v. Metropolitan R. Co.*, 8 D. C. App. Cas. 322; *Hawkins v. Citizens' Investment Co.*, 38 Ore. 544, 64 Pac. Rep. 320; *McCullough v. Newlove*, 27 Ont. 627; *Elkin v. Moore*, 6 B. Mon. 462; *Rensselaer Glass Fac-*

tory v. Reid, 5 Cow. 587, 611; *Robinson v. Bland*, 2 Burr. 1086; *Farquhar v. Morris*, 7 T. R. 124; *Purdy v. Philips*, 11 N. Y. 406; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553; *Hunt v. Jucks*, 1 Hayw. 173, 1 Am. Dec. 555; *Milton v. Blackshear*, 8 Fla. 161; *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267; *Cheek v. Waldrum*, 25 Ala. 152; *Bishop Hill Colony v. Edgerton*, 26 Ill. 54; *Royal v. Miller*, 3 Dana, 55-58; *Newlan v. Shafer*, 38 Ill. 379; *Putnam v. Lewis*, 8 Johns. 389.

The time for making payments being fixed in thirty-three days after completion of a contract, is not extended by a clause therein making the contractor liable for damages occasioned by his work and the fact that actions were pending against him to recover damages so caused. *Donahue v. Partridge*, 160 Mass. 336, 35 N. E. Rep. 1071.

A contract by a city to pay for street paving when assessments shall be collected, and if that is not done at the end of two years the amount then unpaid to become due, does not carry interest prior to the end of two years. *Booth v. Pittsburgh*, 154 Pa. 482, 25 Atl. Rep. 803.

Interest is not allowed with the same liberality in England as [597] in this country. In *Mayne on Damages* (6th ed.), pp. 165-168, it is said: "Formerly it was thought, where a

which give a preference to one class of creditors over another in the distribution of an estate are construed to include interest on the claims of the preferred class, although the assets

sum of money was agreed to be paid on a particular day, that on default interest from that day might be recovered without any express or implied contract to that effect. *Blaney v. Hendricks*, 2 W. Bl. 761, 3 Wils. 205; *Shipley v. Hammond*, 5 Esp. 114; *Chalie v. Duke of York*, 6 Esp. 45; *De Havilland v. Bower Bank*, 1 Camp. 50; *Mountford v. Willes*, 2 B. & P. 337. But this doctrine has now been overruled. *Gordon v. Swan*, 12 East, 419; *Higgins v. Sargent*, 2 B. & C. 348; *Page v. Newman*, 9 B. & C. 378; *Foster v. Weston*, 6 Bing. 709; *Cook v. Fowler*, L. R. 7 H. of L. 27, 43 L. J. (Ch.) 855. See the cases reviewed in London, etc. R. Co. v. South Eastern R. Co., [1893] App. Cas. 429. It has, however, been always held that where, by an award, money is made payable on a certain day, interest ought to be allowed from that day, if payment was demanded at the place appointed. *Pinhorn v. Tuckington*, 3 Camp. 468; *Churcher v. Stringer*, 2 B. & Ad. 777; *Johnson v. Durant*, 4 C. & P. 327. I cannot, on principle, explain this exception. Many apparent exceptions to the rule that interest is only recoverable in the cases just mentioned may be explained by distinguishing between interest recovered as part of the debt and interest recovered as damages for its detention. For instance, interest on a deposit may be recovered, if laid as special damage in an action for breach of an agreement to sell an estate. *De Bernales v. Wood*, 3 Camp. 258; *Farquhar v. Farley*, 7 Truitt. 592. So it may be allowed as damages in an action on a mortgage deed after the day of default (*Dickenson v. Harrison*, 4 Price, 282; *Atkinson v. Jones*, 2 A. & E. 439; *Price v. Great*

Western R. Co., 16 M. & W. 244); or upon a contract to pay money upon a particular day (*Watkins v. Morgan*, 6 C. & P. 661); or upon a covenant to indemnify a surety. *Petre v. Duncombe*, 20 L. J. (Q. B.) 242, 2 Lown., M. & P. 107. Where a written security is given for the payment of money on a particular day, with interest up to that day at a fixed rate, a claim for subsequent interest would be a claim for damages at the discretion of the tribunal before which the demand is made, and not for interest due as a matter of law. The former rate might, but need not be, adopted in assessing the damages. *Cook v. Fowler*, L. R. 7 H. of L. 27-32. Where a mortgage deed provided for interest at ten per cent. up to the time fixed for payment, but contained no covenant for interest after that date the court held that subsequent interest could only be awarded as damages, and refused to grant more than five per cent. In *re Roberts*, 14 Ch. Div. 49; *Mellersh v. Brown*, 45 id. 225. And it is laid down as a general rule, that although it be not due *ex contractu*, a party may be entitled to damages in the form of interest where there has been long delay under vexatious and oppressive circumstances in the payment of what is due under the contract. *Hillhouse v. Davis*, 1 M. & S. 169; *Arnott v. Redfern*, 3 Bing. 353. Where a person under a contract of purchase enters into possession of property which produces a profit, such as machinery, and then declines to carry out his purchase, the vendor is entitled to interest on the value of the property by way of damages. *Marsh v. Jones*, 40 Ch. Div. 563.

"Interest cannot be recovered as

are not sufficient to pay all creditors.¹ Interest should be allowed on claims against a national bank during the period between the time it is placed in the hands of a receiver and the closing up of its affairs, before appropriating the surplus to the stockholders.²

such in an action against the vendor of an estate, the sale of which has gone off, for the recovery of a deposit which has been lying idle (*Bradshaw v. Bennett*, 5 C. & P. 48; *Maberley v. Robins*, 5 Taunt. 625); though it may be recovered as special damages for breach of the contract if so laid. *De Bernales v. Wood*, 3 Camp. 258; *Farquhar v. Farley*, 7 Taunt. 592. But the principal and auctioneer stand on a different footing; and in an action against the latter to recover the deposit paid to him, interest cannot be recovered even as damages, unless, perhaps, after a demand and refusal on the contract being rescinded. *Lee v. Munn*, 8 Taunt. 45. Not even when the auctioneer has made interest upon the money while in his hands, and although he was requested by one of the parties, before the completion of the contract, to invest it. *Harrington v. Hoggart*, 1 B. & Ad. 577. Interest is not due as such in an action for money secured on mortgage, after day of default, without covenants to pay interest, but may be recovered as damages. Nor in an action for money lent unless there has been a usage to that effect (*Calton v. Bragg*, 15 East, 223; *Shaw v. Picton*, 4 B. & C. 723); or for money had and received (*Walker v. Constable*, 1 B. & B. 306); even though by the course of dealing between the defendant and the person from whom the money was received to the plaintiff's use the sum would have borne interest; for no right passed to the plaintiff but a right to

demand the sum actually in the defendant's hands. *Freeling v. Schroeder*, 2 Bing. N. C. 79. And it makes no difference that the money has been obtained by fraud (*Crockford v. Winter*, 1 Camp. 124). Nor in actions for money paid (*Carr v. Edwards*, 3 Stark. 132; *Hicks v. Mareco*, 5 C. & P. 498); or on an account stated (*Nichol v. Thompson*, 1 Camp. 52, n.; *Charlie v. Duke of York*, 6 Esp. 45; *Blaney v. Hendricks*, 2 W. Bl. 761. *Contra*, *Abbot, C. J.*, 2 B. & C. 349); or for goods sold, even though to be paid for on a particular day. *Gordon v. Swan*, 12 East, 419. *Mountford v. Willes*, 2 B. & P. 337, merely decides that if the jury allow interest—which they clearly may do as damages—the court will not disturb their verdict, though it is otherwise where the payment was to be made by bill. Nor in an action for work and labor (*Trelawney v. Thomas*, 1 H. Bl. 303; *Milson v. Hayward*, 9 Price, 134); nor on money lying with a banker (*Edwards v. Vere*, 5 B. & Ad. 232); nor upon a policy of insurance (*Kingston v. McIntosh*, 1 Camp. 518; *Bain v. Case*, 3 C. & P. 496); nor are annuitants entitled to interest on the arrears of their annuities. *Earl of Mansfield v. Ogle*, 4 De G. & J. 41; *Booth v. Coulton*, 30 L. J. (Ch.) 378; *Blogg v. Johnson*, L. R. 2 Ch. 225. See *Marsh v. Jones*, 40 Ch. Div. 563. Interest is not recoverable as such in an action upon a foreign judgment, where the subject of the claim is not one which would bear interest in this country. *Doran v.*

¹*Shultz v. Weaver*, 11 S. & R. 182; *Champneys v. Lyle*, 1 Bin. 327.

²*Chemical Nat. Bank v. Bailey*, 12 Blatch. 480.

A building and loan society which refuses to pay the full sum to which a member who has given notice of his withdrawal is entitled, but offers him a less sum, is liable for interest at the legal rate, notwithstanding the by-laws deny that the stock draws interest after notice of withdrawal is given.¹ Under a statute providing for the allowance of interest on all moneys after they become due on any bond, bill, note or other written instrument, interest may be recovered upon the amount found due on an accounting under a written contract for the payment of a specified per cent. of the amount of certain articles though the contract is silent as to interest.² Interest may be recovered from one who has secretly received money belonging to another, the statute allowing interest "on money received to the use of another and retained without the owner's knowledge."³ A written subscription to the capital stock of a corporation is an instrument in writing, and draws interest after a call has been made.⁴ One who claims property as his own and, by consent of the court in which the title is being litigated, sells it and retains the proceeds, subject to the court's order, is not an indifferent custodian of the money, and is presumed to have used it; hence he is liable for interest.⁵ A creditor of an insolvent corporation is equitably entitled to interest upon a dividend payable to him from the date of the order directing its payment, where that has been delayed by an unsuccessful contest by the receiver.⁶ A mortgagee who forecloses under a power of sale is liable for interest on the surplus retained by him, if there is nothing to prevent its payment.⁷ The liability

O'Reilly, 3 Price, 250; *Atkinson v. Lord Braybrooke*, 4 Camp. 380. But it may be left to the jury to say whether the plaintiff has used proper means to find out the defendant and enforce the judgment; and if they find for him, they may give such interest as they wish—as damages it would appear. *Bann v. Dalzell*, 3 C. & P. 376; *McClure v. Dunkin*, 1 East, 436."

¹ *Enterprise Building & Loan Society v. Balin*, 12 Colo. App. 304, 55 Pac. Rep. 740.

² *Dick Co. v. Sherwood Letter File Co.*, 157 Ill. 325, 42 N. E. Rep. 440.

³ *Currier v. Kretzinger*, 162 Ill. 511, 44 N. E. Rep. 882, 58 Ill. App. 288.

⁴ *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 57 N. E. Rep. 1043, 78 Am. St. 288, 87 Ill. App. 605.

⁵ *Kenton Ins. Co. v. First Nat. Bank*, 93 Ky. 129, 19 S. W. Rep. 185.

⁶ *Citizens' Sav. Bank v. Vaughan*, 115 Mich. 156, 73 N. W. Rep. 143; *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. Rep. 372; *Armstrong v. Exchange Nat. Bank*, 133 U. S. 433, 10 Sup. Ct. Rep. 450.

⁷ *Perkins v. Stewart*, 75 Minn. 21, 77 N. W. Rep. 434.

for interest of one who has collected and retained money in which others have an equal interest with him does not depend upon whether he has received interest.¹ Under a statute providing that interest may be allowed "on money lent or money due on the settlement of accounts from the day of such settlement of accounts between the parties, and ascertaining the balance due," interest is recoverable on a claim for wages from the time of the acknowledgment of the correctness of the account by the debtor's assignee.² A party who has money in his possession, the title to which is in litigation, is liable for interest if he files an interpleader without paying the money into court.³ A recognizance is a promise to pay a certain sum of money, and interest is due thereon after the condition is broken.⁴ A person who illegally receives or obtains possession of money belonging to another is presumed to have made use of it, and will be liable for interest unless he shows that he did not use it.⁵ If a contract provides for the exchange of property or the payment of its value, the party who disables himself so that he cannot deliver the property is chargeable with interest from the time of so doing.⁶ A foreign insurance company which does business in a state without paying the required license fee is liable for interest thereon.⁷

§ 330. No interest on penalties; statutory liability for riots. Interest is not allowed on statutory penalties;⁸ but it may be recovered on so much of the judgment as is for the [598] damages.⁹ Where a constable who failed to return an execution within the time prescribed by statute was declared liable for the amount then due and ten per cent. damages, it was held interest could not be added.¹⁰ Before judgment the

¹ *Bates v. Hamilton*, 144 Mo. 1, 45 S. W. Rep. 641, citing this section.

² *Knatz v. Wise*, 16 Mont. 555, 41 Pac. Rep. 710.

³ *C. K. of Hall Co. v. Lloyd*, 14 Ohio Ct. Ct. 30.

⁴ *Kinney v. State*, 14 Ohio Ct. Ct. 91.

⁵ *Southern R. Co. v. Greenville*, 49 S. C. 449, 27 S. E. Rep. 652.

⁶ *First Nat. Bank v. Lynch*, 6 Tex. Civ. App. 590, 25 S. W. Rep. 1042.

⁷ *Travelers' Ins. Co. v. Fricke*, 99 Wis. 367, 74 N. W. Rep. 372, 78 id. 407,

41 L. R. A. 557; *State v. Fricke*, 102 Wis. 107, 77 N. W. Rep. 732, 78 id. 455.

⁸ *Davenport v. McKee*, 98 N. C. 500, 4 S. E. Rep. 545; *People v. Gold & Stock Tel. Co.*, 98 N. Y. 67; *Thomas v. Weed*, 14 Johns. 255; *Hopper v. Chicago, etc. R. Co.*, 91 Iowa, 639, 650, 60 N. W. Rep. 487; *Blair v. Sioux City, etc. R. Co.*, 109 Iowa, 369, 80 N. W. Rep. 673.

⁹ *Boyd v. Randolph*, 91 Ky. 472, 16 S. W. Rep. 133.

¹⁰ *Trouer v. Sharp*, 4 J. J. Marsh. 79.

penalty allowed for taking or receiving usurious interest by a national bank does not bear interest.¹ A judgment imposing a fine is not interest-bearing.² Interest is not recoverable under a statute which makes a county or municipality liable to the owner of property for damages resulting thereto from a riot;³ but it may generally be recovered on stipulated damages.⁴

§ 331. When allowed on penalty of bonds. There has been some question in actions upon penal bonds, where the damages for breach of the condition equal or exceed the [599] penalty, whether recovery beyond the penalty can be had by adding interest from the date of the breach, where such damages are of such a nature as to bear interest.⁵ But the American courts are now nearly agreed that interest on the penalty in such cases may be recovered.⁶ It is not, however, recoverable upon a bail bond conditioned for the appearance of a person to answer a criminal offense,⁷ and so under the New York code, as to other bonds to secure the performance of acts other than to pay money.⁸

¹ *Columbia Nat. Bank v. Bletz*, 2 Penny. (Pa.) 169; *Higley v. First Nat. Bank*, 26 Ohio St. 75, 20 Am. Rep. 759; *First Nat. Bank v. Turner*, 3 Kan. App. 352, 42 Pac. Rep. 936.

² *State v. Steen*, 14 Tex. 396.

³ *Weir v. Allegheny County*, 95 Pa. 413.

⁴ *Little v. Banks*, 85 N. Y. 267; *Winch v. Mutual Benefit Ice Co.*, 86 id. 618; *French v. French*, 126 Mass. 360. *Contra*, *Devereux v. Burgwin*, 11 Ired. 490 (not even from the date of the writ).

⁵ See *Hellen v. Ardley*, 3 C. & P. 12; *Lonsdale v. Church*, 2 T. R. 358; *Brangwin v. Perrott*, 2 W. Bl. 1190; *Clark v. Bush*, 3 Cow. 151; *McClure v. Dunkin*, 1 East, 436; *Francis v. Wilson*, Ry. & M. 105; *Harris v. Clap*, 1 Mass. 308; *United States v. Arnold*, 1 Gall. 348; *Fairlie v. Lawson*, 5 Cow. 424; *Fraser v. Little*, 13 Mich. 195.

⁶ *Maddox v. Rader*, 9 Mont. 126, 22 Pac. Rep. 386; *Jefferson County v. Laneberger*, 3 Mont. 246, 35 Am. Rep. 462; *Frink v. Southern Exp. Co.*, 82

Ga. 33, 8 S. E. Rep. 862, 3 L. R. A. 482; *Burt v. Delano*, 4 Cliff. 618; *Stern v. People*, 102 Ill. 540; *Leighton v. Brown*, 98 Mass. 516; *United States v. Curtis*, 100 U. S. 119; *School District v. Dreutzer*, 51 Wis. 153, 6 N. W. Rep. 610; *State v. Sooy*, 39 N. J. L. 539, 555; *Clark v. Wilkinson*, 59 Wis. 543, 18 N. W. Rep. 481; *Brunswick v. Snow*, 73 Me. 177; *Burchfield v. Haffey*, 34 Kan. 42, 7 Pac. Rep. 548; *Harris v. Clap*, *supra*; *Brainard v. Jones*, 18 N. Y. 35; *Hughes v. Wickhiffe*, 11 B. Mon. 202; *Carter v. Thorn*, 18 id. 613; *Bank of Brighton v. Smith*, 12 Allen, 243, 90 Am. Dec. 144; *McGill v. Bank of United States*, 12 Wheat. 511; *Ives v. Merchants' Bank*, 12 How. 159; *Warner v. Thurio*, 15 Mass. 151. Compare *Blewett v. Front Street Cable R. Co.*, 49 Fed. Rep. 126. See §§ 477, 478.

⁷ *United States v. Broadhead*, 127 U. S. 212, 8 Sup. Ct. Rep. 1191.

⁸ *Beers v. Shannon*, 73 N. Y. 202; *Polhemus Printing Co. v. Hallen-*

§ 332. **Interest against government.** It has been established as a general rule in the practice of the federal government that interest is not allowed on claims against it, whether they originate in contract or in tort, or whether they arise in the ordinary business of administration or under private acts of relief passed by congress on special application. The only recognized exceptions are where the government stipulates to pay interest and where it is given expressly by an act of congress either by the name of interest or by that of damages.¹ The same rule is applied in England,² and in some of the states.³ A state is not bound to pay interest on its bonds after their maturity unless its consent to do so is shown by an act of its

back, 46 App. Div. 563, 61 N. Y. Supp. 1056.

¹ *United States v. Bayard*, 127 U. S. 251, 8 Sup. Ct. Rep. 1156; *Tillson v. United States*, 100 U. S. 43, 47; *Wrightman v. United States*, 23 Ct. of Cls. 144; *Baxter v. United States*, 2 C. C. A. 411, 51 Fed. Rep. 671; *United States v. Barber*, 20 C. C. A. 616, 74 Fed. Rep. 483; *Walton v. United States*, 61 Fed. Rep. 486; *District of Columbia v. Johnson*, 165 U. S. 330, 17 Sup. Ct. Rep. 363; *United States v. Verdier*, 164 U. S. 213, 17 Sup. Ct. Rep. 42. See *Pacific Coast Steamship Co. v. United States*, 33 Ct. of Cls. 36.

For cases in which interest has been allowed on liquidated claims, see *United States v. McKee*, 91 U. S. 442; *Erskine v. Van Arsdale*, 15 Wall. 75; *The Nuestra Senora de Regla*, 108 U. S. 92, 107, 2 Sup. Ct. Rep. 287.

Where, under a statute, the court grants a certificate that there was probable cause for the acts done by an officer of the United States, for which judgment was rendered against him, the government is not liable for interest on the judgment prior to the granting of such certificate. *United States v. Sherman*, 98 U. S. 365.

A case appealed from the board of general appraisers under the act of

June 10, 1890, is practically a suit against the United States and the importer cannot recover interest. *Marine v. Lyon*, 10 C. C. A. 315, 62 Fed. Rep. 153.

In actions against the government in the court of claims interest prior to judgment cannot be allowed claimants; but sec. 966, R. S. of U. S., requires it to be allowed to the government against claimants, under all circumstances to which that section applies, and without regard to equities which might be considered between private parties. *United States v. Verdier*, 164 U. S. 213, 17 Sup. Ct. Rep. 42.

Sec. 1091, R. S. of U. S., which regulates the recovery of interest against the government, does not extend to a case brought in the court of claims under a special statute, and resting on a treaty which provides for the payment of interest. *Western Cherokee Indians v. United States*, 27 Ct. of Cls. 1; *Blackfeather v. United States*, 28 id. 447.

² *In re Gosman*, 17 Ch. Div. 771.

³ *Ohio v. Board of Public Works*, 36 Ohio St. 409; *Attorney-General v. Cape Fear Navigation Co.*, 2 Ired. Eq. 444; *Young v. State*, 36 Ore. 417, 47 L. R. A. 548, 59 Pac. Rep. 812, 60 id. 711.

legislature or by a contract which its officers were authorized to enter into.¹ The right to interest does not attach to a judgment against the federal government unless by virtue of an act of congress.² If the statute providing for interest on judgments does not except counties they are liable therefor when judgment is rendered against them on contract obligations.³ And under a statute providing that creditors shall be allowed to receive interest, when there is no agreement as to the rate thereof, at the rate of eight per cent. for all moneys after they become due on any bond, bill, promissory note or other instrument in writing, a county is liable for interest on coupons from its bonds. The court, very properly, took a distinction between the governmental and contractual powers of a county. "It had incurred an indebtedness, and, needing money to pay the same, had proceeded to borrow it. In the exercise of powers of this character, as distinguished from governmental powers, the municipality is not entitled to invoke for its protection any immunity pertaining to it as a sovereign or governing body."⁴ Some authorities take the view that counties are not liable for interest by virtue of general statutes fixing liability therefor unless they are specified therein.⁵ Thus, it has been ruled that a statute expressing that "every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest from that day," does not apply to counties.⁶ In Illinois the same rule prevails as to counties, and is extended to townships and other municipalities.⁷ A claim arising against a county upon a statute and not *ex contractu* does not carry in-

¹ United States v. North Carolina, 136 U. S. 211, 10 Sup. Ct. Rep. 920; Sawyer v. Colgan, 102 Cal. 283, 36 Pac. Rep. 589; Carr v. State, 127 Ind. 201, 22 Am. St. 624, 26 N. E. Rep. 778; Davis v. State, 121 Cal. 210, 53 Pac. Rep. 555; Hawkins v. Mitchell, 34 Fla. 405, 16 So. Rep. 311.

² United States v. Sherman, 98 U. S. 565.

³ Nevada County v. Hicks, 50 Ark. 416, 8 S. W. Rep. 180.

⁴ Board of Commissioners of Ouray

County v. Geer, 47 C. C. A. 450, 108 Fed. Rep. 478.

⁵ Seton v. Hoyt, 34 Ora. 266, 43 L. R. A. 634, 55 Pac. Rep. 967, 75 Am. St. 641.

⁶ Hopkins v. Contra Costa County, 106 Cal. 556, 39 Pac. Rep. 933, overruling Davis v. Yuba County, 75 Cal. 452, 13 Pac. Rep. 874, 17 id. 533, which held that coupons on county bonds, after due, bore interest from the time payment was demanded.

⁷ Madison County v. Bartlett, 2 Ill.

terest unless the act so provides.¹ If a funding statute does not provide for interest on bonds issued by a county after their maturity they will not bear it.² County warrants, or papers which are essentially such, do not everywhere bear interest; neither are they judgments or contracts so as to come within a statute allowing interest.³ Under a statute providing that no interest shall be recovered on such warrants they do not carry interest after payment refused.⁴

In Kentucky the rule is that the ordinary appropriations for working roads, supporting the poor, etc., and such as do not arise from contract, but by reason of the control of the county over its funds and the subject to which they are to be applied, bear no interest against a county; but this doctrine does not apply where a county voluntarily assumes a debt; in such a case if responsible parties liable to the creditor are released from liability, the consideration is sufficient to bind the county for both principal and interest.⁵ The liability of counties for interest on default in making contractual payments is the same as that of individuals.⁶ In Pennsylvania counties are liable for interest on fees withheld from public officers.⁷ In New York the exemption from liability for interest in favor of the state and counties does not appear to be recognized. In a case decided in 1899, in which the state had withheld water used for operating a mill, it was held liable for the loss of profits resulting, if they could be shown with the requisite certainty;

67; *Pike County v. Horsford*, 11 Ill. 170; *Pekin v. Reynolds*, 31 Ill. 529.

Interest is not recoverable in that state on interest coupons from county bonds after their maturity, they being silent as to interest. *Graves v. Saline County*, 43 C. C. A. 414, 104 Fed. Rep. 61.

¹ *Garland County v. Hot Spring County*, 68 Ark. 83, 56 S. W. Rep. 636; *Clay County v. Chickasaw County*, 64 Miss. 534; *Beals v. Supervisors*, 28 Cal. 449.

² *Soher v. Supervisors*, 39 Cal. 134.

³ *Anderson v. Issaquena County*, 75 Miss. 873, 896, 23 So. Rep. 310. *Contra*, *Williams v. Shoudy*, 12 Wash. 362, 41 Pac. Rep. 169.

It was ruled in the last case that if county warrants issued for an indebtedness illegally incurred are ratified by the voters at a special election, the warrants carry interest from the date their payment was refused.

⁴ *Alexander v. Oneida County*, 76 Wis. 56, 45 N. W. Rep. 21.

⁵ *Washington County Court v. McKee*, 12 Ky. L. Rep. 102, 13 S. W. Rep. 909.

⁶ *Morris v. Bell County*, 20 Ky. L. Rep. 1912, 50 S. W. Rep. 531.

⁷ *Koch v. Schuylkill County*, 12 Pa. Super. Ct. 567.

otherwise, for the value of the use of the water to the plaintiff, and also for interest on the award of the court of claims during the time payment thereof was delayed by litigation instituted by the state.¹ The older cases were less strict in exempting government from liability for interest;² but they generally held that, in the absence of an express agreement to pay it, a demand was necessary to entitle the creditor to it.³

The liability of municipal and *quasi*-municipal corporations for interest, except on express contracts, depends very largely upon their charters and the general statutes of the state of which they are parts. No rule can be deduced from the adjudications which can be relied upon outside of the jurisdiction in which the particular case was decided. The reason usually given for exempting counties from such liability does not apply to cities and villages, though it has some application to towns. Cities and villages are not arms of the government in the way or to the extent counties and towns are. Their corporate capacities and powers are not imposed upon them in the first instance, but are usually sought after. They are agencies of their citizens, rather than of the state. Unless they are exempted from liability for interest there appears to be no good reason why the statutes governing that subject should not be applicable to them, especially as to contracts for public works. There is a tendency to this view, as the appended note will show.⁴ It has been said that the general interest laws are ap-

¹ *Lakeside Paper Co. v. State*, 45 App. Div. 112, 60 N. Y. Supp. 1081, 55 App. Div. 208, 66 N. Y. Supp. 959. See *Sayre v. State*, 123 N. Y. 291, 25 N. E. Rep. 163, as explained in *Wilson v. Troy*, 135 N. Y. 96, 105, 32 N. E. Rep. 44, 31 Am. St. 817, 18 L. R. A. 449.

² *Respublica v. Mitchell*, 2 Dall. 101; *People v. Canal Com'rs*, 5 Denio, 401; *Canal Com'rs v. Kempshall*, 26 Wend. 401; *Thorndike v. United States*, 2 Mason, 1.

³ *Attorney-General v. Cape Fear Nav. Co.*, 2 Ired. Eq. 444; *Milne v. Rempublican*, 3 Yeates, 102; *Adams v. Beach*, 6 Hill, 27; *Auditor v. Dugges*, 3 Leigh, 241; *Pawlet v. Sandgate*, 19 Vt. 62; *United States v.*

Hoar, 2 Mason, 314; *State v. Mayes*, 28 Miss. 709.

⁴ A claim which has been audited against a county does not bear interest until judgment is rendered upon it. *Wheeler v. Newberry County*, 18 S. C. 132.

Interest is not allowable upon a claim against a county until a warrant has been presented and indorsed "not paid for want of funds." *Grant County v. Lake County*, 17 Ore. 453, 21 Pac. Rep. 447. See *Territory v. Board of Com'rs*, 8 Mont. 396, 7 L. R. A. 105, 20 Pac. Rep. 809.

County warrants which are payable in the order of their registration and are silent as to interest and time

plicable to a city which is in default in paying a contractor. This law is general in its terms, and applies to cities as well as natural persons. Justice is best promoted by the adoption of a uniform rule applicable to all. It is the duty of a city to

of payment do not bear interest. *Ashe v. Harris*, 55 Tex. 49.

If a warrant is not paid on presentment a right of action then accrues, and interest may be recovered on the original indebtedness from the time suit was brought. *Mahanoy v. Comry*, 103 Pa. 362; *Snyder v. Boviard*, 122 id. 442, 9 Am. St. 118, 15 Atl. Rep. 910.

For a violation of its duty as a lessee a city is liable for interest on the resulting damages. *Allegheny v. Campbell*, 107 Pa. 530, 52 Am. Rep. 478.

A municipal officer has no authority to bind the municipality to pay compound interest on an account unless it is expressly given him. *St. Louis Gas L. Co. v. St. Louis*, 11 Mo. App. 55, 77.

As to the liability of a town which has acquired property of another town, by virtue of a statute, to pay interest on the value thereof or for delay, see *Needham v. Wellesley*, 139 Mass. 372, 31 N. E. Rep. 732.

The successful bidders for city bonds are not entitled to interest on a deposit made as a bonus even after a demand therefor, the bonds proving to be invalid. *Denver v. Hayes*, 28 Colo. 110, 63 Pac. Rep. 311.

A county is not liable for interest on the purchase-money of lands sold by its officer, through whose mistake the deed issued was void, until demand made for the return thereof. *Rice v. Ashland County*, 114 Wis. 130, 137, 89 N. W. Rep. 908.

Where money is lawfully collected by special assessment for a street improvement and paid to the treasurer, the city is not liable for interest upon it because it is withheld from the contractor. *Hoblitt v.*

Bloomington, 87 Ill. App. 479; *Vider v. Chicago*, 164 Ill. 354, 45 N. E. Rep. 720.

In the absence of an agreement a municipality is not chargeable with interest on claims against it, except where money has been wrongfully obtained by it and illegally withheld. *Peoria v. Fruin-Bambrick Construction Co.*, 169 Ill. 36, 48 N. E. Rep. 435; *Danville v. Danville Water Co.*, 180 Ill. 235, 54 N. E. Rep. 224; *Schoenberger v. Elgin*, 164 Ill. 80, 45 N. E. Rep. 434.

In Kentucky a city is liable for interest on a contract for labor, the price of which was fixed and the time for its completion, no stipulation as to interest being made. *Louisville v. Henderson's Trustee*, 11 Ky. L. Rep. 796, 13 S. W. Rep. 111. This is the rule in Minnesota. *J. D. Moran Manuf. & C. Co. v. St. Paul*, 65 Minn. 300, 67 N. W. Rep. 1000. And in Missouri. *Neosho City Water Co. v. Neosho*, 136 Mo. 498, 38 S. W. Rep. 89. And in New York, *Sweeney v. New York*, 173 N. Y. 414, 66 N. E. Rep. 101.

If a contractor is to be paid out of assessments, the city has a reasonable time after the completion of the work in which to make and collect them, and is not liable for interest before that. *Keigher v. St. Paul*, 69 Minn. 78, 72 N. W. Rep. 54.

In New York the liability of cities for interest in actions for torts is governed by the same rule as that of individuals. *Wilson v. Troy*, 135 N. Y. 96, 32 N. E. Rep. 44, 31 Am. St. 817, 18 L. R. A. 449.

In Oregon a distinction is made between the liability of counties and cities on the ground that the former are involuntary arms of the

provide the necessary means to defray the expenses of constructing improvements. Unless it is stipulated to the contrary, the work is ordinarily to be paid for as accepted. If the work is not to be paid for at that time, it is the result of a contract to extend the time. In the absence of any contract that payment shall be delayed, the city will be liable for interest like any other debtor. Any other rule is fraught with injustice, and if once established would exclude men of scanty means from taking such contracts, as the delay in payment and loss of the use of the money might, and in many cases would, cause a serious loss which, to one not possessed of ample means, could result in bankruptcy. In its business transactions a city should be required to conform to the ordinary rules, and all exemptions claimed, which would work injustice, should be denied.¹

government; cities are liable for interest on their debts to the same extent as individuals. *Shipley v. Hachéney*, 34 Ore. 303, 55 Pac. Rep. 971. City warrants draw interest from the time they are presented and stamped "not paid," notwithstanding they are retained by the treasurer and others are issued in lieu of them, these being dated and indorsed as was the original. *Monteith v. Parker*, 36 Ore. 170, 59 Pac. Rep. 192, 78 Am. St. 767.

In Pennsylvania interest is payable on municipal claims due in instalments as each instalment becomes due. *South Chester Borough v. Garland*, 162 Pa. 91, 29 Atl. Rep. 403.

In Tennessee a city is not liable for interest upon an implied contract if its power to contract must be exercised in writing. *Gas Light Co. v. Memphis*, 93 Tenn. 612, 30 S. W. Rep. 25.

In Louisiana a city which collects school taxes and fails to pay them over, but uses the money for its own purposes, is liable for interest to judgment creditors of the school

board. *New Orleans v. Fisher*, 34 C. C. A. 15, 91 Fed. Rep. 574.

In Washington the practice of paying interest on municipal warrants acquired the force of law, and they bear interest at the legal rate from the time payment is refused for lack of funds. *Seymour v. Spokane*, 6 Wash. 362, 33 Pac. Rep. 832. But there is no general liability on the part of cities for either principal or interest on warrants issued on account of street improvements in the absence of a contract on the part of the city or the collection and misappropriation of the funds from the local assessment. *Potter v. Whatecom*, 25 Wash. 207, 65 Pac. Rep. 197, overruling *Philadelphia Mortgage & Trust Co. v. New Whatcom*, 19 Wash. 225, 52 Pac. Rep. 1063. To the same effect is *Tucoma Bituminous Paving Co. v. Sternberg*, 26 Wash. 84, 66 Pac. Rep. 121.

A township is liable for interest on money advanced for its benefit by one of its officers. *White River School Township v. Dorrell*, 26 Ind. App. 538, 59 N. E. Rep. 867. But town orders do not bear interest in

¹ *Murphy v. Omaha*, 33 Neb. 402, 50 N. W. Rep. 267.

§ 333. **Judgments bear interest.** In nearly all the states and territories are statutes which provide that judgments shall carry interest in a greater or smaller class of actions and suits, the tendency of legislation being to diminish the number of exceptions.¹ These statutes do not give a judgment the nature of a contract, except when they provide that the rate of interest on a judgment shall be that which the parties have stipulated for. In such a case a change in the statute, after a contract has been made for the payment of an agreed rate of interest, does not, according to some courts, affect the liability or rights of the parties thereto.² This view is not in conformity with the weight of authority. It is said that when a contract creditor elects to merge the rights accruing to him because of the breach of the contract in a judgment, interest as agreed upon ceases and the judgment will bear such interest as is prescribed by statute. The right to change the rate exists where the statute in force when the contract was made fixed the rate for judgments at the contract rate.³ There is also a disagreement in the courts concerning the effect of statutes changing the rate of interest on judgments. In New York a judgment is regarded as an obligation of record, interest on which is given as damages for delay in performing the contract or duty which it enforces. Hence, when the rate of interest thereon is reduced by law, a judgment previously rendered cannot carry a higher rate than is fixed by the amendatory act after

the absence of a statute to that effect. *Mueller v. Cavour*, 107 Wis. 599, 83 N. W. Rep. 944.

If a proposition to issue bonds has been submitted to the electors of a city the officers cannot vary the terms of the proposition as to interest, as by making it payable semi-annually, the notice of the election stating that interest was to be paid annually. *Skinner v. Santa Rosa*, 107 Cal. 464, 40 Pac. Rep. 742, 29 L. R. A. 512.

¹ If the statute declaring that judgments shall draw interest is general in its terms, no exceptions can be made; judgments in condemnation

proceedings are included. *Epling v. Dickson*, 170 Ill. 329, 48 N. E. Rep. 1001. But see the preceding section.

² *Bond v. Dolby*, 17 Neb. 491, 23 N. W. Rep. 351; *Corley v. McKeag*, 57 Mo. App. 415.

A default judgment awarding interest at ten per cent. is erroneous if it was not shown what the contract was. *Titus v. Larsen*, 18 Wash. 145, 51 Pac. Rep. 351.

³ *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494, 53 Pac. Rep. 291, 75 Am. St. 935; *Morley v. Lake Shore, etc. R. Co.*, 146 U. S. 168, 13 Sup. Ct. Rep. 56; *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. Rep. 216.

it takes effect,¹ although the judgment so rendered was based upon a contract which provided for the payment of the stipulated rate until it was discharged.² On the other hand, it is said that judgments are sometimes expressly declared to be contracts;³ and that it is unquestionably true that a judgment partakes of the nature of a contract sufficiently to supersede the original contract or cause of action both as to principal and interest. The original contract or cause of action becomes merged both as to principal and interest. A debt and the liability for interest thereon, as provided by statute at the date of the judgment, are obligations binding upon the debtor till the judgment is reversed or satisfied; and the legislature cannot alter the rate of interest to which a creditor is entitled upon his pre-existing judgment.⁴ Retrospective effect will not be given a statute changing the rate of interest on judgments unless its terms are very clear.⁵ A statute allowing interest on a judgment for injury to the person has been applied to a judgment where the cause of action arose before the statute was enacted.⁶ Where judgments bear the contract rate of interest and that rate is void because contrary to the usury statute, the judgment will bear the same rate it would have borne if there had been no contract.⁷ In Nebraska a plaintiff who sues on an usurious contract is not entitled to costs or interest on any

¹ O'Brien v. Young, 95 N. Y. 428 (two judges dissenting); Wells, Fargo & Co. v. Davis, 105 N. Y. 670, 12 N. E. Rep. 42. See Whitman v. Citizens' Bank, 110 Fed. Rep. 503, 49 C. C. A. 122 for the rule where the judgment is for the enforcement of the statutory liability of a stockholder. *Contra*, Cox v. Marlatt, 36 N. J. L. 389, 13 Am. Rep. 454.

² Taylor v. Wing, 84 N. Y. 471.

Under a decree providing for the payment by the estate of a decedent of the contract rate of interest, only such rate can be collected. Friend v. Engel, 43 Ill. App. 386.

³ Cox v. Marlatt, *supra*; Johnson v. Butler, 2 Iowa, 535.

⁴ Butler v. Rockwell, 17 Colo. 290; 17 L. R. A. 611, 29 Pac. Rep. 458. See

Seton v. Hoyt, 34 Ore. 266, 55 Pac. Rep. 967, 43 L. R. A. 634, 75 Am. St. 641; Shipley v. Hacheney, 34 Ore. 303, 55 Pac. Rep. 971; Meyer v. Brooks, 29 Ore. 203, 54 Am. St. 790, 44 Pac. Rep. 281; Morley v. Lake Shore, etc. R. Co., *supra*.

⁵ Brauer v. Portland, 35 Ore. 471, 480, 60 Pac. Rep. 379; Missouri Pacific R. Co. v. Patton, 35 S. W. Rep. 477 (Tex. Ct. of Civil Appeals); Louisville & N. R. Co. v. Sharp, 11 Ky. L. Rep. 811 (Ky. Super. Ct.).

⁶ Wagers v. Irvine, 103 Ky. 544, 45 S. W. Rep. 872.

⁷ Shafer v. First Nat. Bank, 53 Kan. 614, 36 Pac. Rep. 998. See Brown v. Marion Nat. Bank, 92 Ky. 607, 18 S. W. Rep. 630.

judgment he may recover.¹ The rate of interest designated in a statute for judgments to bear cannot be varied by the parties to the contract sued upon.² Except as they are subject to legislative control to the extent indicated, judgments are debts of record, having like incidents as other debts, including that of bearing interest.³ This quality is given them on common-law principles in actions based upon the fact of the wrongful detention of money. The interest, however, is not collectible on

¹ *Interstate Savings & Loan Ass'n v. Strine*, 58 Neb. 133, 78 N. W. Rep. 377.

² *Haas v. Chicago Society*, 20 Ill. 248; *Moore v. Holland*, 16 S. C. 15; *Neil v. Bank*, 50 Ohio St. 193, 33 N. E. Rep. 720; *Hanford v. Howard*, 1 N. B. Eq. 241. See *Deshler v. Holmes*, 44 N. J. Eq. 581, 18 Atl. Rep. 75. as to the right to have interest paid in excess of the judgment credited on the principal.

³ *Benkard v. Babcock*, 27 How. Pr. 391.

Interest, unless payable by the express terms of a contract to pay it, is recoverable, not by virtue of the contract to pay it, but in the nature of damages for the non-payment of the debt, and a judgment stands in the same position in this respect as a debt, where there is no contract to pay interest. It is doubtful if a judgment can properly be said to be a contract, but if it can be so said, such contract is merely to pay the amount of the judgment, and cannot be extended so far as to include an agreement to pay interest as a part of the contract. If the amount of the judgment is accepted, the interest thereon being waived and the judgment satisfied, the right thereafter to recover interest is gone. *Brady v. Mayor*, 14 App. Div. 152, 43 N. Y. Supp. 452; *Cutter v. Mayor*, 92 N. Y. 166.

A decree awarding preliminary alimony is a money decree, and bears interest. *Harding v. Harding*, 180

Ill. 592, 54 N. E. Rep. 604, 79 Ill. App. 621.

In California (§ 1504, Civil Code) a claim against the estate of a deceased person which has been passed upon on the final settlement of the administrator's account and ordered paid has the effect of a judgment against the estate and bears interest from the date of the settlement regardless of whether the original was interest-bearing. *Olivera's Estate*, 70 Cal. 184, 11 Pac. Rep. 624; *Glenn's Estate*, 74 Cal. 567, 16 Pac. Rep. 396. And so in Texas. *Finley v. Carothers*, 9 Tex. 517, 60 Am. Dec. 186.

But an allowance for the services of an attorney for a deceased administrator made in an equity suit for an accounting between the administrator *de bonis non* and the deceased administrator, for the use and benefit of the attorney, does not bear interest. *In re Blythe*, 103 Cal. 350, 37 Pac. Rep. 392.

The return of commissioners on claims against an estate is not a judgment, and a rate of interest fixed thereon does not affect the contract between the parties. *Bowers v. Hammond*, 139 Mass. 360, 31 N. E. Rep. 729. Neither is an award of dower. *Stunz v. Stunz*, 131 Ill. 210, 23 N. E. Rep. 410. An order of court affirming the assessment of damages resulting from taking property for public use is a judgment. *Beveredge v. Park Com'rs*, 100 Ill. 75; *Cook v. South Park Com'rs*, 61 id. 115.

execution, either as such or as damages, unless authorized by statute,¹ or it is so specified in the judgment.² In the absence of a statute authorizing the collection of interest upon execution, that which accrues between the rendition and collection of a judgment is lost; or in other words, since such interest is allowed as damages it can only be obtained by suit. The very sum in the judgment is the amount to be collected by execution unless a statute exists authorizing the officer to compute and collect interest.³ *Indebitatus assumpsit* will not lie for that purpose.⁴ And the claim for it will be extinguished by collection or payment of the principal to which it is incident.⁵ Some cases are to be found which deny that judg-

¹ Perkins v. Fourniquet, 14 How. 328; Michaux v. Brown, 10 Gratt. 612.

² Interest cannot be collected on a money judgment unless it so directs. Anderson's Succession, 33 La. Ann. 581. But a recovery of it is not prevented because the record entry of the judgment does not show that it was allowed. Nevada County v. Hicks, 50 Ark. 416, 8 S. W. Rep. 180; Amis v. Smith, 16 Pet. 303, 311.

Where every judgment in a civil action bears the rate of interest which the cause of action bore, although the judgment is silent concerning it, a judgment-creditor may have the record corrected to show the rate. Evans v. Fisher, 26 Mo. App. 541.

A judgment against a corporation is an unliquidated demand when the defendant's property has been placed in the hands of a receiver; it is not enforceable as a judgment against the receiver's funds, and does not bear interest against them. The fact that it was rendered by consent is immaterial, and so is the fact that an order has been made directing the receiver to pay it, but without specifying the sum due. Ex parte Brown, 18 S. C. 87.

Though a decree makes no provision for the payment of interest thereon, it may be recovered as dam-

ages for the detention of the money due under it. Stuart v. Hurt, 88 Va. 343, 13 S. E. Rep. 438.

³ Perkins v. Fourniquet, 14 How. 328; Michaux v. Brown, 10 Gratt. 612; Solon v. Virginia, etc. R. Co., 14 Nev. 405.

Under a statute providing for interest on any judgment recovered before any court, the clerk may issue execution for the amount of the principal sum with legal interest regardless of whether the judgment expressed the rate of interest or not. Nevada County v. Hicks, 50 Ark. 416, 8 S. W. Rep. 180; Amis v. Smith, 16 Pet. 311; Crook v. Tull, 111 Mo. 283, 20 S. W. Rep. 8; Burke v. Carruthers, 31 Cal. 467. *Contra*. Hastings v. Johnson, 1 Nev. 613; Solen v. Virginia & T. R. Co., 14 Nev. 405.

The federal courts will follow the decisions of the state court on this question. Moran v. Hagerman, 69 Fed. Rep. 427.

⁴ Beedle v. Grant, 1 Tyler, 423.

⁵ See § 372.

After a judgment providing for the payment of the legal rate of interest has been satisfied the creditor cannot collect the contract rate though it was his right to have the judgment provide for it. Rice v. Hulbert, 67 Iowa, 724, 25 N. W. Rep. 897.

ments bear interest unless by virtue of a statute.¹ Considering the hostility of the early common law to interest, it is easy to maintain on its principles any proposition adverse to its recovery. But on the principle, now universally admitted, that on all liquidated sums interest may be recovered after the date when it was the duty of the debtor to pay, judgments will carry interest. And it is generally held that interest is recoverable both on judgments and decrees,² at least on the latter so far as

¹ Perkins v. Fourniquet, 14 How. 328; Homer v. Kirkwood, 25 Miss. 96; Easton v. Vandorn, Walk. (Miss.) 214; Sewell's Case, 37 Mo. 448; Williamson v. Broughton, 4 McCord. 123. See Harrington v. Glenn, 1 Hill (S. C.), 53; Thomas v. Wilson, 3 McCord, 105; Lambkin v. Nance, 2 Brev. 99; Todd v. Botchford, 86 N. Y. 517.

A judgment cannot draw interest in the absence of a statute authorizing it although it be rendered upon a contract. Reece v. Knott, 3 Utah, 451, 24 Pac. Rep. 757.

Interest was refused on a judgment the amount of which was doubled by interest, a portion of it being compounded. Downs v. Allen, 22 Fed. Rep. 805.

In the District of Columbia judgments for personal torts do not bear interest. Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 13 Sup. Ct. Rep. 557, reversing or correcting local cases.

² Beall v. Silver, 2 Rand. 401; Roan's Adm'r v. Drummond's Adm'r, 6 Rand. 182; Clarke's Adm'r v. Day, 2 Leigh, 172; Marshall v. Dudley, 4 J. J. Marsh. 244; Mercer v. Beall, 4 Leigh, 189; Laidley v. Merrifield, 7 id. 346; Klock v. Robinson, 22 Wend. 157; Nunnelle v. Morton, Cooke, 21; Gwinn v. Whittaker, 1 Harr. & J. 754; Sayre v. Austin, 3 Wend. 496; Smith v. Todd's Ex'r, 3 J. J. Marsh. 306; Hodgdon v. Hodgdon, 2 N. H. 169; Hudson v. Daily, 13 Ala. 742; Hopkins v. Shepard, 129 Mass. 600; Florsheim v.

Illinois Trust & Savings Bank, 192 Ill. 382, 61 N. E. Rep. 491, 83 Ill. App. 297; Higgins v. Same, 193 Ill. 394, 61 N. E. Rep. 1024, 96 Ill. App. 29; Stenger v. Carrig, 61 Neb. 753, 86 N. W. Rep. 475.

In Administrator of Pinckney v. Singleton, 2 Hill (S. C.), 52, it was said: "At common law no interest could be collected upon an execution under a judgment; but interest was recoverable in an action of debt on judgment, and by commencing such an action the plaintiff obtains an inchoate right to the interest which cannot be defeated by a subsequent payment. And, therefore, where an action of debt on judgment was commenced against an administrator suggesting a *derastavit*, although the administrator after suit brought paid the amount of the judgment and costs with interest on the original cause of action, it was held that the plaintiff might still go on to recover the interest on the entire amount of the judgment (including the principal and interest), and the court will not preclude him from this right by ordering satisfaction to be entered on the judgment."

In Crawford v. Ex'r of Simonton, 7 Port. 110, Collier, J., reviewed the authorities and stated the law: "Damages in lieu of interest are allowed at common law for a default to pay money or deliver property, upon the principle that the creditor should be compensated for the want of punctuality in his debtor in keep-

they are *in personam* and binding upon the debtor's property, and rendered without reference to the sale of particular portions of it and the distribution of their proceeds.¹ A creditor who first attaches the reversion in a fund not bearing interest

ing him out of the use of the money or property. *McWhorter v. Standifer*, 2 Port. 519. Accordingly, it has been held that interest is allowed on judgments at common law to the time of affirmance or of a new judgment rendered. *Zink v. Langton*, 2 Doug. 749. By the rules of the common law Lord Ellenborough considered it to be within the general province of a jury to give damages for the detention of a debt, and he, therefore, sustained a verdict which allowed interest on a statutable ascertainment of damages for an injury to individual property occasioned by a public improvement made by a corporation (1 M. & Sel. 171); and in 7 Har. & J. 755, it is said that both by the decisions of the court of Maryland and the English courts every judgment for money carries interest unless otherwise agreed by the parties or its terms forbid it. So in North Carolina it has been holden that a plaintiff is entitled to interest on his judgment if a new action is brought up to the time of the rendition of the new judgment. 2 Hayw. 26, 378; *Thomas v. Edwards*, 3 Ans. 804; *Butler v. Stoullit*, 8 Moore, 472; *Prescott v. Parker*, 4 Mass. 170. In *Atkinson v. Braybrooke*, 4 Camp. 380, Lord Ellenborough considered that interest was not in general recoverable on a foreign judgment because it was a simple contract. S. P., 3 Price, 350. But in *McClure v. Dunkin*, 1 East,

436, the court of king's bench determined that in *assumpsit* on a judgment rendered in Ireland it was competent to the jury to allow interest to the plaintiff, and that in that respect there was no difference between a foreign judgment and a judgment in a court of record in England. The only adjudication to the contrary is a case in 4 McCord, 212, which is deemed outweighed by the authorities. In *Moore v. Patten*, 2 Port. 451, it was determined that a jury might, in their discretion, allow interest upon unsettled accounts for goods, wares, etc., from the time they became due. And in *Tate v. Lunerarity*, 1 Stew. & Port. 33, it was adjudged competent upon common-law principles for parties to stipulate for the payment of a reasonable rate of interest, and where it was not ascertained by contract the rate might be fixed by the custom of the place where the contract was made.

"From the decisions we have noticed we educe as applicable to the case at bar the rule that the allowance of interest, except upon the particular liabilities embraced by statute, must depend upon the circumstances of the case. To avoid its payment it is competent for the defendant to show that he is not in fault for the non-payment of the principal sum, or that the plaintiff had been absent from the country, without having left a known agent, etc.; but if the defendant offers no

¹ If a decree provides for the division of the proceeds of designated property according to fixed priorities and specifies the amounts to be paid claimants, and there is not enough

to pay the principal and interest due them all, it will not be construed as allowing interest to one claimant to the exclusion of others. *National Bank v. Heard*, 65 Gr. 189.

is entitled to interest from the date of his judgment, although at the expense of subsequent attaching creditors of the same fund.¹ It is not a sufficient reason for not allowing interest at the legal rate on a recovery for the conversion of bonds that they bore a less rate.²

Rule twenty-three of the supreme court of the United States provides that in cases where a writ of error is prosecuted to that court and the judgment is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid. This has reference only to the action of the supreme court respecting interest, and is not to be enforced by inferior courts to which mandates of the former are sent. If the judgment or decree of an inferior court is silent as to interest and is merely affirmed, nothing being said as to interest, it is to be taken as a declaration by the supreme court that no interest is to be allowed.³

excuse for the delay the plaintiff is entitled to recover interest as damages."

In *Himely v. Rose*, 5 Cranch, 313, it was held that if property ordered to be restored be sold, interest is not to be paid unless specially ordered by the decree. Marshall, C. J.: "Restitution of the cargo was awarded. The property having been sold, the money proceeding from the sale is substituted for the specific articles. If this money remains in the possession of the court, it carries no interest; if it be in the hands of an individual, it may bear interest or otherwise, as the court may direct."

In *Cox v. Marlatt*, 36 N. J. L. 389, 13 Am. Rep. 454, the court say: "Our practice has been for many years, independent of any express statute, to allow interest to be levied under execution as an incident to the judgment, and as an increase of damages for the detention of the debt without bringing a distinct action for the interest as damages for such detention." See *Todd v. Botchford*, 86 N. Y. 517.

Judgments for costs carry interest (*Emmitt v. Brophy*, 42 Ohio St. 82; *In re Kennedy*, 94 Cal. 22, 29 Pac. Rep. 412; *Klock v. Robinson*, 22 Wend. 157), when the costs are included in a judgment which is the cause of action. *Tiernan v. Minghini*, 28 W. Va. 314. See p. 905.

In an admiralty proceeding a federal circuit court is not bound to allow interest on costs awarded by the district court, although they are included in the former's decree. *The Scotland*, 118 U. S. 507, 6 Sup. Ct. Rep. 1174.

A judgment entered *nunc pro tunc* bears interest from the day on which it is considered to have been rendered. *Barber v. Briscoe*, 9 Mont. 341, 23 Pac. Rep. 726.

¹ *Edenton v. Dickinson*, 2 Tenn. Cas. 324.

² *Scollans v. Rollins*, 179 Mass. 346, 60 N. E. Rep. 983.

³ *In re Washington & G. R. Co.*, 140 U. S. 96, 11 Sup. Ct. Rep. 673; *Kimberly v. Arms*, 40 Fed. Rep. 551; *Green v. Chicago, etc. R. Co.*, 1 C. C. A. 478, 49 Fed. Rep. 907.

Under a statute providing that "interest shall be allowed on all money due upon any judgment," it may be recovered upon a foreign judgment which is sued upon.¹ In suits upon judgments rendered in other states interest is recoverable under the laws of the forum, and not at the rate authorized by the laws of the state in which they were rendered;² and this is the rule whether the law of the original jurisdiction allows interest on judgments or not.³ There is reason in the view which denies the recovery of interest on a judgment rendered in another state unless proof be made of its laws allowing it.⁴ If interest is recovered as damages, this rule is undoubtedly correct.

A judgment for costs is within the words "interest shall be allowed on all money due upon any judgment,"⁵ also one for

¹ *Shickle v. Watts*, 94 Mo. 410, 7 S. W. Rep. 274.

² *Wells, Fargo & Co. v. Davis*, 105 N. Y. 670, 12 N. E. Rep. 42; *Barringer v. King*, 5 Gray, 9; *Hopkins v. Shepard*, 129 Mass. 600; *Clark v. Child*, 136 id. 344; *Crone v. Dawson*, 19 Mo. App. 214 (in the absence of proof of the rate of interest in the state in which judgment was rendered).

In *Schell v. Stetson*, 12 Phila. 187, a judgment of a New York court sued on in Pennsylvania was held to carry interest by virtue of the fact that it would do so in the former state, of the law of which the court took notice. The judgment was for costs, and interest thereon was not allowable under the laws of Pennsylvania.

In *Stewart v. Spaulding*, 72 Cal. 264, 13 Pac. Rep. 661, the judgment of another state directed that a part of the sum recovered bear interest at a specified rate, but was silent as to the rate of interest on the balance. Interest should have been allowed on the balance at the rate fixed by the law of the foreign state; but the allowance of a lesser rate was not ground for objection by the judgment debtor.

³ *Nelson v. Felden*, 7 Rich. Eq. 394; *Warren v. McCarty*, 25 Ill. 95; *Prince v. Lamb*, Breese, 378; *Fonville v. Monroe*, 74 Ill. 129; *Talbot v. National Bank*, 129 Mass. 67, 37 Am. Rep. 302; *Williams v. American Bank*, 4 Met. 317; *Barringer v. King*, 5 Gray, 9; *Olson v. Veazie*, 9 Wash. 481, 43 Am. St. 855, 37 Pac. Rep. 677.

⁴ *Schroeder v. Boyce*, 127 Mich. 33, 86 N. W. Rep. 387; *Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318; *Cavender v. Guild*, 4 Cal. 253. The Michigan court said: As the common law is presumed to be in force in other states unless the contrary is shown, and as at common law judgments do not carry interest, interest is not recoverable on a judgment rendered by the courts of another state without proof that the law of such state allows interest on judgments.

⁵ *Bates v. Wilson*, 18 Colo. 287, 32 Pac. Rep. 615; *Keifer v. Summers*, 137 Ind. 106, 35 N. E. Rep. 1105; *Hayden v. Hefferan*, 99 Mich. 162, 58 N. W. Rep. 59; *Johnson v. Masters*, 49 S. C. 525, 27 S. E. Rep. 474. *Contra*, *Cookrill v. Mizer*, 11 Ky. L. Rep. 637, 12 S. W. Rep. 1040. See note, p. 394.

costs and attorney's fees;¹ but not one for the fees of witnesses and officers.² Where the defendant paid the judgment and costs at the close of the litigation and the plaintiff had paid but a mere item of the costs, he was not entitled to interest on the costs.³ If the party against whom a judgment for costs is rendered enjoins its collection on grounds not going to its validity, although it may be proper to stay the payment, he is liable for interest from the time the injunction was granted.⁴ Interest on costs cannot be recovered under a statute fixing the rate of interest on all money decrees and judgments.⁵ A direction in a judgment that the costs of the attorneys for the parties be paid out of the estate is not a judgment, no statement being made in it as to the amount of the costs, and such amount never having been inserted therein, notwithstanding it was fixed by an order in the action.⁶

A judgment is rendered or made when the trial court makes its original findings, and not when it enters corrected findings under the mandate of the supreme court; hence, under a statute which provides for the computation of interest upon the decision of the court from the time it was rendered or made, interest is to be computed from the time the former event occurred.⁷ An estate is liable for interest pending an appeal taken by the administrator from a decree directing him to pay money held by his intestate in trust, where he retains possession of the fund as administrator and takes the appeal in good faith, from the time the decree was entered until it was affirmed.⁸ Where a judicial sale of real estate is not absolute so as to entitle the purchaser to a conveyance or the judgment creditor to any part of the proceeds until it has been confirmed, the debtor is not liable for interest until that

¹ Hoyt v. Beach, 104 Iowa, 257, 73 N. W. Rep. 492, 65 Am. St. 461; Carver v. Mayfield Lumber Co., 68 S. W. Rep. 711, and Texas cases cited.

² Keifer v. Summers, *supra*; Baum v. Reed, 74 Pa. 322; Ghent v. Boyd, 18 Tex. Civ. App. 88, 43 S. W. Rep. 891.

³ O'Donnell v. Omaha, etc. R. Co., 31 Neb. 846, 48 N. W. Rep. 880.

⁴ Shipman v. Fletcher's Adm'r, 95 Va. 585, 29 S. E. Rep. 325.

⁵ People's Bank v. Aetna Ins. Co., 76 Fed. Rep. 548, ruled under the statutes of South Carolina.

⁶ State Trust Co. v. Cowdrey, 68 Hun, 97, 22 N. Y. Supp. 601.

⁷ Barnhart v. Edwards, 128 Cal. 572, 61 Pac. Rep. 176.

⁸ Haines v. Hay, 169 Ill. 93, 48 N. E. Rep. 218.

time.¹ In such a case the creditor is entitled to interest until the sale is confirmed.² Under a statute providing that judgments for money upon contracts bearing more than six per cent. interest shall bear the contract rate, if suit is brought on a judgment which bears interest at the rate of ten per cent. the new judgment should bear interest at the same rate.³ And where a note stipulates for the payment of one rate of interest on the money borrowed and a lower rate on principal and interest as attorney's fee, if it should be placed in the hands of an attorney for collection, the judgment properly provides that it shall carry the higher rate on the whole sum.⁴

§ 334. Same subject. Although the judgment separately states the amount of principal and interest the total bears interest.⁵ After judgment against a corporation interest on it is computed in an action against a stockholder.⁶ It

¹ *Lombard Investment Co. v. Burton*, 5 Kan. App. 197, 47 Pac. Rep. 154.

² *Trompen v. Hammond*, 61 Neb. 446, 85 N. W. Rep. 436, citing *Lombard Investment Co. v. Burton*, *supra*, and *Central Trust Co. v. Condon*, 67 Fed. Rep. 84.

³ *Corley v. McKeag*, 57 Mo. App. 415.

⁴ *Llano Improvement Co. v. Watkins*, 4 Tex. Civ. App. 428, 23 S. W. Rep. 612; *Washington v. First Nat. Bank*, 64 Tex. 4.

⁵ *Coles v. Kelsey*, 13 Tex. 75.

A verdict will not be vitiated by including improper interest, separately stated from any other sum found, nor for assuming to direct that prospective interest be allowed; the excessive interest or the impertinent direction that the sum found bear interest in the future may be stricken out or disregarded as surplusage. *Brugh v. Shanks*, 5 Leigh, 598.

Where a petition sets forth the recovery of judgment for a certain sum, without stating the rate of interest it is entitled to draw, but the

plaintiff in his petition demands judgment for the amount of the recovery, with interest thereon at ten per cent. from a day therein stated, the record showing a submission of the cause to the court by the parties, and the rendition of a judgment for the original judgment, with ten per cent. interest, without exception, it was considered that the demand for ten per cent. would authorize the introduction of proof of that rate, and that the production of such proof should be presumed. *Haskins v. Alcott*, 13 Ohio St. 210.

Under a statute providing that judgments for money upon contracts shall bear the contract rate, it is not necessary that the judgment so provide; the rate of interest may be determined from the record. *Catron v. Lafayette County*, 125 Mo. 67, 28 S. W. Rep. 331.

⁶ See § 343.

The parties liable for the payment of a money judgment are also liable for interest on it—as the assignee of shares of stock. *Logan v. Illinois Trust & Savings Bank*, 93 Ill. App. 39; *Floraheim v. Same*, id. 297.

seems to have been the practice in Kentucky, prior to the statute of 1837, giving interest on judgments and decrees, and in other states, to adjudge "accruing" interest on debts which [603] by the terms of the agreement were to bear interest "until paid." The practice was to adjudge interest from the date when it was provided by agreement to commence without any computation to the rendition of the judgment, and it was not included with the principal sum recovered; when the judgment was collected or paid the interest was computed according to the agreement and judgment without rest at the time of the latter. But where interest was recoverable as damages, it was embraced in the judgment. Interest on judgments in that state, prior to 1837, as damages for detention of the money, was not matter of right, but discretionary.¹ Judgments upon contracts stipulating a certain rate of interest until the debt should be paid were entered for accruing interest. The court entered judgment for the debt in the declaration mentioned, and also the legal or conventional interest from the time the debt was due and payable, or the interest stipulated to be given computed until payment should be made.² But since the statute of 1837, giving interest on all judgments, it is error to render judgment in a suit on a bill of exchange for principal and interest by way of damages, by which interest would run after judgment by force of the statute.³ In debt on a judgment bearing interest, if the plaintiff demanded only principal and interest accrued at the commencement of the action, he could not have judgment for accruing interest.⁴ But generally, under stat-

¹ *Lair v. Jelf*, 3 Dana, 181; *West v. Patrick's Adm'r*, 1 J. J. Marsh. 95; *Shockey's Adm'r v. Glasford*, 6 Dana, 16; *Marshall v. Dudley*, 4 J. J. Marsh. 245; *Caldwell v. Richards*, 2 Bibb, 331; *Guthrie v. Wickliffe*, 4 id. 542, 7 Am. Dec. 746; *Smith's Adm'r v. Todd's Ex'r*, 3 J. J. Marsh. 306, 20 Am. Dec. 142; *Bartlett v. Blanton*, 4 J. J. Marsh. 440; *McMillan v. Scott*, 1 T. B. Mon. 150.

² *Harden v. Major*, 4 Bibb, 104; *Taul v. Moore*, Hardin, 90; *Cotton v. Reavill*, 2 Bibb, 99; *Russell v. Shep-*

herd, Hardin, 44; *Harper v. Bell*, 2 Bibb, 221; *Troxwell v. Fugate*, Hardin, 2. See *Henderson v. Desha*, Hemp. C. C. 231. But see also *Byrd v. Gasquet*, id. 261.

³ *Chamberlain v. Maitland*, 5 B. Mon. 448.

⁴ *Caldwell v. Richards*, 2 Bibb, 332.

Where a creditor obtained a judgment at law, and then came into a court of equity to foreclose a mortgage for the same debt, it was held that interest should not be decreed, the judgment not bearing it; but the

utes allowing judgments to be taken upon contracts to [604] bear interest thereafter at the contract rate, the correct rule is to add the interest due on the principal up to the time of the judgment to the principal, and enter the judgment for the gross amount; and this judgment, including both principal and interest, is then to bear the interest stipulated in the contract until the debt is paid.¹ A final decree for alimony carries interest upon unpaid alimony allowed in a former decree from the date of the maturity of each instalment, and upon unpaid counsel fees from the date of the original decree; but costs of the original trial do not bear interest.² On the affirmance of a judgment the trial court should enter judgment for the amount of the original judgment, with interest thereon, but it should not include as part of the principal interest on the interest due when the original judgment was first rendered.³ Under a statute providing that on the affirmance of a money judgment, the execution of which has been stayed, the judgment shall bear an additional rate of interest to be fixed by the court, the rate so fixed does not continue after the mandate of the court has reached the trial court, because execution of it is no longer stayed. The interest so imposed should not be compounded by computing the amount due up

judgment be taken as the amount to be paid. *Heydle v. Hazlehurst*, 4 Bibb, 19. See *Brigham v. Van Buskirk*, 6 B. Mon. 197, holding that by the statute of 1837 the intention was to establish the principle that debts established by judgment or decree should bear interest from that time unless by the terms of the judgment they bore interest from a prior day.

¹*Guy v. Franklin*, 5 Cal. 416; *Emerie v. Tains*, 6 id. 155; *McCann v. Lewis*, 9 id. 246; *Mount v. Chapman*, id. 297; *Corcoran v. Doll*, 32 id. 82; *Bibend v. Liverpool, etc. Ins. Co.*, 30 id. 78; *Coles v. Kelsey*, 13 Tex. 75; *Palmer v. Murray*, 8 Mont. 312, 19 Pac. Rep. 553, overruling earlier cases; *Havemeyer v. Paul*, 15 Neb. 373, 389, 63 N. W. Rep. 932; *Connecticut Mut. L. Ins. Co. v. Westerhoff*, 58

Neb. 379, 73 N. W. Rep. 724, 79 id. 731, 76 Am. St. 101.

Under a statute which provides that "when a decree or judgment is rendered or made for the payment of money it shall be for the aggregate of principal and interest due at the time of judgment or decree, with interest thereon from that date," when a decree has once been made for the principal and interest to that date a second aggregation of the same debt in the same cause in subsequent decrees for the payment of the original decree is unauthorized. *Tierman v. Minghini*, 28 W. Va. 314, 323.

²*Huellmantel v. Huellmantel*, 124 Cal. 583, 57 Pac. Rep. 582.

³*Brane v. Portland*, 35 Ore. 471, 58 Pac. Rep. 861, 59 id. 117, 60 id. 378.

to the time of the order in the higher court, and then computing interest thereon upon the whole sum.¹ Equity follows the law and allows interest in like cases.² On debts on which interest would be given as damages at law, it is decreed in chancery down to the time of the decree.³

§ 335. *Not allowed on revival of judgment by scire facias.* Accrued interest on a judgment is lost by reviving it by *scire facias*. Nearly all the authorities agree that the judgment in such proceedings does not include interest on the judgment revived; the party reviving only obtains execution of the judgment without interest.⁴ And it has been held in Vermont that the revival of the judgment by such process is a final waiver and renunciation of the interest which had accrued up to the [605] time of the new judgment on the *scire facias*.⁵ But it is held in Pennsylvania that bringing *scire facias* does not extinguish the right to interest. Where a judgment had been

¹ *Syndicate Improvement Co. v. Bradley*, 7 Wyo. 228, 51 Pac. Rep. 242, 52 id. 532.

² *Linton v. National L. Ins. Co.*, 44 C. C. A. 54, 104 Fed. Rep. 584; *Baker v. Cummings*, 8 D. C. App. Cas. 515; *Connecticut Mut. L. Ins. Co. v. Stinson*, 86 Ill. App. 663; *Morse v. Pacific R. Co.*, 93 Ill. App. 33; *Samuel v. Minter*, 3 A. K. Marsh. 480; *McAlexander v. Lee*, id. 483; *Moore v. Pendergrast's Heirs*, 6 J. J. Marsh. 534; *Taylor v. Knox's Ex'rs*, 5 Dana, 466; *Hammond v. Hammond*, 2 Bland's Ch. 306.

³ *Deany v. Scriba*, 2 Call, 415; *Dawson v. Clay's Heirs*, 1 J. J. Marsh. 165; *Lair v. Jelf*, 3 Dana, 181; *Hughes v. Standeford*, id. 285.

⁴ *Anonymous*, Mart. & Hayw. 183; *Mann v. Taylor*, 1 McCord, 113. See *Barron v. Morrison*, 44 N. H. 226.

⁵ *Hall v. Hall*, 8 Vt. 156. In this case Redfield, chancellor, said: "It is well settled that on *scire facias* to revive a judgment no damages can be awarded. The writ claims none. The object of the suit is merely to revive the judgment, and no interest can be added to it; exe-

cution upon the judgment in *scire facias* must issue for the same sum of the original judgment. At common law, not only could no damages be recovered, but no costs, until the statute of 8 & 9 Wm. 3, ch. 11, which provides for costs. 14 Petersdorf, 386. As the debtor had been discharged on *habeas corpus*, no good reason is now perceived why the oratrix might not have brought debt upon the judgment. *Scire facias* is the most common, although not the exclusive, remedy. But the judgment having been revived by *scire facias*, the plaintiff failed, of course, of obtaining execution of the interest which had accrued; and we think thus lost the claim of interest. It will not be allowed to separate the interest from the debt of which it is a mere incident. The judgment upon the *scire facias* so far merged the judgment for the alimony that the portion not recovered by the levy was gone. It became a new debt, and could never be declared upon as a judgment of any other term than that of the judgment on the *scire facias*."

several times so revived, the plaintiff, in an action on it, had a right to charge interest on the aggregate amount of principal and interest due at the time of rendering judgment on each *scire facias*.¹

§ 336. Interest in condemnation proceedings. Interest is allowed on the damages assessed in proceedings to condemn property in the exercise of the power of eminent domain, if the property has been taken,² and from the time of the taking though proceedings are not instituted until subsequently,³ and it will run during the pendency of an appeal if the assessment appealed from is confirmed or increased;⁴ but not otherwise.⁵

¹ Fries v. Watson, 5 S. & R. 220. See Meason's Estate, 4 Watts, 341.

It is said in an amicable action to revive and continue the lien of a judgment that the statute does not require that the amount of principal and interest then due should be liquidated. A general judgment upon the *scire facias* to revive that judgment is all that is prescribed. No doubt it may often be advisable, where no interest has been paid, to ascertain the amount of the debt; but the judgment of revival points the subsequent purchaser or incumbrancer directly to the original judgment where the amount is fixed, and a simple calculation ascertains the interest due upon it. Appeal of Fogelsville Loan & Building Ass'n, 89 Pa. 293; Kistler v. Mosser, 140 Pa. 367, 21 Atl. Rep. 357.

Where there was an amicable revival of a judgment for \$500, upon which interest was due, for "\$500, with interest," it was held that the judgment bore interest from the date of its revival only, and that interest prior thereto could not be allowed to the prejudice of a subsequent incumbrancer. Kistler v. Mosser, *supra*. See In re Assigned Estate of McCamant, 6 Delaware Co. Rep. 192, 12 Lancaster L. Rev. 251.

² Phillips v. South Park Com'rs, 119 Ill. 627, 10 N. E. Rep. 230; Alloyway v. Nashville, 88 Tenn. 510, 13 S. W. Rep. 123, 8 L. R. A. 123; Clough v. Unity, 18 N. H. 75; Cook v. South Park Com'rs, 61 Ill. 115; Commonwealth v. Boston, etc. R., 3 Cush. 25; Chicago v. Palmer, 93 Ill. 125; Reed v. Hanover Branch R. Co., 105 Mass. 303; Atlantic, etc. R. Co. v. Koblenz, 21 Ohio St. 334. See South Park Com'rs v. Dunlevy, 91 Ill. 49, and § 1091, where the subject is more fully considered.

³ Velte v. United States, 76 Wis. 278, 45 N. W. Rep. 119; Sweaney v. United States, 62 Wis. 396, 22 N. W. Rep. 609.

⁴ Illinois, etc. R. Co. v. McClintock, 68 Ill. 296; Beebe v. Newark, 24 N. J. L. 47.

If the condemning party, notwithstanding an appeal, may deposit the money for the use of the land-owner or give security for the costs and damages which may be awarded on appeal, and if the money deposited may be taken without prejudice to the owner's right to appeal, interest is only allowable on the amount finally awarded, in excess of the deposit; if no deposit is made, interest on the whole amount is due. Concord R. Co. v. Greeley, 23 N. H. 237;

⁵ Reisner v. Atchison Union Depot Co., 27 Kan. 382.

The right to interest will be affected by circumstances. If the owner has had the profitable use of the premises, or has received rents pending the appeal, these facts should be taken into account, and interest abated accordingly.¹ So if the owner appeals and is the sole occupant, interest should not be allowed.² But if the condemning party also appeals, interest should be allowed where collection is thereby stayed.³ Before possession is taken interest is not allowed; until then there is a *locus penitentia* to those moving the condemnation,⁴ and the [606] money is not considered as detained.⁵ If the first assessment is set aside on motion of a railroad corporation, which has instituted proceedings for condemnation of private property and taken possession, it is competent for the jury, in making a second assessment, to allow and include in their verdict interest from the time when possession was taken, although the company had paid into court the amount of the damages, and the sum continued to be retained by the court.⁶ The state is liable to pay interest upon the amount of a legal appraisal of damages for land taken for public use only after a demand made by the party entitled of the officers of the law charged with the duty of making payment;⁷ and so with a city where an award is payable upon its confirmation.⁸ If a city is not authorized to institute proceedings for the ascertainment of the damages resulting to property owners from a

Shattuck v. Wilton R. Co., id. 269. But if the owner may not take the money deposited under the award of the commissioners and the party condemning may occupy the land, the former is entitled to interest from the time compensation was due him, the damages given being increased on the appeal. *Sioux City R. Co. v. Brown*, 13 Neb. 317, 14 N. W. Rep. 407; *Hayes v. Chicago, etc. R. Co.*, 64 Iowa, 753, 19 N. W. Rep. 245; *West v. Milwaukee, etc. R. Co.*, 56 Wis. 318, 14 N. W. Rep. 292; *Unick v. Chicago, etc. R. Co.*, 67 Wis. 108, 29 N. W. Rep. 899.

¹ *Donnelly v. Brooklyn*, 121 N. Y. 9, 24 N. E. Rep. 17; *Hamersly v. Mayor*, 56 N. Y. 533; *Hilton v. St. Louis*, 99

Mo. 199, 12 S. W. Rep. 657; *West v. Milwaukee, etc. R. Co.*, *supra*; *Metler v. Easton, etc. R. Co.*, 36 N. J. L. 222.

² *Metler v. Easton, etc. R. Co.*, *supra*; *Matter of Trustees of New York & Brooklyn Bridge*, 137 N. Y. 95, 32 N. E. Rep. 1054.

³ *Metler v. Easton, etc. R. Co.*, *supra*.

⁴ *Chicago v. Barbican*, 80 Ill. 482.

⁵ *Fisk v. Chesterfield*, 14 N. H. 240. But see *Beveridge v. West Chicago Park Com'rs*, 100 Ill. 75.

⁶ *Atlantic, etc. R. Co. v. Koblenz*, 21 Ohio St. 334; *Beebe v. Newark*, 24 N. J. L. 47.

⁷ *People v. Canal Com'rs*, 5 Denio, 401.

⁸ *Barnes v. Mayor*, 27 Hun, 236.

change in the grade of streets the party claiming compensation cannot recover interest thereon until he exercises his right to have the damages liquidated, and interest will be allowed only from the time he began proceedings for that purpose.¹ But if the municipality may take the initiative the property owner is entitled to interest from the time the damages were sustained.² In Pennsylvania interest as such is not allowed in actions sounding in tort when the damages sought to be recovered are unliquidated. In condemnation proceedings the jury may consider the lapse of time between the taking of the land and the trial in making up the damages.³

§ 337. **Interest on taxes and license fees.** Taxes do not draw interest as contracts or as damages except by force of a statute.⁴ A county is not liable to the state for interest on taxes by way of damages.⁵ If taxes are illegally demanded and paid under protest interest may be recovered.⁶ One who secures an abatement of his taxes is entitled to interest on the

¹ *Tyson v. Milwaukee*, 59 Wis. 78, 5 N. W. Rep. 914.

² *Cincinnati v. Whetstone*, 47 Ohio St. 196, 24 N. E. Rep. 409.

³ *Klages v. Philadelphia & R. Terminal Co.*, 150 Pa. 386, 28 Atl. Rep. 862; *Becker v. Same*, 177 Pa. 252, 35 Atl. Rep. 617.

⁴ *Illinois Central R. Co. v. Adams*, 78 Miss. 895, 29 So. Rep. 996; *Camden v. Allen*, 26 N. J. L. 398; *Shaw v. Peckett*, 26 Vt. 482; *Danforth v. Williams*, 9 Mass. 324; *Haskell v. Bartlett*, 34 Cal. 281; *Himmelman v. Oliver*, id. 246; *Perry v. Washburn*, 20 Cal. 318; *Perry County v. Selma*, etc. R. Co., 65 Ala. 391; *Louisville, etc. R. Co. v. Commonwealth*, 89 Ky. 531, 12 S. W. Rep. 1064; *Ormsby v. Louisville*, 79 Ky. 202; *People v. Central Pacific R. Co.*, 105 Cal. 576, 33 Pac. Rep. 905.

A statute declaring that every tax has the effect of a judgment against the person does not impose liability for interest on taxes; but a judgment for taxes bears interest like any other

judgment. *People v. Central Pacific R. Co.*, *supra*.

⁵ *State v. Multnomah County*, 13 Ore. 287, 10 Pac. Rep. 635.

A statute imposing liability for interest in case of delay by county treasurers in paying over state taxes applies to other officers who perform duties such as are imposed upon such treasurers. *People v. Myers*, 138 N. Y. 590, 34 N. E. Rep. 372.

If, through neglect of the state's officers, a county treasurer fails to make a prompt return of the tax due the state and afterwards embezzles it, the county is not liable for interest on that part of the money which the state must return to it. *Commonwealth v. Philadelphia County*, 157 Pa. 531, 27 Atl. Rep. 546; *Commonwealth v. Philadelphia City & County*, 157 Pa. 555, 27 Atl. Rep. 553.

⁶ *Atwell v. Zeluff*, 26 Mich. 118; *Shaw v. Becket*, 7 Cush. 442; *Galveston County v. Galveston Gas Co.*, 73 Tex. 509, 10 S. W. Rep. 583; *Pennsylvania Co. v. McClain*, 9 Pa. Dist. Ct. Rep. 747.

sum paid in excess of that which he was liable for.¹ Under the Michigan law concerning the taxation of railroads, though the reports of a company to the auditor-general correctly show its gross earnings, interest is not demandable for delay in paying the amount thereby appearing to be due until that officer acts upon the reports and notifies the company.² An assessment made for public improvements does not carry interest unless it is so expressed in the statute.³ If liability for interest on taxes is imposed a taxpayer who appeals from an excessive assessment is not exempted therefrom to the extent that the assessment is sustained, neither does interest cease during the time the assessment is being reviewed unless he tenders enough money to meet his liability.⁴ A fee required to be paid by a foreign insurance company as a condition imposed upon its right to do business is not a tax, and if the privilege is applied for, obtained and used without making the required payment the company is responsible for the fee and for interest upon it.⁵ Under a statute prescribing that all executions for taxes shall bear interest taxes accruing against a railroad company while its property is in the hands of a receiver are included. Such a provision does not impose a penalty.⁶

§ 338. *Infants liable for.* It was the conviction of Lord Ellenborough that an infant could not give security for a debt, and that his bond conditioned for the payment of the principal sum and interest was clearly prejudicial.⁷ Following this view it was held in Vermont that interest could not be allowed on an account against a minor,⁸ but this position was soon receded

¹ *Amoskeag Manuf. Co. v. Manchester*, 70 N. H. 336, 348, 47 Atl. Rep. 74.

² *Lake Shore, etc. R. v. People*, 46 Mich. 193, 9 N. W. Rep. 249.

³ *Road Com'rs v. Hudson*, 45 N. J. L. 173; *Brenner v. Farrier*, 47 id. 75; *Mall v. Portland*, 35 Ore. 89, 56 Pac. Rep. 64; *Sargent v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. Rep. 828.

⁴ *Western U. Tel. Co. v. State*, 64 N. H. 267, 9 Atl. Rep. 547; *Hartford v. Hills*, 72 Conn. 599, 45 Atl. Rep. 433.

⁵ *Travelers' Ins. Co. v. Fricke*, 99 Wis. 367, 41 L. R. A. 557, 74 N. W. Rep. 372, 78 id. 407; *Southern Car & F. Co. v. State*, 133 Ala. 624, 32 So. Rep. 235.

A license fee is a tax under some circumstances. See *Mays v. Cincinnati*, 1 Ohio St. 263; *State v. Roberts*, 11 Gill & J. 506.

⁶ *Sparks v. Lowndes County*, 98 Ga. 284, 25 S. E. Rep. 426.

⁷ *Fisher v. Mowbray*, 8 East, 330; *Baylis v. Dinely*, 3 M. & S. 477.

⁸ *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228.

from on the ground that any general rule exempting infants from interest would be unjust.¹

§ 339. *Allowed on sums due for rent.* Interest is allowable in personal actions for the recovery of specific sums agreed to be paid for rent after the same become due and in arrears on the principles that apply to other debts after it becomes the debtor's duty to pay.² In New York and Wisconsin it is

¹ *Bradley v. Pratt*, 23 Vt. 378.

² *Vandevoot v. Gould*, 36 N. Y. 639; *Hack v. Norris*, 46 Mich. 587, 10 N. W. Rep. 104; *Heissler v. Stose*, 131 Ill. 393, 23 N. E. Rep. 347; *Pearson v. Sanderson*, 128 Ill. 88, 21 N. E. Rep. 200 (appraisement of improvements made under terms of a lease; interest allowed from time appraisement made); *Elkin v. Moore*, 6 B. Mon. 462; *Honore v. Murray*, 3 Dana, 31; *Walker v. Haddock*, 14 Ill. 399; *Buck v. Fisher*, 4 Whart. 516; *Ten Eyck v. Houghtaling*, 12 How. Pr. 523; *Obermeyer v. Nichols*, 6 Bin. 159, 6 Am. Dec. 439; *Cook v. Farinholt*, 3 Ala. 384; *Naglee v. Ingersoll*, 7 Pa. 185; *Clark v. Barlow*, 4 Johns. 183; *Dennison v. Lee*, 6 Gill & J. 383; *West Chicago Alcohol Works v. Sheer*, 8 Ill. App. 367. See § 854.

In *Jackson v. Wood*, 24 Wend. 413, it was held that in ascertaining the *mesne* profits or the rents of premises situate in New York city, interest may be computed upon rents from the expiration of the quarter days when payable.

In *Stockton's Adm'r v. Guthrie*, 5 Harr. 204, it was held that interest is recoverable for arrears of rent payable in money on a day certain, though the letting be by parol from year to year. Bayard, J.: "It is sufficient to determine that in this state, whenever a sum certain is payable by contract on a day certain, interest is recoverable of right against the party in default; and thus whether the contract be under seal in writing or merely verbal.

The interest is allowed as a legal incident to the principal sum existing from the default in the non-performance of his contract by the debtor, whenever there is a certainty in the sum to be paid and the time of payment; nor can any sufficient reason be given for a distinction in the allowance of interest between contracts for the payment of money under seal or in writing and verbal contracts. The contract being valid the breach is as injurious to the creditor in the one case as in the other and the exact character of the act or duty to be performed as fully ascertained in the one case as in the other, and the consequences of the default should therefore be the same. There would seem to be but one exception to this rule, and that is where interest becomes due on a principal sum on a day certain; yet interest on the interest so in arrears is not recoverable. This exception is founded on the statute which prohibits the taking of more than a certain rate of interest for the use or loan of money; and until the interest in arrears is severed from the principal sum by the agreement of the parties it has been held that it cannot be treated as a new loan. Arrears of rent, however, have no analogy to arrears of interest, and fall neither within the words or intent of the statute. In the case of lands, whether the fee or a life estate be parted with, there can be in reason no difference in the right to interest on the sum payable for the

[607] settled that when the rent is payable in specified kinds of property which the tenant has failed to deliver, interest is recoverable on the value of the rent from the time it became payable.¹ When, however, the landlord seeks his remedy for rent by distress or by re-entry, to hold until the arrears are paid, this remedy does not extend to the interest.² A lessee who is ejected is entitled to interest on the fair value of the leased premises to him.³

§ 340. **Interest on damages for infringing patents.** "The general rule is that interest should be allowed on royalties from the time those royalties ought to have been paid, in all cases where a royalty is the measure of the complainant's damages; the theory in such cases being that damages are liquidated at such time as the royalty would have been due if

estate acquired by the vendee or tenant; provided it is payable in money on a day certain, and no question could be made as to the right of the vendor to recover interest on the unpaid purchase-money of land sold in fee from the time it became payable, whether there was an express stipulation for the payment of interest or not. Nor can any difference or distinction as to the right to interest arise from the fact that no greater estate at law in lands can, in Delaware, be granted than for one year except by deed; for the estate acquired by the tenant from year to year, holding under a verbal contract, for a sum certain, is just as valid as that acquired by the lessee for a term of years, or a vendee in fee under a demise or conveyance by deed. The tenant equally with the lessee for years, or the vendee, acquires the estate for which he is to pay by a contract ascertaining and fixing the sum to be paid, and the day of payment, and in default of payment interest should equally follow as of right in either case. It may be observed that the allowance of interest is, in general, a rule of practice (In re Badger, 2

Barn. & Ald. 691, and *Windle v. Andrews*, id. 696); and in this state the practice of allowing interest on arrears of rent has been uniform and settled." But see *Breckenridge v. Brooks*, 2 A. K. Marsh. 335, 12 Am. Dec. 401; *Cooke v. Wise*, 2 Hen. & M. 463; *Skipweth v. Clinch*, 2 Call, 253; *Graham v. Woodson*, id. 249; *Kyle v. Roberts*, 6 Leigh, 495; *Van Rensselaer v. Platner*, 1 Johns. 276; *Dowe v. Adams*, 5 Munf. 21.

¹ *Lush v. Druse*, 4 Wend. 313; *Van Rensselaer v. Jones*, 2 Barb. 643; *Livingston v. Miller*, 11 N. Y. 80; *Van Rensselaer v. Jewett*, 2 id. 135, 5 Denio, 135; *Vaughan v. Howe*, 20 Wis. 523, 91 Am. Dec. 436; *Gammon v. Abrams*, 53 Wis. 323, 10 N. W. Rep. 479.

² *Tanton v. Boonsgaarden*, 89 Ill. App. 500; *Marr v. Ray*, 151 Ill. 340, 37 N. E. Rep. 1029; *Lansing v. Rattoone*, 6 Johns. 42; *Longuell v. Ridinger*, 1 Gill, 57; *Bantoon v. Smith*, 2 Bin. 146, 4 Am. Dec. 430; *Dougherty's Estate*, 9 W. & S. 189, 42 Am. Dec. 326; *Gaskins v. Gaskins*, 17 S. & R. 390.

³ *Hodgkins v. Price* 141 Mass. 162, 5 N. E. Rep. 502.

the defendant had elected to purchase instead of to infringe the right to the use of the invention in suit, but that no interest is due on damages measured otherwise than by a royalty because such damages are unliquidated until they are ascertained by an action.¹ But the latter part of this rule is subject to exceptions, and in equity the allowance of interest appears to have been left largely to the discretion of the court."² The profits allowed in equity for the injury that a patentee has sustained by the infringement of his patent are unliquidated, and as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained.³

§ 341. **Right to interest as affected by the marital relation.** Wherever the wife has a separate estate which she permits her husband to use, they living together and enjoying the benefits of it, and there is no stipulation that interest shall be paid by him for its use, it will be presumed, in the absence of any circumstances showing a contrary understanding, that the husband is not liable to account for or pay interest thereon.⁴

¹ Walker, Pat., § 571; *Locomotive Safety Truck Co. v. Railroad Co.*, 2 Fed. Rep. 681; *Mowry v. Whitney*, 14 Wall. 653; *Jarecki v. Hays*, 161 Pa. 613, 29 Atl. Rep. 118.

² *Creamer v. Bowers*, 35 Fed. Rep. 206, per Wales, J.

It was held in *Graham v. Plano Manuf. Co.*, 35 Fed. Rep. 597, that the allowance by a court of a named sum for each machine manufactured, as damages for the infringement of a patent, the sum not resting on the basis of a customary charge, does not establish a fixed royalty which may be made the basis to calculate interest upon in favor of the patentee in a subsequent suit for another infringement, damages in which were recovered at the same rate, the patentee having in a third suit contended for a larger measure of damages. See § 1197.

³ *Tilghman v. Proctor*, 125 U. S. 136, 160, 8 Sup. Ct. Rep. 894.

⁴ *Columbia Savings Bank v. Winn*, 132 Mo. 80, 33 S. W. Rep. 457; *Kittel's Estate*, 156 Pa. 445, 26 Atl. Rep. 1116; *Wormley's Estate*, 137 Pa. 101, 20 Atl. Rep. 621; *Lisley v. Lishey*, 2 Tenn. Ch. 5, 6 Lea, 418; *Powell v. Hankey*, 2 P. Wms. 82; *Ridout v. Lewis*, 1 Atk. 269; *Roach v. Bennett*, 24 Miss. 98; *Logan v. Hall*, 19 Iowa, 491; *Hamill's Appeal*, 88 Pa. 363.

"It is well settled that a husband who receives any portion of the principal of his wife's separate estate becomes, in the absence of an agreement controlling his reception of it, her debtor for the amount so received, but he is not, as a general rule, chargeable with interest upon it. It lies on him to show the agreement which relieves him from the payment of the principal, and on her to show the agreement which entitles her to interest, but the agreement, in either case, may be implied from the circumstances attending

The fact that he is the trustee of his wife's estate does not affect the legal presumption.¹ But if, from the mode of dealing between them, there are any circumstances from which it may reasonably be inferred that the intention was to charge interest, the husband will be liable for it.² If a portion of the purchase price of property bought by a husband is contributed by the wife and the title is taken in her name, she will not be entitled to interest on her investment therein so long as they continue to live on the property; but if the husband severs the ownership of it and treats the proceeds of the property as his own and both parties move away from the property, he is chargeable in equity with interest on her money.³ A wife who has bequeathed to her a mortgage against her husband on land on which they had lived together, there being no formal promise to pay interest except to the testator, cannot recover interest from the sheriff's vendee of the land except from the date of the sale, notwithstanding the husband had paid the wife interest for several years, he having quit doing so. The fact that he had always supplied her with money for necessities for herself and family, which she regarded as in lieu or satisfaction of the interest, was considered as raising the presumption that she did not intend to claim interest.⁴ To recover interest from her husband for money loaned to him, the wife must prove an agreement or promise that entitles her to it. His obligation to pay interest cannot be presumed, but his agreement to do so may be inferred from the circumstances attending the loan.⁵

§ 342. **Interest as between partners.** The right to interest on partnership accounts and dealings, in the absence of agreement to pay it, may depend upon the practice of each particular firm or on the custom of the trade in which it is engaged.⁶ In the absence of both of these or an express agreement, the

the transaction." *Hauer's Estate*, 140 Pa. 420, 23 Am. St. 245, 21 Atl. Rep. 445.

¹ *Lishey v. Lishey*, *supra*; *Caton v. Rideout*, 1 Macn. & G. 599.

² *Roach v. Bennett*, *supra*; *Keady v. White*, 168 Ill. 76, 48 N. E. Rep. 314; *Grubbe v. Grubbe*, 26 Ore. 363, 38 Pac. Rep. 182.

³ *Moore v. Moore*, 165 Pa. 464, 30 Atl. Rep. 932.

⁴ *Stuart v. Stuart*, 182 Pa. 543, 38 Atl. Rep. 409.

⁵ *Cornman's Estate*, 197 Pa. 125, 46 Atl. Rep. 940.

⁶ *Morris v. Allen*, 14 N. J. Eq. 44; *Miller v. Craig*, 6 Beav. 433.

rule is that interest cannot be recovered on capital paid in.¹ If no demand has been made on a partner who has failed to furnish the amount due under his agreement as capital and the business has not required it, interest, according to the Nebraska court, is not recoverable on the deficiency on a final accounting; but this may be doubted.² Though it is agreed that capital shall bear interest the contract ceases to operate on the dissolution of the partnership because its earning capacity is then ended and it is no longer beneficial to the other partners in making profits, but is resolved into property held only for the purpose of distribution.³ But in Texas a surviving partner engaged in settling the partnership business may recover interest accruing upon advancements after the death of his co-partner, as well as before, interest being stipulated for in the contract of partnership.⁴ An advance by a partner to the firm is not treated in England and in some American courts as an increase of his capital, but rather as a loan on which interest ought to be paid, and by usage it is payable on money *bona fide* advanced and used for partnership purposes, the advance being made with the knowledge of the other partners.⁵ But in the absence of usage or contract interest is not allowed on advances.⁶ Such a general statement of the rule is not to be

¹ Wilson v. Wilkinson, 97 Ga. 814, 25 S. E. Rep. 908; Burgher v. Burgher, 12 Ky. L. Rep. 95 (Ky. Super. Ct.); Gilmour's Adm'r v. Kerr's Ex'r, 18 Ky. L. Rep. 400, 25 S. W. Rep. 270; Rodgers v. Clement, 162 N. Y. 422, 76 Am. St. 342, 56 N. E. Rep. 901; Smith v. Putnam, 107 Wis. 155, 168, 82 N. W. Rep. 1077, 83 id. 288; Tirrell v. Jones, 39 Cal. 655; Day v. Lockwood, 24 Conn. 185, 198; Sanford v. Barney, 50 Hun, 108, 4 N. Y. Supp. 500; Seibert's Assignee v. Ragsdale, 103 Ky. 296, 41 S. W. 653; Tutt v. Land, 50 Ga. 350; Desha v. Smith, 20 Ala. 747. Compare Reynolds v. Mardis, 17 id. 32.

Monthly balances in partnership transactions do not fairly represent new principal, and interest on them is not compoundable. Wells v. Babcock, 56 Mich. 276, 22 N. W. Rep. 809, 27 id. 575.

² Clark v. Worden, 10 Neb. 87, 4 N. W. Rep. 413. The contrary is assumed, without discussion, in Krapp v. Aderholt, 42 Kan. 247, 21 Pac. Rep. 1063. In accord with the latter case is Delp v. Edlis, 190 Pa. 25, 42 Atl. Rep. 462.

³ St. Paul Trust Co. v. Finch, 53 Minn. 342, 54 N. W. Rep. 190; Watney v. Wells, L. R. 2 Ch. 250; Bartfield v. Loughborough, L. R. 8 Ch. 1.

⁴ Gresham v. Harcourt, 93 Tex. 149, 53 S. W. Rep. 1019.

⁵ 1 Lindley's Part. *390 (2d Am. ed.); Ex parte Chippendale, 4 De G., M. & G. 36; Denton v. Rodie, 3 Camp. 491; Baker v. Mayo, 129 Mass. 517; Berry v. Folkes, 60 Miss. 576; Matthews v. Adams, 84 Md. 143, 35 Atl. Rep. 60; Hill v. Beach, 12 N. J. Eq. 31; Uhler v. Semple, 20 N. J. Eq. 288.

⁶ Godfrey v. White, 43 Mich. 171, 5

accepted literally; but as meaning that if the moneys paid or advanced for the use of the firm were in fact loans, and the partner who furnished them was a creditor of the firm, he stands upon the same footing as any other creditor with respect to the right to interest upon an accounting. "A partner may loan money to the firm of which he is a member, and when he does his right to interest is to be determined in the same way as that of any other creditor. In such cases the general rule is to allow interest upon the advances, although there was no express agreement by the firm to pay it, in the absence of some agreement to the contrary, express or implied. The right to interest, or an agreement to pay or allow it, is to be implied in such cases without any express promise, as in like transactions between parties holding no partnership relations to each other.¹ A partner who executes a note soon after an adjustment of the firm accounts, whereby an equal partnership is formed, which note is for the benefit of the firm, is entitled, in a subsequent accounting, to credit for interest paid by him on the note, although the maker of it was to furnish the money necessary to conduct the partnership business.² The rule which applies to unliquidated demands governs in the case of partnership accounts; and ordinarily interest will not be allowed on the latter until a balance has been struck,³ if there has been no unreason-

N. W. Rep. 243; *Sweeney v. Neely*, 53 Mich. 421, 19 N. W. Rep. 127; *Prentice v. Elliott*, 72 Ga. 154.

A partner cannot claim interest on money in his possession which was produced by the business of the firm as an advance thereof by him. *Wells v. Babcock*, 56 Mich. 276, 22 N. W. Rep. 809, 27 id. 575.

¹ *Rodgers v. Clement*, 162 N. Y. 422, 56 N. E. Rep. 901, 76 Am. St. 342, citing many New York cases, and *Morris v. Allen*, 14 N. J. Eq. 44; *Baker v. Mayo*, 129 Mass. 517; *In re German Mining Co.*, 4 De G., M. & G. 35; *In re Norwich Yarn Co.*, 22 Beav. 143, 168; *Tronp's Case*, 29 Beav. 353; *In re Beulah Park Estate*, L. R. 15 Eq. 43; *Hodges v. Parker*, 17 Vt. 242, 44 Am. Dec. 331; *Ligare v. Peacock*,

109 Ill. 94; *Matthews v. Adams*, 84 Md. 143, 35 Atl. Rep. 60. *Grant v. Smith*, 70 App. Div. 301, 75 N. Y. Supp. 82, is to the same effect.

² *Hake v. Coach*, 114 Mich. 558, 72 N. W. Rep. 623.

³ *Kemmerer v. Kemmerer*, 85 Iowa, 193, 52 N. W. Rep. 194; *Wendling v. Jennisch*, 85 Iowa, 392, 52 N. W. Rep. 341; *Dexter v. Arnold*, 3 Mason, 284; *Day v. Lockwood*, 24 Conn. 185; *Lee v. Lashbrooke*, 8 Dana, 214; *Prentice v. Elliott*, 72 Ga. 154; *Smith v. Knight*, 88 Iowa, 257, 55 N. W. Rep. 189; *Jones v. Farquhar*, 186 Pa. 386, 396, 40 Atl. Rep. 1034; *Gilman v. Vaughan*, 44 Wis. 646; *Gage v. Parmalle*, 87 Ill. 330; *McKay v. Overton*, 65 Tex. 82; *Sweeney v. Neely*, 53 Mich. 421, 19 N. W. Rep. 127.

able delay in arriving at a settlement.¹ And if there is uncertainty as to the state of the accounts interest will not be allowed anterior to the institution of the action.² The allowance or disallowance of interest is largely governed by the circumstances of the individual case, the character of the claim, as well as the vigilance or laches of the party who demands it. If unusual delay in prosecuting litigation is attributable to the parties that may be a cause for denying the claim for interest, although the accounts have been preserved,³ and there will be a more cogent reason for so doing if they have been lost.⁴ Interest has been allowed where a partner had withdrawn largely more than he was entitled to do from the firm treasury and used the money for personal purposes, harm resulting to the other partners,⁵ and where a partner, after the dissolution of the firm, had retained money due his copartners.⁶ "Ordinarily, interest on the balance found due to a partner at the dissolution of a partnership will be allowed from the date of the dis-

A claim for loss of capital stock does not bear interest until a balance has been found. *Juillard v. Orem's Ex'rs*, 70 Md. 465, 17 Atl. Rep. 333.

In *McCormick v. McCormick*, 7 Neb. 440, all the partners drew out such sums as they pleased, which were charged on the books, and all except the plaintiff so largely over-drew that in consequence of bad debts the capital was thereby impaired to such an extent that money had to be borrowed to take its place. The plaintiff claimed that he was entitled to interest on what was due at each annual rest from the time the capital was so impaired that money had to be borrowed; but it was held that he was not thus entitled, for that the deficiency arose from bad debts that were regarded as assets without considering whether they were collectible, and those overdrawing did not intend thereby to cripple, much less to bankrupt, the firm. *Atherton v. Whitcomb*, 66 Vt. 447, 29 Atl. Rep. 671, approves the case stated.

¹*Magilton v. Stevenson*, 173 Pa. 560, 34 Atl. Rep. 235; *Brownell v. Steere*, 138 Ill. 209, 21 N. E. Rep. 3.

²*Carroll v. Little*, 73 Wis. 52, 40 N. W. Rep. 582; *Green v. Stacy*, 90 Wis. 46, 62 N. W. Rep. 627.

If one of two persons engaged in a joint enterprise, not amounting to a partnership, is liable to account to the other, but unnecessarily fails to do so, he will be liable for interest from the time when the account could have first been stated. *Jones v. Farquhar*, 186 Pa. 400, 40 Atl. Rep. 1134.

³*Hunt v. Smith*, 3 Rich. Eq. 465, 520; *Brenner v. Carter*, 10 Pa. Dist. Rep. 457, 203 Pa. 75, 52 Atl. Rep. 178; *Carter v. Producers' Oil Co.*, 200 Pa. 579, 50 Atl. Rep. 167.

⁴*Smith v. Smith*, 18 R. L. 722, 39 Atl. Rep. 584.

⁵*Masonic Savings Bank v. Bangs' Adm'r*, 10 S. W. Rep. 633 (Ky.).

⁶*Wells v. Babcock*, 50 Mich. 276, 23 N. W. Rep. 809, 27 Id. 575.

solution, or from such date as would afford a reasonable opportunity to close up the partnership business.¹ A partner who, on the dissolution of the partnership, holds the assets and property of the firm and is intrusted with the duty of winding up its affairs, is chargeable with interest, as between himself and copartner, if he mingles the money of the firm with his own or neglects unreasonably to settle his accounts."² In Illinois, under a statute, the delay of payment which subjects a surviving partner to liability for interest on money received in settling the partnership affairs must be both unreasonable and vexatious;³ but these aggravating circumstances are not everywhere essential.⁴ A partner who has the firm property in possession for the purpose of winding up the partnership affairs is not liable for interest if there has been no mismanagement, and the delay in settlement is the result of mutual fault.⁵ If the partnership property is used by the surviving partner for his individual benefit and the business is so conducted that he cannot make an accounting, he will be charged with the rental value of it in lieu of interest.⁶ A partner who, prior to the dissolution of the firm, is allowed to take its property is liable for interest on its value from the date he appropriated it.⁷ Where by mistake a sum largely in excess of that due had been paid a partner as his share of the firm profits, interest was allowed from the time the money was received;⁸ but where the overpayment was the result of a mutual and innocent mistake interest was allowed only from the time of demand.⁹

§ 343. Interest on stockholders' statutory liability. The liability of the stockholders of an insolvent national bank under

¹ Allen v. Woonsocket Co., 13 R. I. 146.

² Per Torrance, J., in Buckley v. Kelly, 70 Conn. 411, 39 Atl. Rep. 601; Dunlap v. Watson, 124 Mass. 305; Crabtree v. Randall, 133 Mass. 552; Robbins v. Laswell, 58 Ill. 203.

³ Maynard v. Richards, 166 Ill. 466, 46 N. E. Rep. 1138, 57 Am. St. 145.

⁴ Powell v. Horrell, 92 Mo. App. 406; Campbell v. Coquard, 93 Mo. 474, 6 S. W. Rep. 360.

⁵ Randolph v. Inman, 172 Ill. 575,

50 N. E. Rep. 104; Snell v. Taylor, 182 Ill. 473, 55 N. E. Rep. 545, 79 Ill. App. 462.

⁶ Smith v. Knight, 88 Iowa, 257, 55 N. W. Rep. 189.

⁷ Folsom v. Marlette, 23 Nev. 459, 49 Pac. Rep. 39; Powell v. Horrell, 92 Mo. App. 406; Morrill v. Weeks, 70 N. H. 178, 46 Atl. Rep. 32.

⁸ Atherton v. Cochran, 9 S. W. Rep. 519 (Ky.).

⁹ Gould v. Emerson, 160 Mass. 438, 35 N. E. Rep. 1065, 39 Am. St. 501.

the federal statutes is for the contracts, debts and engagements of the bank to its creditors. Hence the former are liable for interest to the same extent the bank would have been if it remained solvent, not, however, to exceed the maximum fixed by law,¹ from the time the comptroller of the currency makes his order determining their liability,² and in the case of book accounts in favor of the depositors, from the time of the suspension of the bank.³ In Illinois, South Carolina and Maine stockholders are not liable for interest on the amount for which they are responsible to the creditors of the corporation under the statutes.⁴ In New York and Ohio such liability exists from the time suit was begun.⁵ In the latter, in cases in which the liability is sought to be enforced before suit has determined the extent of it, if such liability equals the face value of the stock interest will follow from the time suit was begun; but if the extent of liability is not fixed interest can only be recovered from the time judgment was rendered.⁶ In Wisconsin, Michigan, Missouri and Kansas stockholders are liable for interest on judgments against corporations.⁷ In Colorado interest may be recovered from stockholders on any debt bearing interest against the corporation.⁸ In California stockholders are liable for interest on corporate debts from the time they become due.⁹ In Louisiana interest on stock subscriptions runs from the date of judicial demand;¹⁰ and so in Kansas.¹¹ In Missouri a creditor of a corporation proceeding

¹ *Richmond v. Irons*, 121 U. S. 26, 64, 7 Sup. Ct. Rep. 788.

² *Casey v. Galli*, 94 U. S. 673; *Davis' Estate v. Watkins*, 56 Neb. 288, 76 N. W. Rep. 575; *Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. Rep. 46.

³ *Richmond v. Irons*, *supra*.

⁴ *Munger v. Jacobson*, 99 Ill. 349; *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. 225; *Cole v. Butler*, 43 Me. 401.

⁵ *Handy v. Draper*, 89 N. Y. 334; *Burr v. Wilcox*, 22 id. 551; *Mason v. Alexander*, 44 Ohio St. 318, following *Wehrman v. Reakirt*, 1 Ctn. Super. Ct. 239. See *Wheeler v. Millar*, 90 N. Y. 353.

⁶ *Berger v. Commercial Bank*, 5 Ohio Dec. 277 (Hamilton Common Pleas).

⁷ *Cleveland v. Burnham*, 64 Wis. 317, 25 N. W. Rep. 407; *Grand Rapids Savings Bank v. Warren*, 52 Mich. 557, 18 N. W. Rep. 356; *Shickle v. Watts*, 91 Mo. 410, 7 S. W. Rep. 274; *Grund v. Tucker*, 5 Kan. 70.

⁸ *Zang v. Wyant*, 25 Colo. 551, 56 Pac. Rep. 565, 71 Am. St. 145.

⁹ *Knowles v. Sanderecock*, 107 Cal. 629, 40 Pac. Rep. 1017; *Wells v. Enright*, 127 Cal. 669, 60 Pac. Rep. 439.

¹⁰ *Jackson F. & M. Ins. Co. v. Walle*, 105 La. 89, 29 So. Rep. 503.

¹¹ *Pine v. Western Nat. Bank*, 63 Kan. 462, 65 Pac. Rep. 660. See *nr*

by motion against a shareholder whose shares have not been paid in full can recover interest only from the time the motion is granted;¹ but the liability of a bank stockholder for interest to a depositor in the bank dates from the commencement of suit and is not affected because the interest extends his liability beyond the limit fixed by law.² A note given for stock does not bear interest until payment of subscriptions is called for, notwithstanding it may be past due when the call is made, no promise to pay interest being in the note.³ The provisions in the articles of a corporation as to the rate of interest defaulting stockholders shall pay do not apply to calls made by the liquidators of the corporation; they will be charged with the usual rate from the time the call should have been paid.⁴

[608] § 344. Allowed on annuities and legacies. Annuities, except those which are testamentary, are not very common in this country. In England they do not bear interest;⁵ nor do liquidated demands generally after default, except on commercial securities.⁶ But on the principles which govern on this side of the Atlantic, after a sum is due (which is not interest) and ought to be paid, it bears interest.⁷ There is no reason why an annuity should be an exception.⁸ Where a

to the rate of interest, *Whitman v. Citizens' Bank*, 110 Fed. Rep. 503, 49 C. C. A. 122.

¹ *Coquard v. Prendergast*, 47 Mo. App. 243.

² *Millisack v. Moore*, 76 Mo. App. 528.

³ *Seattle Trust Co. v. Pitner*, 18 Wash. 401, 51 Pac. Rep. 1048.

⁴ *In re Welsh Flannel & Tweed Co.*, L. R. 20 Eq. 360; *In re Spottiswoode Estate Co.*, 21 Vict. L. R. 334.

⁵ *Earl of Mansfield v. Ogle*, 4 De Gex & J. 41; *Booth v. Coulton*, L. R. 5 Ch. 684; *Blogg v. Johnson*, L. R. 2 Ch. 225. See *Buson v. Elliott*, 1 Del. Ch. 368.

⁶ *Higgins v. Sargent*, 2 B. & C. 348. See quotation from *Mayne on Damages* in note to § 329.

⁷ *Dobbins v. Higgins*, 78 Ill. 440.

Interest may be claimed on monthly wages on each sum as it

becomes due. *Butler v. Kirby*, 53 Wis. 188, 10 N. W. Rep. 373.

⁸ *Brotzman's Appeal*, 133 Pa. 478, 19 Atl. Rep. 564.

"Where the bequest is of an annuity, in the absence of any direction to the contrary, the annuity will commence from the death of the testator, and the first payment become due at the end of the first year from that event." *Welsh v. Brown*, 43 N. J. L. 37.

An annuity is due at the death of the testator notwithstanding the executors were directed to invest the principal of the legacy and failed to do so. *Eichelberger's Estate*, 170 Pa. 242, 32 Atl. Rep. 605.

Where a legatee was erroneously informed by one of the executors that her annuity did not begin to run until the death of her mother, acquiescence in such mistake and

debt is payable by instalments, each instalment will bear interest after it is due.¹

The rule as to legacies is that they bear interest after they are payable, which is usually, by legal intendment, at the expiration of one year from the testator's death,² unless the will discloses a contrary intention.³ Legacies made payable at

omission for seventeen years to demand the annuity was not such laches as barred the right to interest on each annual payment as it became due. *Hoffman's Estate*, 3 Pa. Dist. Rep. 663. But where there is no such mistake long delay in demanding interest prevents recovery of it anterior to demand or suit. *Gaskins v. Gaskins*, 17 S. & R. 390.

In some cases the annuitant's right to interest is a question for the jury. *Rohn v. Odenwelder*, 162 Pa. 346, 29 Atl. Rep. 899.

¹ *Knettle v. Crouse*, 6 Watts, 123.

² *Duffield v. Pike*, 71 Conn. 521, 42 Atl. Rep. 641; *Bartlett*, Petitioner, 163 Mass. 509, 40 N. E. Rep. 899; *Moore v. Pullen*, 116 N. C. 284, 21 S. E. Rep. 195; *Watt's Estate*, 3 Pa. Dist. Rep. 343; *Chappel v. Theus*, 3 Tenn. Cas. 457; *Bonham v. Bonham*, 38 N. J. Eq. 419; *Dustan v. Carter*, 3 Dema. 149; *Bliss v. Olmstead*, id. 273; *Verne v. Williams*, id. 349; *Bartlett v. Slater*, 53 Conn. 102, 55 Am. Rep. 73, 22 Atl. Rep. 678; *Wood v. Hammond*, 16 R. I. 98, 17 Atl. Rep. 324, 18 id. 198; *Chambers' Guardian v. Chambers*, 87 Ky. 144, 7 S. W. Rep. 620; *Sevearingham v. State*, 4 Har. & McHen. 38; *Lyons v. Magagno's Adm'r*, 7 Gratt. 577; *Shobes v. Carr*, 3 Munf. 10; *King v. Diehl*, 9 S. & R. 409; *Page's Appeal*, 71 Pa. 402; *Hoagland v. Ex'r of Schenck*, 16 N. J. L. 370; *Bradner v. Faulkner*, 12 N. Y. 472; *Darden v. Orgain*, 5 Cold. 211; *Daniels v. Benton*, 180 Mass. 559, 62 N. E. Rep. 960.

In *Valentine v. Ruste*, 93 Ill. 585, it was held that where legacies or

bequests in a will are by their terms to be paid when the testator's estate is settled, the legatees cannot demand the same until the happening of the contingency. If the executors should fail to settle the estate when by law they ought to do so, the county court can compel them to make such settlement, and then the legacies might be demanded; the legatees were not entitled to interest upon the legacies before the principal was demandable.

A contingent general legacy does not bear interest until the precedent event occurs. *Cannon v. Apperson*, 14 Lea, 553.

Where the legacy was payable on the death of a life beneficiary of the income the residuary legatee, to whom the estate had been transferred charged with the payment of the legacy, was liable for interest only from the time of demand. *Gilbert v. Taylor*, 148 N. Y. 298, 42 N. E. Rep. 713.

The rule stated in the text is not affected because of the death of the legatee within the year, nor because an administrator of his estate was not appointed until after the year expired and within that time the person afterwards appointed administrator claimed a personal interest in the legacy, and notified the executor to pay it to no one else. *Esmond v. Brown*, 18 R. I. 48, 25 Atl. Rep. 652.

³ See *Langhorst v. Ahlers*, 12 Ohio Dec. 405.

"On bequest of the residue of the testator's estate, or of some aliquot

a designated time bear interest from such time;¹ if payable out of the proceeds of lands to be sold at any time within two years after the testator's death interest runs from that time or from the time of sale if that was earlier.² A legacy given in satisfaction of a debt carries interest from the time of the testator's death;³ and so does a legacy consisting of the next interest or income of a given sum.⁴ In Massachusetts this rule has been extended to a legacy given absolutely to a widow in lieu of dower,⁵ but it is otherwise in Pennsylvania,⁶ New Jersey⁷ and New York,⁸ especially where the testator leaves no real estate and the widow parts with nothing by accepting the legacy. But if the legacy is the income of a trust fund and is given in lieu of dower, the widow is entitled to interest from the time of the testator's death.⁹ Where cred-

part or portion thereof, in trust to pay the interest or income to a legatee for life with the gift of the principal over at his death, the interest or income payable to the tenant for life will be computed from the testator's death." *Welsh v. Brown*, 43 N. J. L. 37; *Marsh v. Taylor*, 43 N. J. Eq. 1, 10 Atl. Rep. 486; *Williamson v. Williamson*, 6 Paige. 304; *Loving v. Minot*, 9 Cush. 151; *Couch v. Eastham*, 29 W. Va. 784, 2 S. E. Rep. 23; *Townsend's Appeal*, 106 Pa. 263, 51 Am. Rep. 523.

Such intention is not to be inferred as to general legacies because of a clause in the will extending the time for paying legacies to certain institutions. *Bartlett, Petitioner*, 163 Mass. 509, 40 N. E. Rep. 899. Nor because the will gives the executors three years in which to settle the estate in their discretion. *Warwick v. Ely*, 59 N. J. Eq. 44, 44 Atl. Rep. 666; *Spencer's Petition*, 16 R. I. 25, 12 Atl. Rep. 124.

Where it is directed that a legacy be paid as soon as convenient to the executors, the legatee being one, he is not entitled to interest though payment was not made until sixteen months after letters were issued.

Matter of Hodgman, 140 N. Y. 421, 35 N. E. Rep. 660.

¹ *Duffield v. Pike*, 71 Conn. 521, 42 Atl. Rep. 641; *Doten v. Doten*, 66 N. H. 331, 20 Atl. Rep. 387; *Langhorst v. Ahlers*, 9 Ohio Dec. 607; *Langendorfer's Estate*, 8 Pa. Dist. Rep. 273; *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. Rep. 625.

² *Re Robinson*, 22 Ont. 438.

³ *Clark v. Sewell*, 3 Atk. 99; *Knauss's Estate*, 148 Pa. 265, 23 Atl. Rep. 894.

⁴ *In re Estate of Catron*, 82 Mo. App. 416; *Ayre v. Ayre*, 128 Mass. 575; *Flick-wir's Estate*, 136 Pa. 374, 20 Atl. Rep. 518; *Cooke v. Meeker*, 36 N. Y. 15; *Matter of Stanfield*, 135 N. Y. 292, 31 N. E. Rep. 1013; *Green v. Blackwell*, 32 N. J. Eq. 763.

⁵ *Pollard v. Pollard*, 1 Allen, 490; *Pollock v. Learned*, 103 Mass. 49; *Towle v. Swasey*, 106 Mass. 100.

⁶ *Martin v. Martin*, 6 Watts, 67; *Gill's Appeal*, 2 Pa. 221.

⁷ *Dutch Church v. Ackerman*, 1 N. J. Eq. 40.

⁸ *Matter of Barnes*, 7 App. Div. 13, 40 N. Y. Supp. 494, affirmed without opinion, 154 N. Y. 737.

⁹ *Id.*

itors' rights will not be affected interest on a note payable to the testator ceases to run at the time of his death, the note providing that if it was not paid before such death it might be deducted from the maker's share of the testator's estate.¹ Where a will sets apart a fund and impresses it with a trust in favor of the legatee, to be paid before distribution of the estate, the legacy bears interest from the time of the testator's death.² In Vermont legacies, unless otherwise controlled by the will, draw interest after one year from its probate,³ and in New York at the expiration of one year after the granting of letters testamentary or of administration, whether temporary or final.⁴ If the probate of a will is revoked and a final will is established, interest on a legacy begins to run one year after the issuance of letters under the latter will.⁵ In the absence of any contrary expression or unavoidable implication of a contrary intent of the testator, devises or bequests subordinate to a life estate in his widow and contingent upon her death, or payment of which is postponed until then, become presently payable upon her election to take under the intestate laws. As to its effect to take upon all claims under the will her election is equivalent to her death.⁶ But the right to interest may not exist simultaneously with such election. Where there was a contest over the will and the executors could not pay until it was settled, interest did not begin to run until then.⁷

There is a difference of opinion concerning the effect of a statute which provides that if no time is fixed in the will for the payment of legacies the executor or administrator shall have one year after its probate to pay and satisfy them. Some courts hold or say that, inasmuch as a legacy does not draw interest

¹ *In re Will of Newcomb*, 98 Iowa, 175, 67 N. W. Rep. 587.

² *Ensley v. Ensley*, 105 Tenn. 107, 58 S. W. Rep. 288; *Harrison v. Henderson*, 7 Heisk. 348.

³ *Bradford Academy v. Grover*, 55 Vt. 462; *Vermont State Baptist Convention v. Ladd*, 53 id. 95, 4 Atl. Rep. 634.

⁴ *Matter of McGowan*, 124 N. Y. 526, 26 N. E. Rep. 1098; *Matter of*

Oakes, 19 App. Div. 192, 45 N. Y. Supp. 984.

⁵ *Patterson's Estate*, 5 N. Y. Misc. 178, 25 N. Y. Supp. 702.

⁶ *Coover's Appeal*, 74 Pa. 143; *Ferguson's Estate*, 138 Pa. 208, 20 Atl. Rep. 945; *Trustees Church Home v. Morris*, 99 Ky. 317, 36 S. W. Rep. 2.

⁷ *Trustees Church Home v. Morris*, *supra*.

before it becomes legally payable, the effect of the statute is to postpone the right to interest for one year after the will has been established, no direction being given in it.¹ The surrogates' courts of New York regard the expressions of the court of appeals in the cases referred to as *dicta*, and hold that the interest runs in favor of a legatee one year after the death of the testator.² This is in accord with the view in New Jersey;³ but not with that declared in Ohio and Michigan.⁴

Where the legacy is to a child of the testator, or one to whom he stood *in loco parentis*, and for whom no other provision is made in the will, interest thereon is given from the death of the testator on the presumption that such was his intention.⁵ The right of an infant legatee to interest from the

¹ Bradner v. Faulkner, 12 N. Y. 364; Thorn v. Garner, 113 id. 198, 21 N. E. Rep. 149.

² See Matter of Gibson, 24 Abb. N. C. 45; Lawrence v. Embree, 3 Bradf. 354; Wallace's Estate, 5 N. Y. Supp. 31; Campbell v. Cowdrey, 31 How. Pr. 172; Dustan v. Carter, 3 Dema. 149; Carr v. Bennett, id. 433, 457.

³ Davison v. Rake, 45 N. J. Eq. 767, 18 Atl. Rep. 752.

⁴ Gray v. Case School of Applied Science, 62 Ohio St. 1, 56 N. E. Rep. 484; Wheeler v. Hathaway, 54 Mich. 550, 20 N. W. Rep. 579.

⁵ Budd v. Garrison, 45 Md. 420; Langendorfer's Estate, 8 Pa. Dist. Rep. 273; Webb v. Webb, 92 Md. 101, 48 Atl. Rep. 95; Keating v. Bruns, 3 Dema. 233; Brown v. Knapp, 79 N. Y. 136; Flinn v. Flinn, 4 Del. Ch. 44; King v. Talbot, 50 Barb. 453; Martin v. Martin, 6 Watts. 67; Magoffin v. Patton, 4 Rawle, 113; Heath v. Perry, 3 Atk. 101; Harvey v. Harvey, 2 P. Wms. 21; Green v. Belchin, 1 Atk. 506. See Cooke v. Meeker, 42 Barb. 533; Incledon v. Northcote, 3 Atk. 438; Hearle v. Greenbank, id. 716; Coleman v. Seymour, 1 Ves. Sr. 210; Beckford v. Tobin, id. 308; Carey v. Askew, 2 Bro. Ch. 58.

Where a sum is left in trust, with

direction that the interest and income be applied to the use of a person, such person is entitled to interest from the death of the testator. Cooke v. Meeker, 36 N. Y. 15.

The rule does not extend to minor grandchildren nor to an adult child (Brinkerhoff v. Merselis, 24 N. J. L. 682; Howard v. Francis, 30 N. J. Eq. 444), unless the testator stood *in loco parentis* to the grandchild. Marsh v. Taylor, 43 N. J. Eq. 1.

The fact that an infant legatee has extraneous means of support does not affect its right to interest from the testator's death. Neder v. Zimmer, 6 Dema. 180.

Where the son of the testator was legatee of \$1,000,000, payable eighteen months after the death of the testator, and there was no clause in the will relating to interest, or for the support of the legatee until payment of the legacy, interest was denied notwithstanding the legatee, who was twenty-seven years old and had always been supported by his father, was in delicate health, though not incompetent to transact business. Thorn v. Garner, 113 N. Y. 198, 21 N. E. Rep. 149.

Where a legacy given for the education of the legatee was not applied

time of the testator's death is not affected because the will contains a provision for the maintenance of the child out of the income of the legacy, or out of the income of a share of the residue given to him equally with the other children. This rule rests on the theory that the residue is an unascertained amount and may be insufficient for the support of the legatee — the question is to be regarded with reference to the sufficiency of the provision made for the infant.¹ A legacy for the maintenance of the legatee draws interest from the time of the testator's death.² But it must be shown that it was the intention of the testator to give the legacy for that purpose where the relation of *loco parentis* does not exist. Where a grandfather bequeathed pecuniary legacies to his grandchildren to be paid at their majority, with a condition that if either of them died before attaining that age the share to which he would have been entitled should go into the residue of the testator's estate, the legatees were not entitled to interest. "To require in the meantime the payment of interest would, in effect, add a provision to the will, or would imply that the testator intended interest to be paid because of the existence between him and the legatees of the relation of parent and child though there is not the slightest evidence that such a relation did in fact exist."³

The date from which and the rate at which a legacy bears interest is to be determined by the law of the testator's [609] domicile.⁴ After a legacy is due it bears interest although the fund liable therefor may not have come to the executor's hands within that time, and notwithstanding the delay was occasioned by something in the will;⁵ or the will was not pro-

for by him until he was thirty years of age it was awarded with interest. *Lynch's Appeal*, 12 W. N. C. 104. But see *Bohrer v. Otterback*, 21 D. C. 32, holding that if the legatee permits the legacy to remain in the *corpus* of the estate for many years after it is payable he forfeits the right to interest.

¹ In re *Moody*, [1895] 1 Ch. 101.

² In re *Mackay*, 107 Cal. 303, 40 Pac. Rep. 558.

³ *Vonder Horst v. Vonder Horst*, 88 Md. 127, 41 Atl. Rep. 124.

⁴ *Welch v. Adams*, 152 Mass. 74, 9 L. R. A. 244, 25 N. E. Rep. 34; *Graveley v. Graveley*, 25 S. C. 1, 60 Am. Rep. 478.

⁵ *Davis v. Rake*, 44 N. J. Eq. 506, 16 Atl. Rep. 227; *Kent v. Dunham*, 105 Mass. 586; *Huston's Appeal*, 9 Watts, 472; *Hoagland v. Ex'rs of Schenck*, 16 N. J. L. 370; *Martin v. Martin*, 6 Watts, 67; *Addams v. Heffernan*, 9

bated at the expiration of a year from the testator's death;¹ or the executors have not been able to realize from the estate because of unjustifiable proceedings taken by the legatees.² But if a legatee who is chargeable with knowledge that his legacy must be paid out of the proceeds of the sale of land wrongfully enters into the possession of the land and prevents its sale, he is not entitled to interest during the time the sale is delayed.³ If the legacy produces interest the legatee is entitled to it though the amount is realized contrary to the testator's direction.⁴ The interest is payable at the legal rate though it is in excess of that produced by the fund.⁵ If a legacy consists of sums directed to be paid annually it seems that interest on arrears is not allowed, unless under special circumstances.⁶ A testamentary annuity to the widow in lieu of dower will be considered as intended for support and looked upon with favor, and interest will be allowed while in arrears;⁷

id. 529. See *Turrentine v. Perkins*, 46 Ala. 631; *Magoffin v. Patton*, 4 Rawle, 113; *Brownlee v. Steel's Ex'rs*, Walk. (Miss.) 179.

¹ *Ogden v. Pattee*, 149 Mass. 82, 14 Am. St. 401, 21 N. E. Rep. 227; *Lawrence v. Embree*, 3 Bradf. 364.

² *Kent v. Dunham*, 106 Mass. 586.

³ *Haight v. Pine*, 10 App. Div. 470, 42 N. Y. Supp. 303.

⁴ *Whitworth v. Ewing*, 15 Lea. 595; *Stephenson v. Harrison*, 3 Head. 729; *Stroud v. Gwyer*, 28 Beav. 130. See *Dimes v. Scott*, 4 Russ. 195.

⁵ *Welch v. Adams*, 152 Mass. 74, 9 L. R. A. 244, 25 N. E. Rep. 34; *Ogden v. Pattee*, 149 Mass. 82, 21 N. E. Rep. 227, 14 Am. St. 401; *Loring v. Woodward*, 41 N. H. 381, 77 Am. Dec. 769; *Kent v. Dunham*, 106 Mass. 586; *Stevens v. Melcher*, 152 N. Y. 551, 580, 46 N. E. Rep. 965; *Matter of Oakes*, 19 App. Div. 192, 45 N. Y. Supp. 984; *Gray v. Case School of Applied Science*, 62 Ohio St. 1, 56 N. E. Rep. 484; *Watt's Estate*, 3 Pa. Dist. Rep. 343; *Sloan's Appeal*, 163 Pa. 422, 32 Atl. Rep. 42, 47 Am. St. 889.

In *Matter of O'Hara*, 19 N. Y. Misc. 254, 44 N. Y. Supp. 222, it is held that a bequest in trust, with direction that the income shall be applied to a person's use for life, does not entitle the legatee to interest from the time of the decedent's death where there was no income from it during the year following the granting of letters.

⁶ *Watt's Estate*, 3 Pa. Dist. Rep. 343; *McNairy v. McNairy*, 1 Tenn. Cas. 329; *Grant v. Edwards*, 92 N. C. 447; *Isenhardt v. Brown*, 2 Edw. 341; *Adams v. Adams*, 10 Leigh, 527.

A legatee is not bound, in the absence of an order of court, to accept payment of his legacy in instalments. *Welch v. Adams*, 152 Mass. 74, 9 L. R. A. 244, 25 N. E. Rep. 34.

⁷ *Waples v. Waples*, 1 Harr. 394; *Houston v. Jamison*, 4 id. 330.

If a widow accept the provisions made for her by will in lieu of dower, when she might have rejected them, she cannot claim the benefit of the rule which regards her as a purchaser for value, and must accept the interest on her legacy subject to

but not if payable in agricultural products at a particular place, in the absence of proof of a demand at that place.¹ Where, in execution of an ante-nuptial agreement that the wife should have one-third of all the real and personal property her husband should die seized and possessed of during her life and widowhood, in lieu of her dower and distributive share, the court of chancery, with her consent, decreed a sale of lands of the deceased husband free from all claims of the widow, and prescribed as part of the terms of sale that one-third of the price should be payable on the termination of her life or widowhood, but the interest thereon should be annually paid to her, it was considered that the same rule should apply as to annuities granted for maintenance, and that interest should be allowed on the arrears of interest.²

If a legatee is executor and receives money from the estate from time to time which is charged as a payment upon the legacy and applied to the use of the legatee, it is proper to compute the interest upon the legacy until the sum so received equals the interest, and then to credit it as a payment upon the legacy and compute the interest upon the balance until another payment was so credited.³ If a legatee does not demand interest and during the period of neglect the executrix enjoys the income of the property, interest cannot be collected thereafter at the expense of the tenants in remainder.⁴ The right to interest is waived if it is not asserted at the time of executing a release and acquittance, the acceptance of the principal being a sufficient consideration to support the acquittance and release.⁵ The fact that the legatee is a non-resident of the state and that his residence is unknown to the executor, and the fact that the residue of the testator's estate is given in trust

the general rule; interest on the deferred interest will not be allowed. *Welch v. Adams, supra.*

¹ *Phillips v. Williams*, 5 Gratt. 259.

² *Turrentine v. Perkins*, 46 Ala. 631; *Beavers v. Smith*, 11 id. 32; *Newman v. Auling*, 3 Atk. 579. See *Addams v. Heffernan*, 9 Watts. 529; *Reed v. Reed*, 1 W. & S. 245; *Smyser v. Smyser*, 3 id. 437; *Stewart v. Martin*, 2 Watts, 200; *Kuettle v. Crouse*, 6 id.

123. See, also, *Woodward v. Woodward*, 2 Rich. Eq. 23; *Gill's Appeal*, 2 Pa. 221.

³ *Stevens v. Melcher*, 152 N. Y. 551, 580, 46 N. E. Rep. 965.

⁴ *Adams v. Adams*, 55 N. J. Eq. 42, 35 Atl. Rep. 827.

⁵ *Keehner v. Kinder*, 81 Ill. App. 23; *Mutter of Hodgman*, 140 N. Y. 421, 35 N. E. Rep. 660.

for his mother, and that the income is to be paid on the trust fund from the death of the testator, is immaterial to the legatee's right to interest after the expiration of one year from the testator's death. The fact that payment of the legacy was not demanded at the expiration of the year is also immaterial.¹

§ 345. *Interest on advancements.* Because property or money advanced to a legatee or distributee belongs to him, the general rule is, in the absence of anything to the contrary in the will, that he is not chargeable with interest on it during the life-time of the ancestor,² though the amount was originally an indebtedness to him and remained such until he made his will.³ In Virginia, if there is any liability for interest, it does not arise until the estate is ready for final distribution.⁴ In Pennsylvania interest will be charged from one year after the testator's death;⁵ but in Tennessee it is chargeable from the time of death,⁶ although receipts for the amount provide for its computation from an earlier period.⁷ In an English case⁸ the testator gave his residuary estate to his widow for life with remainder to his children equally, with a proviso for bringing into hotchpot all sums advanced to any of them by him during his life. He made advances to some of them, and it was held that in distributing the residuary estate among the children after the death of the widow the children to whom advances were made must bring them into hotchpot with interest up to the distribution of the estate, such interest to be computed from the death of the widow. In another case⁹ interest was allowed as from the date of the advance, that being necessary to bring about equality between the heirs.

¹ *Daniels v. Benton*, 180 Mass. 559, 62 N. E. Rep. 960.

² *Cabell v. Puryear*, 27 Gratt. 902; *Barrett v. Morris*, 33 id. 273; *Davies v. Hughes*, 86 Va. 909, 11 S. E. Rep. 488.

³ *Patterson's Appeal*, 128 Pa. 269, 18 Atl. Rep. 430; *Garth v. Garth*, 139 Mo. 456, 41 S. W. Rep. 238; *Matter of Keenan*, 15 N. Y. Misc. 368, 38 N. Y. Supp. 426; *Farnum's Estate*, 176 Pa. 366, 35 Atl. Rep. 232; *Comer v. Shehee*, 129 Ala. 558, 30 So. Rep. 95. See *Baker v. Safe Deposit & Trust Co.*, 93 Md. 368, 48 Atl. Rep. 920, 49 id. 623.

⁴ Cases cited first to this section.

⁵ *Patterson's Appeal*, *supra*.

⁶ *Johnson v. Patterson*, 13 Lea. 626; *Williams v. Williams*, 15 id. 438; *Steele v. Frierson*, 85 Tenn. 430, 3 S. W. Rep. 649. Compare these cases with *McNairy v. McNairy*, 1 Tenn. Cas. 329 (1874), and *Granberry v. Jordan*, 3 id. 267 (1879).

⁷ *Roberson v. Nail*, 85 Tenn. 124, 2 S. W. Rep. 19.

⁸ *In re Rees*, 17 Ch. Div. 701.

⁹ *Middleton v. Moore*, [1897] 2 Ch. 169. See *Dallmeyer v. Dallmeyer*, [1896] 1 Ch. 372.

§ 346. **On money due on policy of insurance.** An illustration of the principle that all moneys certain in amount and time of payment bear interest after they become due is afforded by the rule applied in actions on policies of in- [610] surance which contain an agreement to pay at a certain time after loss. Interest is allowed after that time expires until payment is made.¹ The time fixed by the policy may be waived by the conduct of the insurer, and the money become due before that period expires, as where, on proof of loss and demand of payment at an earlier day, the insurer, admitting the loss, offered a less sum and refused to pay the full amount.² If the loss is payable sixty days after proofs are made an agreement to arbitrate the loss is a waiver of proofs, and interest may be recovered from the time of the loss,³ or, preferably, sixty days after the waiver.⁴ On the denial of its liability the insurer becomes immediately liable for interest though formal demand of payment was not made.⁵ In at least one case liability for interest related back to the time of loss.⁶ If the policy provides for the payment of the loss after its adjustment or after proofs of it have been made, in the former case there will be no liability for interest anterior to judicial demand if reasonable efforts are made by the in-

¹ *Catholic Knights of America v. Franke*, 137 Ill. 118, 27 N. E. Rep. 86; *Grand Lodge A. O. U. W. v. Bagley*, 164 Ill. 340, 45 N. E. Rep. 538, 60 Ill. App. 589; *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. Rep. 425; *Hanover F. Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. Rep. 297; *Pratt v. Manhattan L. Ins. Co.*, 47 La. Ann. 855, 17 So. Rep. 341; *Hardy v. Lancashire Ins. Co.*, 166 Mass. 210, 33 L. R. A. 241, 44 N. E. Rep. 209, 55 Am. St. 395; *Randall v. American F. Ins. Co.*, 10 Mont. 340, 25 Pac. Rep. 953, 24 Am. St. 50; *Wood v. Cascade F. & M. Ins. Co.*, 8 Wash. 427, 36 Pac. Rep. 267, 40 Am. St. 917; *Unsell v. Hartford L. & Annuity Ins. Co.*, 32 Fed. Rep. 443; *Guarantee Co. v. Mechanics' Savings Bank & Trust Co.*, 80 Fed. Rep. 766; *Home Ins. Co. v. Adler*, 71 Ala. 516;

Hastings v. Westchester F. Ins. Co., 73 N. Y. 141; *Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578; *Field v. Insurance Co. of North America*, 6 Biss. 121; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553.

² *Baltimore F. Ins. Co. v. Loney*, 20 Md. 20.

³ *Glover v. Rochester German Ins. Co.*, 11 Wash. 142, 39 Pac. Rep. 380.

⁴ *East Texas F. Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. Rep. 713.

⁵ *Perine v. Grand Lodge A. O. U. W.*, 51 Minn. 224, 53 N. W. Rep. 567; *North-Western Mut. L. Ins. Co. v. Freeman*, 19 Tex. Civ. App. 632, 47 S. W. Rep. 1025.

⁶ *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 145 Pa. 346, 22 Atl. Rep. 665.

suror to effect an adjustment;¹ and so in the latter case if proper proofs are not furnished.² If the contract contemplates that a loss is to be paid within a specified time if the funds on hand are sufficient, and otherwise that the company shall make an assessment, in case of the insufficiency of the funds, and there is no laches in making the assessment, interest cannot be recovered.³ If the insurance is payable to the person whose life is insured, if he survives a certain day, interest is recoverable only from the time demand is made. If there is also a provision in the policy by which it is payable ninety days after notice of the death of the insured, this clause has no application to the first contingency, and interest is due only as damages.⁴ The insurer is not liable for interest according to the terms of its policy so long as the person entitled to receive the amount due neglects to clothe himself with the legal right to demand and receive it.⁵ The insured cannot recover interest if he refuses to submit the extent of the loss to arbitration in accordance with the policy;⁶ nor if he sues to set aside an award; there is nothing on which to compute interest before judgment in that suit.⁷ If the contract is partly written and partly unwritten it is unwritten within the meaning of the Illinois statute, and interest is not recoverable unless there has been unreasonable and vexatious delay in payment within the intent of that statute.⁸ Interest is not allowable in favor of claimants against the assets of an insolvent insurer.⁹ Where the sum sued for in any case is certain and liquidated, it does not cease to be such for the purpose of the allowance of interest, though the jury make an arbitrary deduction therefrom.¹⁰

¹ *Gettwerth v. Teutonia Ins. Co.*, 29 La. Ann. 30.

² *Trager v. Louisiana Equitable L. Ins. Co.*, 31 La. Ann. 235.

³ *Commonwealth v. Massachusetts Mut. Ins. Co.*, 119 Mass. 45; *Pray v. Life Indemnity & Security Co.*, 104 Iowa, 114, 73 N. W. Rep. 485.

⁴ *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151.

⁵ *Webster v. British Empire Mut. L. Assur. Co.*, 15 Ch. Div. 169, overruling *Crossley v. City of Glasgow L. Assur. Co.*, 4 id. 421; *Britton v.*

Supreme Council Royal Arcanum, 46 N. J. Eq. 102, 18 Atl. Rep. 675, 19 Am. St. 376.

⁶ *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. Rep. 1005.

⁷ *Stemmer v. Scottish Ins. Co.*, 33 Ore. 65, 49 Pac. Rep. 588.

⁸ *Railway Passenger & Freight Conductors' Ass'n v. Tucker*, 157 Ill. 194, 42 N. E. Rep. 398. See § 323.

⁹ *American Casualty Ins. Co.'s Case*, 82 Md. 535, 34 Atl. Rep. 778.

¹⁰ *Martin v. Silliman*, 53 N. Y. 615. If the jury fail to award interest

A marine policy is a maritime contract, and the allowance of interest, under the rules adopted by the United States supreme court for the government of courts of admiralty, is for the discretion of the court. Where the insurer admitted liability for almost the whole sum claimed, but did not tender the amount, but withheld it for nearly seven years, during which a costly litigation was carried on, the allowance from the time the sum due should have been paid was sustained.¹ If there is no stipulation concerning interest the rate is governed by the statute in force when the right to recover the loss occurred unless the law reducing the rate took effect intermediate that event and payment, in which case interest at the larger rate would be due until the reduced rate became the legal rate, when that would govern.²

§ 347. **Not allowed on unliquidated demands.** It is a general principle that interest is not allowed on unliquidated damages or demands. The term "unliquidated" applies to the damages recoverable for assault and battery or slander, and also to those recoverable on a *quantum meruit* for goods sold and delivered, or services rendered. Interest is denied when the demand is unliquidated, for the reason that the person liable does not know what sum he owed, and therefore cannot be in default for not paying. Those damages which are wholly at large, depending on no legal standard, and which are referred to the discretion of a jury, can never be made certain except by accord or verdict. There can be no default in respect to their payment, and they are never enhanced by interest.³ But demands based upon market values susceptible

in a verdict for the face value of a life policy the court may add it or direct the jury to do so. *Knights of Pythias v. Allen*, 104 Tenn. 623, 59 S. W. Rep. 241.

¹ *New Zealand Ins. Co. v. Earnmoor S. S. Co.*, 24 C. C. A. 614, 79 Fed. Rep. 368.

² *Firemen's Fund Ins. Co. v. Western Refrigerating Co.*, 162 Ill. 322, 44 N. E. Rep. 746. See §§ 368-370.

³ *Ferre v. Chabot*, 121 Cal. 233, 53 Pac. Rep. 689, 1092; *Coburn v. Goodall*, 72 Cal. 498, 14 Pac. Rep. 190, 1 Am.

St. 75; *Easterbrook v. Farquharson*, 110 Cal. 311, 42 Pac. Rep. 811; *Cox v. McLaughlin*, 76 Cal. 67, 9 Am. St. 161, 18 Pac. Rep. 100; *Macomber v. Bigelow*, 123 Cal. 532, 56 Pac. Rep. 449, 126 Cal. 9, 58 Pac. Rep. 312; *Dexter v. Collins*, 21 Colo. 455, 42 Pac. Rep. 664; *Imperial Hotel Co. v. Chaffin Co.*, 175 Ill. 119, 51 N. E. Rep. 610; *Wittenberg v. Mollyneux*, 59 Neb. 203, 80 N. W. Rep. 824, citing the text; *Button v. Kinneta*, 8 Hun. 35, 34 N. Y. Supp. 524; *Matter of Hartman*, 13 N. Y. Misc. 406, 45 N. Y.

of easy proof, though unliquidated until the particular subject of the demand has been made definite and certain by agreement or proof, are not so uncertain that no default can be predicated of any delay in making payment.¹ A demand is unliquidated if one party alone cannot make it certain,²—when it cannot be made certain by mere calculation; but the allowance of interest as damages is not dependent on this rigid test.³ The test as to the right to recover interest for the breach of contracts for the sale of property is the existence of an established market value of it, or means accessible to the party sought to be charged of ascertaining by computation or otherwise the amount to which the plaintiff is entitled.⁴ It is not sufficient to bring a case within this rule that expert testimony shows the value of the property; market value must be shown by sales, the current price.⁵ The words “debt or sum certain payable at a certain time,” in the English statute governing the right to interest, require that the certainty of both the sum due and the time it is payable shall be ascertainable from the contract. If all the elements of certainty so

Supp. 495; *Meyers' Estate*, 179 Pa. 157, 36 Atl. Rep. 239; *Kuhn v. McKay*, 7 Wyo. 42, 65, 49 Pac. Rep. 473, 51 id. 205, quoting the text; *Pacific Postal Tel. Cable Co. v. Fleischner*, 14 C. C. A. 166, 66 Fed. Rep. 899; *Couburn v. Muskegon Booming Co.*, 72 Mich. 134, 40 N. W. Rep. 198; *Mansfield v. New York, etc. R. Co.*, 114 N. Y. 331, 21 N. E. Rep. 735, 1037, 4 L. R. A. 566.

¹ Regardless of the character of the action, interest is recoverable in all cases for the use or destruction of property when the amount which is due the plaintiff may be known or ascertained approximately by reference to market values. *Missouri, etc. R. Co. v. Clark*, 60 Neb. 406, 83 N. W. Rep. 202, citing the text and *De Lavallette v. Wendt*, 75 N. Y. 579; *Sullivan v. McMillan*, 37 Fla. 134, 19 So. Rep. 240, 53 Am. St. 239; *Gulf, etc. R. Co. v. Dunman*, 6 Tex. Civ. App. 101, 24 S. W. Rep. 995; *Mobile, etc. R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. Rep. 566.

² *Clark v. Dutton*, 69 Ill. 521; *Roberts v. Prior*, 20 Ga. 561.

Where a contract to convey land is so indefinite in its description as to be incapable of specific performance, and its money value is unknown, and the vendor cannot know even approximately how much he is liable for, the rule permitting interest upon damages ascertainable by computation or from well established market prices cannot be applied. *Harvey v. Hamilton*, 54 Ill. App. 507.

³ The text is quoted with approval in *Sanderson v. Read*, 75 Ill. App. 190, 193.

⁴ *Gray v. Central R. Co.*, 157 N. Y. 483, 52 N. E. Rep. 555; *White v. Miller*, 78 N. Y. 393, 34 Am. Rep. 544; *Mansfield v. New York, etc. R. Co.*, 114 N. Y. 331, 4 L. R. A. 566, 21 N. E. Rep. 375; *Clegg v. New York Newspaper Union*, 72 Hun. 395, 25 N. Y. Supp. 565.

⁵ *Sloan v. Baird*, 162 N. Y. 327, 56 N. E. Rep. 752.

appear and nothing more is required than an arithmetical computation to ascertain the exact sum or the exact time for payment, interest may be recovered.¹ The code of California awards interest to every person who is entitled to recover damages, certain or capable of being made certain by computation, if the right of recovery exists upon a particular day. Interest is recoverable under this provision where a contract has been fully performed by the plaintiff and its fruits accepted without objection by the defendant, who was in default as to payment, the only question open being as to the value of such performance.² It is not recoverable where the value of the services rendered can only be established by evidence in court or by an accord between the parties, and is not susceptible of ascertainment either by computation or by reference to known standards of value.³

In a leading New York case, decided in 1849, suit was [611] brought for the value of rent long in arrear, payable in services and specific articles: "eighteen bushels of wheat, four fat hens, and one day's service with carriage and horses," were payable yearly as rent. It was an unliquidated demand, not payable in money, nor was a specified sum to be paid in any other way. But the time of payment was certain, and therefore the claim of interest clearly raised the question whether the uncertainty of amount alone relieved the lessee from liability for interest on the value, he having made default in paying in the particular mode provided for. Bronson, J., delivered the opinion in favor of such liability. He said: "It was decided in 1806, without assigning any reason for the judgment, that interest was not recoverable in such a case."⁴ But since that time the supreme court has deliberately

¹ *London, etc. R. Co. v. South-eastern R. Co.*, [1892] 1 Ch. 120. [1893] App. Cas. 429; *Merchant Shipping Co. v. Armitage*, L. R. 9 Q. B. 99; *McCullough v. Clemow*, 26 Ont. 467.

A sum is payable at a certain time if the promise is that it shall be paid within six months after the death of the promisor. *Fooks v. Horner*, (1856) 2 Ch. 188.

² *Mix v. Miller*, 57 Cal. 356; *Mc-*

Fadden v. Crawford, 39 Cal. 662. The latter case was ruled before the code was enacted.

³ *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. 164, 18 Pac. Rep. 100; *Swinnerton v. Argonaut Land & Development Co.*, 112 Cal. 375, 44 Pac. Rep. 719.

⁴ *Van Rensselaer v. Platner*, 1 Johns. 276.

held, on three several occasions, including the present one, that interest is recoverable in such a case.¹ The principle to be extracted from these decisions may be stated as follows: Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which he has done him; and a just indemnity, though it may sometimes be more, can never be less, than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought in all cases to recover interest, in addition to the debt, by way of damages. It is true that on an agreement like the one under consideration the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services. But the value can be ascertained; and when that has been done the creditor, as a question of principle, is just as plainly entitled to interest after the default as he would be if the like sum had been payable in money. The English courts do not allow interest in such cases; and I feel some difficulty in saying that it can be [612] allowed here without the aid of an act of the legislature to authorize it. But the courts in this and other states have for many years been tending to the conclusion, which we have finally reached, that a man who breaks his contract to pay a debt, whether the payment was to be made in money or in anything else, shall indemnify the creditor so far as that can be done by adding interest to the amount of damage which was sustained on the day of the breach. The rule is just in itself; and as it is now nearly nineteen years since the point was decided in favor of the creditor and eight out of the nine judges of the supreme court have, at different times, concurred in that opinion, we think the question should be regarded as settled.”² The doctrine of this case has been adhered to in

¹ *Lush v. Druse*, 4 Wend. 313; *Van Rensselaer v. Jones*, 2 Barb. 643.

² *Van Rensselaer v. Jewett*, 2 N. Y. 135. In *McMahon v. New York & E. R. Co.*, 20 id. 463, it is said of this

case that the court went as far as it was reasonable to go. See *Mansfield v. New York, etc. R. Co.*, 114 id. 331, 4 L. R. A. 566, 21 N. E. Rep. 735, 1037.

that state and often re-affirmed.¹ In many other states there is a tendency at least in favor of the allowance of interest as damages where there is default in payment.² Justice Winslow of the Wisconsin bench has thus expressed the trend of judicial sentiment: It is quite well established by the preponderance of authority that there are cases for breach of contract, and cases sounding in tort, where the damages are wholly unliquidated, but where they may be fixed by known and reasonably certain market values or other definite standards, where interest is to be allowed from the time of the breach or the commission of the injury. In such cases interest is not allowed, as such, but simply as compensation for the delay, and in order that the plaintiff may be fully remunerated for his injury. In such cases interest is regarded, in the absence of special circumstances showing greater loss, as measuring the proper compensation for the delay which the plaintiff has suffered in waiting for the payment of his damages; the principle being that the plaintiff will not be fully compensated unless he receive, not only the value of the thing

In Oregon a demand payable in building materials does not bear interest until judgment is rendered. *Poppleton v. Jones*, —Ore.—, 69 Pac. Rep. 919.

¹ *Adams v. Fort Plain Bank*, 36 N. Y. 255; *McCormick v. Pennsylvania Central R. Co.*, 49 id. 303; *Mygatt v. Wilcox*, 45 id. 406, 6 Am. Rep. 112; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *McMahon v. New York & E. R. Co.*, 20 N. Y. 463; *McCullum v. Seward*, 62 id. 316; *Pipperly v. Stewart*, 50 Barb. 52; *Church v. Kidd*, 6 Hun. 475; *Mercer v. Vose*, 67 N. Y. 56; *Wilson v. Troy*, 135 N. Y. 104, 32 N. E. Rep. 44, 18 L. R. A. 449; *Mansfield v. New York, etc. R. Co.*, 114 N. Y. 331, 21 N. E. Rep. 735, 4 L. R. A. 566; *Gray v. Central, etc. R. Co.*, 157 N. Y. 483, 52 N. E. Rep. 555; *Sweeny v. New York*, 173 N. Y. 414, 66 N. E. Rep. 101.

² *Sullivan v. McMillan*, 37 Fla. 134, 143, 53 Am. St. 39, 19 So. Rep. 340 (it

is said in this case that in the allowance of interest the distinction is practically obliterated between liquidated and unliquidated demands); *McCormack v. Lynch*, 69 Mo. App. 524; *Watkins v. Junker*, 90 Tex. 584, 40 S. W. Rep. 11; *Kuhn v. McKay*, 7 Wyo. 42, 65, 49 Pac. Rep. 473, 51 id. 205; *Murray v. Doud*, 63 Ill. App. 247; *Vierling v. Iroquois Furnace Co.*, 68 id. 643; *Spaulding v. Mason*, 161 U. S. 375, 396, 16 Sup. Ct. Rep. 592; *Laycock v. Parker*, 103 Wis. 161, 79 N. W. Rep. 327 (quoted from § 321; *New York, etc. R. Co. v. Ansonia Land & Water Power Co.*, 72 Conn. 703, 46 Atl. Rep. 157, stated in 355; *Bartee v. Andrews*, 12 Ga. 407; *Vaughan v. Howe*, 20 Wis. 523, 91 Am. Dec. 436; *Gannon v. Abrams*, 53 Wis. 323, 10 N. W. Rep. 479, *Levan v. Baldrick*, 3 McCord 294; *Druggers v. Bell*, 91 Ill. 224; *Swanson v. Addison*, 83 Minn. 505, 510, 80 N. W. Rep. 465.

lost, but receive it, as nearly as may be, of the date of his loss.¹

§ 348. *Same subject.* The question is the same, of course, so far as the uncertainty of amount affects it, when the demand is for services rendered, or, for property sold and delivered. Such a case was decided in New York in 1867. The referee found that the defendant was indebted to the plaintiff's assignor, on a certain date, in a specified sum. The indebtedness was for professional services. But the court remark: "It is not our province and we are not called upon to examine the evidence to ascertain how this indebtedness arose. It is found as a fact that such indebtedness specifically existed in a certain ascertained amount, and consequently it became presently due and payable, and an action could then have been maintained for its recovery, and it follows that interest was recoverable on the amount from the day the same became due."² Damages by way of interest may be allowed the plaintiff in an action on a building contract for the detention of money due him, notwithstanding the amount sued for is liable to be reduced because of his deviation from the plans for the building.³ Where [613] the rule of damages is the difference between the contract price and the market value, as in case of failure to deliver goods according to contract, interest is allowed on that measure from the date of the breach.⁴ Johnson, J., insisted on the duty to pay interest in this forcible language: "The party is entitled on the day of performance to the property agreed to be delivered; if it is not delivered, the law gives as the measure of compensation then due the difference between the contract and market prices. If he is not also entitled to interest from that time, as a matter of law, this contradictory

¹ J. I. Case Plow Works v. Niles & Scott Co., 107 Wis. 9, 82 N. W. Rep. 568; Richards v. Citizens' Natural Gas Co., 130 Pa. 37, 18 Atl. Rep. 600; McCall Co. v. Icks, 107 Wis. 232, 83 N. W. Rep. 300.

² Adams v. Fort Plain Bank, 36 N. Y. 255; Watkins v. Junker, 90 Tex. 584, 40 S. W. Rep. 11; Mercer v. Vose, 67 N. Y. 56; Yates v. Shepardson, 39 Wis. 173. *Contra*, Swinnerton v.

Argonaut Land & Development Co., 112 Cal. 375, 44 Pac. Rep. 719.

³ Healy v. Fallon, 69 Conn. 228, 37 Atl. Rep. 495; Laycock v. Parker, 103 Wis. 161, 79 N. W. Rep. 327.

⁴ Driggers v. Bell, 94 Ill. 223; Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Plum v. Campbell, 129 Ill. 101, 18 N. E. Rep. 790; McCall Co. v. Icks, 107 Wis. 232, 83 N. W. Rep. 300.

result follows: that while an indemnity is professedly given, the law adopts such a mode of ascertaining its amount that the longer a party is delayed in obtaining it the greater shall its inadequacy become. It is, however, conceded to be law that in these cases the jury may give interest by way of damages in their discretion. Now, in all cases, unless this be an exception, the measure of damages in an action upon a contract relating to money or property is a question of law, and does not at all rest in the discretion of the jury. If the giving or refusing interest rests in discretion, the law, to be consistent, should furnish some legitimate means of influencing its exercise by evidence; as by showing that the party in fault has failed to perform either wilfully or by mere accident, and without any moral misconduct. All such considerations are constantly excluded from a jury; and they are properly told that in such an action their duty is to inquire whether a breach of the contract has happened, not what motives induced the breach. That by law a party is to have the difference between the contract price and the market price, in order that he may be indemnified, and because the rule affords the measure of his injury when it occurred; that he may not, as a matter of law, recover interest which is necessary to a complete indemnity; that nevertheless the jury may, in their discretion, give him a complete indemnity, by including the amount of interest in their estimate of his damages; but that he may not give any evidence to influence their discretion, presents a series of propositions, some of which cannot be law. The case of *Van Rensselaer v. Jewett*¹ establishes a principle broad enough to include this case, and has freed the law from this as well [614] as other inconsistencies in which it was supposed to have become involved. The right to interest in actions upon contract depends not upon discretion, but upon legal right; and in actions like the present interest is as much a part of the indemnity to which the party is entitled as the difference between the market value and the contract price."²

Nor is it an objection to the allowance of interest on the

¹ 2 N. Y. 141.

ker, 90 Tex. 584, 40 S. W. Rep. 11, in
to the same effect.

² In *Dana v. Fiedler*, 12 N. Y. 40,
50, 62 Am. Dec. 130. *Watkins v. Jun-*

contract price of property sold, not paid when due, that there is a dispute between the parties as to the quantity and quality.¹ In actions between vendor and purchaser for failure to fulfill the contract, or for breach of warranty — where the measure of recovery is the difference between market price and contract price, or the market price of a warranted property and its actual value in a state or quality inferior to that which was warranted,— interest is to be added to the damages from the time of the breach.² So where the action is on warranty of title.³ Money is due immediately, and carries interest from the date of the transaction, where there is a purchase of goods or other things for cash on delivery, or without any other time being agreed on.⁴ If a sale is made on a

¹ *Vaughn v. Howe*, 20 Wis. 523, 91 Am. Dec. 436. See *Gammon v. Abrams*, 53 Wis. 323, 10 N. W. Rep. 479. Interest is not recoverable on an account for services if the employment is disputed. *Griggs v. Ganford*, 50 Ill. App. 172.

² *J. I. Case Plow Works v. Niles & Scott Co.*, 107 Wis. 9, 82 N. W. Rep. 568, citing the text; *Brown v. Doyle*, 69 Minn. 543, 72 N. W. Rep. 814; *Burford v. Gould*, 35 Ala. 265; *Clark v. Dales*, 20 Barb. 42; *Hamilton v. Gan-yard*, 34 id. 204; *Fishell v. Winans*, 38 id. 228; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Badgett v. Broughton*, 1 Ga. 591; *Enders v. Board Public Works*, 1 Gratt. 372; *Blackwood v. Leman*, Harp. 143; *Bicknall v. Waterman*, 5 R. L. 43; *Merryman v. Criddle*, 4 Munf. 542; *McKay v. Lane*, 5 Fla. 268; *Wolfe v. Sharpe*, 10 Rich. 60; *Marshall v. Wood*, 16 Ala. 806; *Mayo v. Purcell*, 3 Munf. 243; *Sohier v. Williams*, 2 Curtis, 195. See *Curtis v. Innerarity*, 6 How. 146.

After demand made interest may be recovered for the breach of a contract to deliver goods, the price and quantity being agreed upon. *Thomas v. Wells*, 140 Mass. 517, 5 N. E. Rep. 485.

In Georgia the recovery of interest is in the discretion of the jury. *Snowden v. Waterman*, 110 Ga. 99, 35 S. E. Rep. 309.

³ *Rowland v. Shelton*, 25 Ala. 217; *Goss v. Dysant*, 31 Tex. 186; *Crittenden v. Posy*, 1 Head. 311; *Eggleston v. Macauley*, 1 McCord, 237. But see *Ancrum v. Slone*, 2 Spear, 594.

⁴ *Wyandotte, etc. Gas Co. v. Schliefer*, 22 Kan. 468; *Foote v. Blanchard*, 6 Allen, 221, 83 Am. Dec. 624; *Pollock v. Ehle*, 2 E. D. Smith, 541; *Salter v. Parkhurst*, 2 Daly, 240; *Clark v. Dalton*, 69 Ill. 521; *Waring v. Henry*, 30 Ala. 721; *Smith v. Shaffer*, 50 Md. 132; *Atlantic Phosphate Co. v. Graffin*, 114 U. S. 492, 5 Sup. Ct. Rep. 967. Where there is a sale of goods and the price is not a gross sum the amount is liquidated by the terms of the invoice received and retained by the vendee. *Ibid. Contra. State v. Warner*, 55 Wis. 271, 9 N. W. Rep. 795, 13 id. 255; *Marsh v. Fraser*, 37 Wis. 152. Both these cases are probably overruled by *Laycock v. Parker*, 103 Wis. 161, 185, 79 N. W. Rep. 327. In harmony with the latter is *Farr v. Semple*, 81 Wis. 230, 51 N. W. Rep. 319.

definite term of credit, agreed on or implied from custom, interest is chargeable from the expiration of that term of credit.¹ In Wisconsin it was held that where a party's right to [615] compensation under a contract is doubtful, is contested upon reasonable grounds, and a suit is required to determine the amount, interest will not be allowed for any time preceding such determination.² It has been laid down as a general rule that there cannot be a recovery of interest on the damage sustained in an action for the breach of contract where the recovery is measured by the loss of profits,³ and that interest is not recoverable on profits anterior to their determination by verdict.⁴

§ 349. Interest on accounts. On accounts which were not due when made, nor by the expiration of any term of credit, interest is allowed after demand *in pais* or by suit.⁵ A demand

¹ Esterly v. Cole, 3 N. Y. 502; Kennedy v. Barnwell, 7 Rich. 124; Howard v. Farley, 3 Robert. 308; National Lancers v. Lovering, 30 N. H. 511; Moore v. Patton, 2 Port. 451; Raymond v. Isham, 8 Vt. 258; Dickinson v. Gould, 2 Tyler, 32; Leyde v. Martin, 16 Minn. 38; Foote v. Blanchard, 6 Allen, 221, 83 Am. Dec. 624; Wiltburger v. Randolph, Walk. (Miss.) 20; Wyandotte, etc. Gas Co. v. Schliefer, 22 Kan. 468.

² Shipman v. State, 41 Wis. 458; Tucker v. Grover, 60 id. 240, 19 N. W. Rep. 62. See Tyson v. Milwaukee, 50 Wis. 78, 5 N. W. Rep. 914. The two cases first cited are affected by Laycock v. Parker, *supra*, where they and other cases of like tenor are considered.

³ Wiggins Ferry Co. v. Chicago & A. R. Co., 128 Mo. 224, 27 S. W. Rep. 568.

⁴ Swanson v. Andrus, 83 Minn. 505, 86 N. W. Rep. 465.

⁵ Lane v. Turner, 114 Cal. 396, 46 Pac. Rep. 290; Evans v. Western Brags Manuf. Co., 118 Mo. 548, 24 S. W. Rep. 175; Dempsey v. Schawucker, 140 Mo. 680, 34 S. W. Rep. 954; Williams v. Chicago, etc. R. Co., 153 Mo.

487, 54 S. W. Rep. 689; Patterson v. Missouri Glass Co., 72 Mo. App. 492; Laycock v. Parker, 103 Wis. 161, 187, 79 N. W. Rep. 327; Remington v. Eastern R. Co., 109 Wis. 154, 84 N. W. Rep. 898, 85 id. 321; Ledyard v. Bull, 119 N. Y. 62, 23 N. E. Rep. 444; Carricarti v. Blanco, 121 N. Y. 230, 24 N. E. Rep. 284; Heidenheimer v. Ellis, 67 Tex. 426, 3 S. W. Rep. 666; Case v. Hotchkiss, 3 Keyes, 334, 3 Abb. Pr. (N. S.) 381, 1 Abb. Ct. of App. 324; Mygatt v. Wilcox, 45 N. Y. 306, 6 Am. Rep. 93; White v. Miller, 78 N. Y. 393, 34 Am. Rep. 544; Melhvaine v. Wilkins, 12 N. H. 474; Barnard v. Bartholomew, 22 Pick. 294; Wheeler v. Haskins, 41 Me. 432; Hall v. Hucksins, id. 574; Goff v. Rehoboth, 2 Cush. 475; Wood v. Hickox, 2 Wend. 501; Brainerd v. Champlain Transportation Co., 29 Vt. 154; Gammel v. Skinner, 2 Gall. 45; Van Husean v. Kanouse, 13 Mich. 303; Beardslee v. Horton, 3 id. 560; McCollum v. Seward, 62 N. Y. 316; Harrison v. Conlan, 10 Allen, 85; Adams Exp. Co. v. Milton, 11 Bush, 49; Palmer v. Stockwell, 9 Gray, 237; Hunt v. Nev-ers, 15 Pick. 505, 26 Am. Dec. 616; Barrow v. Renb, 9 How. 366; Enders

made, by rendering the account, informs the debtor what is claimed to be due from him and gives him the means of examining it in detail; and if no objection is made it becomes a stated account—from that time a liquidated debt.¹ If a bill is presented and the debtor admits his indebtedness for the items thereof, subject to modification and correction as to the sum charged, interest runs from that time on the items not subsequently objected to, and on the others from the commencement of the action.² The accounts of a public officer are liquidated by being submitted to the authorities who have power to pass upon and approve them.³ On the termination of mutual accounts the creditor is entitled to interest by way of damages upon the balance due from that date until judgment.⁴ The general rule as to accounts may not apply to exceptional dealings. Where a contract for the reorganization of a railroad company was operative from the time it was made but was silent as to interest for money or the debts of the company during the time of the proceedings of the reorganization,

v. Board of Public Works, 1 Gratt. 389; Ruckman v. Pitcher, 20 N. Y. 9; McFadden v. Crawford, 39 Cal. 662; Young v. Dickey, 63 Ind. 31; Rend v. Boord, 75 Ind. 307; Marsteller v. Crapp, 62 Ind. 359.

¹ Henderson Cotton Manuf. Co. v. Lowell Machine Shops, 86 Ky. 668, 7 S. W. Rep. 142, quoting the text; Walden v. Sherburne, 15 Johns. 409; Liotard v. Graves, 3 Cal. 226; Elliott v. Minott, 2 McCord, 125; Beardslee v. Horton, 3 Mich. 560; Van Hulan v. Kanouse, 13 id. 303; Underhill v. Gaff, 48 Ill. 198; Richard v. Parrett's Heirs, 7 B. Mon. 379, 383; Barnard v. Bartholomew, 22 Pick. 291; Mygatt v. Wilcox, 45 N. Y. 306, 6 Am. Rep. 90; Case v. Hitchcock, 3 Keyes, 334; Martin v. Silliman, 53 N. Y. 615. See Davis v. Smith, 48 Vt. 52.

Under the statute of Illinois interest is not recoverable on a verbal contract unless there has been an unreasonable and vexatious delay of payment. West Chicago Alcohol Works v. Sheer, 104 Ill. 586. See § 323.

If goods are sold under a contract in writing which fixes the times at which payments are to be made, interest will be allowed upon all sums not paid when due from the time agreed upon for payment, whether the delay in payment is unreasonable and vexatious or not. Rouse v. Western Wheel Works, 66 Ill. App. 647, 169 Ill. 536, 539, 48 N. E. Rep. 459. And, it seems, the promise to pay need not be in writing if the creditor presents monthly statements and the debtor promises from month to month to pay. Lusk v. Throop, 189 Ill. 127, 59 N. E. Rep. 529, 89 Ill. App. 509.

In Colorado interest is recoverable on an account stated and on an open account from the date when it became due and payable. Mine & Smelter Supply Co. v. Parke & Lacy Co., 47 C. C. A. 34, 107 Fed. Rep. 881.

² Hand v. Church, 39 Hun, 203.

³ Stern v. People, 102 Ill. 540.

⁴ McKeon v. Byington, 70 Conn. 429, 39 Atl. Rep. 853.

interest was not recoverable upon the mutual demands and liabilities of the parties.¹

The denial of interest on accounts rests more on the ground that there is a running credit than because the demand is uncertain and unliquidated.² This latter objection may exist in particular cases; but accounts are not ordinarily unliquidated demands in the sense which prevents the allowance of interest. A demand is not to be assumed to be unliquidated and uncertain merely because it is in the form of an account. A running account implies an indefinite credit, and a de- [616] mand is necessary to place the debtor in default. Interest is properly due and recoverable on accounts when the items are not controverted nor unliquidated, and where the circumstances are such that a debtor is in default;—has unreasonably neglected to make payment.³ To put an account upon interest a demand is often necessary, but not on the ground of uncertainty. And after demand or commencement of suit accounts generally bear interest. The beginning of suit is a form of demand. Accounts are generally made up of items which represent money paid or advanced, goods sold and delivered or services rendered on request. They are, severally, demands on which interest may be claimed, though the price has not been fixed by agreement, and must be established by evidence.⁴

An account is no more uncertain as to amount, in the aggregate, than are its constituent items; and the fact that they are charged in account can have no adverse effect in respect to interest; entering them in a book has even been emphasized as though it were a circumstance having some influence in favor of interest.⁵ Where, however, the account or demand is

¹ Davidson v. Mexican Nat. R. Co., 58 Fed. Rep. 653.

² Ledyard v. Bull, 119 N. Y. 62, 23 N. E. Rep. 444; Cox v. McLaughlin, 76 Cal. 60, 9 Am. St. 164, 18 Pac. Rep. 100; Rogers v. Yarnell, 51 Ark. 198, 10 S. W. Rep. 622.

³ See cases in first note to § 349; 1 Am. Lead. Cas. 505; Kinard v. Glenn, 25 S. C. 590.

⁴ Id.; Smith v. Shaffer, 50 Md. 132.

⁵ Marsh v. Fraser, 37 Wis. 140.

Compare Schmidt v. Limehouse, 2 Bailey, 276; Dillon v. Dudley, 1 A. K. Marsh. 65; Hunt v. Nevers, 15 Pick. 500, 26 Am. Dec. 616; Dodge v. Perkins, 9 Pick. 368; Cannon v. Beggs, 1 McCord, 370, 10 Am. Dec. 677; Scudder v. Morris, 2 N. J. L. *419; Wells v. Abernethy, 5 Conn. 222; Breyfogle v. Beckley, 16 S. & R. 264; Nelson v. Cartmel's Adm'r 6 Dam. 7; Ringo v. Biscoe, 13 Ark. 563.

for particulars, the value or amount of which cannot be measured or ascertained by reference to market rates, and are intrinsically uncertain, or the creditor's demand of payment is excessive or vague, a different case is presented.¹ Where the plaintiff merely asked the defendant for his pay for labor and materials, an account not being presented and never having been rendered, such request was not considered a demand which could aid any view of the case.² But a demand of that kind would be sufficient where no information in respect to the amount of the claim need be imparted.³

[617] Where no such uncertainty appears, and the subject of the account and the circumstances connected with it indicate that the delay has not been owing to the debtor's ignorance of the amount he had to pay, interest has been allowed after a reasonable credit.⁴ Nor will the want of a demand be any objection to the allowance of interest, where the debtor has absented himself from the state without calling for his account, and thereby prevented any demand being made upon him. In such a case interest was held to be allowable from the time of the latest transaction or service.⁵ A demand of more than is due may well be treated as insufficient to put the debtor in default; for it not only does not tend to liquidate the claim, but actually indicates that the plaintiff prevents both adjustment and payment, or that the claim is intrinsically uncertain.⁶

In Vermont the rule respecting interest is somewhat peculiar. In cases of ordinary running accounts, where there is no understanding to the contrary, express or implied, annual rests should be made and interest allowed on the balance from each such rest. In these cases the law implies a contract to pay interest on whatever may remain unsatisfied after the expiration of a year, on the ground that a year is by common

¹ *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. 164, 18 Pac. Rep. 100. See *Clark v. Clark*, 46 Conn. 586.

² *Marsh v. Fraser*, 37 Wis. 149.

The debtor's request for delay is the legal equivalent of presentment. *Babcock v. Hubbard*, 56 Conn. 284, 306, 15 Atl. Rep. 791.

³ *Gammel v. Skinner*, 2 Gall. 45.

⁴ *Wells v. Brown*, 3 N. J. L. 411; *Wood v. Smith*, 23 Vt. 706.

⁵ *Graham v. Ex'r of Graham*, 2 Keyes, 21; *Graham v. Chrystal*, 2 Abb. App. Dec. 263; *Bell v. Mendenhall*, 78 Minn. 56, 67, 80 N. W. Rep. 843.

⁶ *Hoagland v. Segur*, 38 N. J. L. 230; *Lusk v. Smith*, 21 Wis. 28; *Goff v. Rehoboth*, 2 Cush. 475.

understanding the usual period of credit in matters of open account, and that the debtor should have seen to the adjustment of the account at that time, and, failing to do so, is presumed to have contemplated the payment of subsequently accruing interest. This rule, though mainly applied to cases of mutual dealings, has not been limited thereto. In a recent case the plaintiff contracted to board the intestate's daughter; no stipulation was made respecting the time board should be furnished or the time of payment. The plaintiff performed his contract for sixteen years, during which but seven small payments were made; the plaintiff made no demand. Interest was computable from the end of each year.¹

§ 350. Same subject. Claims sounding in damages, and accounts where there has been no especial diligence on the part of the creditor, or long and vexatious delay on the part of the debtor, in the absence of a demand, present cases where interest may not be recovered as matter of law, but may be allowed in the name of damages by a jury in their discretion.² The important inquiry is whether the debtor has done all the law required of him in the particular case. If he has, he is not liable for interest; if he has not, he must pay it as a com- [618] pensation for the non-performance of his contract.³

¹ *Yearteau v. Bacon's Estate*, 65 Vt. 516, 27 Atl. Rep. 198, stating the application of the rule to different classes of questions and citing the cases.

² *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126, 4 N. E. Rep. 620; *Eckert v. Wilson*, 12 S. & R. 393; *Anonymous*, 1 Johns. 315; *Constable v. Colden*, 2 id. 480; *Hagg v. Augusta Ins. & B. Co.*, Taney, 159; *Wiltburger v. Randolph, Walk. (Miss.)* 20; *Huston v. Crutcher*, 31 Miss. 51; *Willings v. Consequa*, Pet. C. C. 172; *Gilpins v. Consequa*, id. 85; *Dox v. Dey*, 3 Wend. 356; *Stark's Adm'r v. Price*, 5 Dana. 140; *Morford v. Ambrose*, 3 J. J. Marsh. 688; *Delaware Ins. Co. v. Delannie*, 3 Bin. 295; *Amory v. McGregor*, 15 Johns. 24, 8 Am. Dec. 295; *Kilderhouse v. Saveland*, 1 Ill. App. 65; Chi-

cago v. Allcock, 86 Ill. 384; *Newson v. Douglass*, 7 Harris & J. 417; *Black's Ex'r v. Reybold*, 3 Harr. 528; *Dotter v. Bennett*, 5 Rich. 295; *Feeter v. Heath*, 11 Wend. 477; *Tatum v. Mohr*, 21 Ark. 350; *Rogers v. West*, 9 Ind. 403; *Bare v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42; *Richmond v. Dubuque*, etc. R. Co., 33 Iowa, 422; *McNally v. Shobe*, 22 Iowa, 49; *Mote v. Chicago*, etc. R. Co., 27 Iowa, 22; *McNear v. McOmber*, 18 Iowa, 12; *Noe v. Hodges*, 5 Humph. 103; *Watkinson v. Laughton*, 8 Johns. 213; *Uhland v. Uhland*, 17 S. & R. 265; *Graham v. Williams*, 16 S. & R. 257, 16 Am. Dec. 569. See *Wood v. Smith*, 23 Vt. 706; § 321.

³ *Dodge v. Perkins*, 9 Pick. 368. This case is referred to in *Foot v. Blanchard*, 6 Allen, 221, 83 Am. Dec.

The cases are numerous in which it has been held or declared in general terms that interest is not allowed on open running accounts.¹ But they were those where there had been no demand of payment or other circumstances to impose the immediate duty to pay; or else the claim founded on the account was exceptionally uncertain and unliquidated. When a promissory note or other instrument expresses no time when it is payable, it is due immediately, and bears interest from date;² and other commercial paper payable at day certain will bear interest after maturity.³ Notes payable on demand will not bear interest until a demand is made; the creditor, so long as he refrains from making a demand, acquiesces in the debtor's retention of the money.⁴ A due bill, payable on demand and being silent as to interest, bears interest only from the time

624, as correctly stating the law as held in Massachusetts. See *Evans v. Beckwith*, 37 Vt. 285; also *Scroggs v. Cunningham*, 81 Ill. 110.

¹ *Polhemus v. Annin*, 1 N. J. L. 176; *Tucker v. Ives*, 6 Cow. 193; *Davis v. Walker*, 18 Mich. 25; *Clement v. McConnell*, 14 Ill. 154; *Beardslee v. Horton*, 3 Mich. 560; *Marsh v. Fraser*, 37 Wis. 149; *Henry v. Risk*, 1 Dall. 286; *Williams v. Craig*, id. 338; *Blaney v. Hendrick*, 3 Wils. 205; *De Haviland v. Bowerbank*, 1 Camp. 50; *Smith v. Velie*, 60 N. Y. 106; *Benedict v. Sliter*, 82 Hun, 190, 31 N. Y. Supp. 413.

In an action to recover the value of services as warehouseman the account between the parties had not been settled for several years, and the balance due either party was uncertain and indefinite; interest was allowed only from the date the action was begun. *Tobin v. South's Adm'r*, 18 Ky. L. Rep. 350, 36 S. W. Rep. 1039.

In Illinois interest cannot be recovered on an account unless there has been an unreasonable and vexatious delay in payment. *Sammis v. Clark*, 13 Ill. 544; *Phillips v. Rehm*, 64 Ill. App. 477. See § 323.

In Nebraska accounts do not draw interest until the expiration of six

months from the date of the last item thereof. *Staker v. Begole*, 34 Neb. 107, 51 N. W. Rep. 468; *Garneau v. Omaha Printing Co.*, 52 Neb. 383, 72 N. W. Rep. 360.

² *Gaylord v. Van Loan*, 15 Wend. 308; *Lewis v. Lewis, Mart. & Hayw.* 191; *Purdy v. Phillips*, 1 Duer, 169; *Francis v. Castleman*, 4 Bibb, 383; *Sheehy v. Mandeville*, 7 Cranch, 208; *Farquhar v. Morris*, 7 T. R. 124; *Collier v. Gray, Overton*, 110; *Rogers v. Colt*, 21 N. J. L. 19.

³ *Gantt v. MacKenzie*, 3 Camp. 51; *Thorndike v. United States*, 2 Mason. 1; *Hastings v. Wiswall*, 8 Mass. 455.

Interest begins to run on a note payable on a certain day with interest after maturity after it is due although it is not suable until expiration of days of grace. *Wheless v. Williams*, 62 Miss. 369, 52 Am. Rep. 190; *Weems v. Ventress*, 14 La. Ann. 267.

⁴ *Hudson v. Daily*, 13 Ala. 722; *Vaughan v. Goode*, Minor, 417; *Freeland v. Edwards*, Mart. & Hayw. 207; *Hurd v. Palmer*, 21 Up. Can. Q. B. 49; *Pate v. Gray, Hemp.* 155; *Patrick v. Clay*, 4 Bibb, 246; *Bartlett v. Marshall*, 2 id. 469; *Wallace v. Wallace*, 8 Ill. App. 69; *South v. Leary, Hardin*, 518; *Conyers v. Magrath*, 4 McCord, 218; *Trotter v. Grant*, 2 Wend.

payment is demanded.¹ It has been held that, by con- [619] sending to a delay of payment, a creditor is precluded from recovering interest during such delay; so, if a person entitled to money resists the reception of it, or fails to qualify himself to receive it, he cannot recover interest.² If a note be payable at a fixed time, as one day after date, and there be a subjoined agreement that suit shall not be brought so long as the maker is alive or the payee is satisfied that he is solvent, interest still runs from the time specified for payment.³ Where an obligation was written payable in a certain month, it was held that interest did not commence until after the last day of that month.⁴ Interest is not payable before the maturity of the principal unless so expressed. Where a note is for several annual instalments interest is payable on them as they become due, and not annually on the whole sum.⁵ If a mortgage given to secure an account provides for the payment of a higher rate of interest on certain items of the account than on others, the lower rate only can be recovered if the plaintiff does not separate the items.⁶

413; *Wood v. Hickok*, id. 501; *McConnico v. Curzen*, 2 Call, 301; *Kerr v. Love*, 1 Wash. (Va.) 217; *Hadley v. Ayres*, 12 Abb. Pr. (N. S.) 240; *Wood v. Smith*, 23 Vt. 706; *Shemel v. Givan*, 2 Blackf. 312; *Delaware Ins. Co. v. De Launie*, 3 Bin. 301; *Crawford v. Willing*, 4 Dall. 286; *Oberinger v. Nichols*, 6 Bin. 159, 6 Am. Dec. 439; *Newell v. Keith*, 11 Vt. 214; *Esterly v. Cole*, 1 Barb. 235, 3 N. Y. 502; *McKnight v. Dunlop*, 4 Barb. 36; *Hoagland v. Segur*, 38 N. J. L. 230.

In *Darlington v. Wooster*, 9 Ohio St. 518, on a demand note where there was no proof of a demand, it was held that by force of the statute fixing the rate of interest, the plaintiff was entitled to recover interest from the date of the note. The statute provides "that all creditors shall be entitled to receive interest upon all moneys after the same shall become due either on bond, bill, promissory note, or other instrument of writing," etc.

In *Billingsby v. Billingsby*, 24 Ala. 518, it was decided that where a note is payable on a specified day, and contains a stipulation that it shall not bear interest until another specified day after maturity, an action is maintainable after maturity notwithstanding the judgment will bear interest from its rendition even prior to the day specified for interest to begin. See *Ijams v. Rice*, 17 Ala. 404.

¹ *Cook v. Clark's Committee*, 21 Ky. L. Rep. 316, 51 S. W. Rep. 316; *Gore v. Buck*, 1 B. Mon. 209.

² *Craig v. Penick*, 3 J. J. Marsh. 16; *Webster v. British Empire Mut. L. Assur. Co.*, 15 Ch. Div. 169.

³ *Powell v. Guy*, 3 Dev. & Batt. 70; *Carter v. King*, 11 Rich. 125; *Rallman v. Baker*, 5 Humph. 406.

⁴ *Pollard v. Yoder*, 2 A. K. Marsh. 264.

⁵ *Bawder v. Bawder*, 7 Barb. 560.

⁶ *Honnett v. Williams*, 66 Ark. 148, 49 S. W. Rep. 405.

§ 351. When demand necessary. Although money lent bears interest from the lending, it is only so when there is no agreement of the parties modifying the right. If a note for money lent be taken payable on demand it has no advantage on account of that consideration, and only bears interest like all other similar notes from the time of demand;¹ and so of a dishonored check.² Besides moneys due on running accounts and demand notes, there are various other kinds of what may be termed passive liabilities in respect to which the party liable cannot be placed in default and be charged with interest, until the money is demanded, or notice of some fact is given,³ as a note given in payment of a subscription for corporate stock, although it is not paid until after it is due, there being no promise to pay interest and no call made for the payment of subscriptions.⁴ The question of notice has been much discussed and is by no means settled. It is not necessary to [620] enter into it fully in this connection.⁵ In many cases, as in those of continuing guaranties, it is necessary to a complete cause of action; in others, to place the defendant in default so as to subject him to interest.⁶

¹ *Adams v. Adams*, 55 N. J. Eq. 42, 35 Atl. Rep. 827; *In re Estate of King*, 94 Mich. 411, 54 N. W. Rep. 178; *Butler v. Austin*, 64 Cal. 3, 27 Pac. Rep. 787; *Schmidt v. Limehouse*, 2 Bailey, 276; *Pullen v. Chase*, 4 Ark. 120; *Walker v. Wills*, 5 Ark. 166.

The same rule applies to other contracts silent as to the time of payment and as to interest. *North & South Rolling Stock Co. v. Nowland*, 73 Ill. App. 689.

² *Andrus v. Bradley*, 102 Fed. Rep. 54.

³ Where no demand has been made upon a co-tenant in possession of the premises, either for their possession or the value of their use, he is not liable for interest. *West v. Weyer*, 46 Ohio St. 66, 15 Am. St. 552, 18 N. E. Rep. 537.

⁴ *Seattle Trust Co. v. Pitner*, 18 Wash. 401, 51 Pac. Rep. 1048.

⁵ See 2 Am. Leal. Cas. 33 *et seq.*;

Vinal v. Richardson, 13 Allen, 521; *Brown v. Curtis*, 2 N. Y. 225; *Bank of Newberry v. Sinclair*, 60 N. H. 100, 49 Am. Rep. 307.

⁶ A statutory provision that no interest accruing on a claim after a debtor's death shall be allowed against his estate unless the claim is verified and payment demanded within one year of the personal representative may be waived by the latter if he alone will be affected by the waiver. *Croninger v. Marthen*, 83 Ky. 662.

It is not waived by his making payment on an unverified claim. He may therefore insist on compliance with the statute as to the unpaid balance. *Jett's Ex'x v. Cockrill's Ex'x*, 85 Ky. 348, 3 S. W. Rep. 422.

The demand is waived if the personal representative requests the creditor to postpone the collection of his claim and assures him that it

Bail are liable for interest on the judgment from the return of the *ca. sa.*, for they are fixed from that time and are bound to take notice of the proceedings of the court.¹ So, on a replevin bond, the sureties are liable for interest on the value of the property adjudged against the principal from the date of the judgment. The undertaking in these and similar cases is specific, depending only on contingencies determinable by the proceedings in the case, and of which the sureties are bound to inform themselves. But in an action for the benefit of a creditor of an insolvent estate brought upon an administrator's bond against a surety, it appeared that the creditor's claims had been allowed and the probate court had made a decree of distribution, and that the administrator died soon thereafter; it was held that interest should be added to the sum found due by the decree of distribution only from the time payment was demanded of the surety.²

It is a general rule that a party is not entitled to notice unless he has stipulated for it, or it is necessary by the very nature of the transaction, as where the act on which payment is to be made is indefinite, and when it occurs will be peculiarly within the knowledge of the payee.³ On a guaranty of payment of notes, not exceeding in all a certain amount that should be discounted by a bank for another, it was held that the guarantor was liable to the amount of the guaranty, but not for interest until notice given that the principal had failed to pay.⁴ If the event on which the money is to be payable is one not particularly within the knowledge of the payee, as a [621] death⁵ or a marriage, even though the payee be a party to it,⁶ interest commences to run from the time when the event occurs.

will be paid in full, at least where such representative is the only other creditor and the estate is not sufficient to pay both debts. *Boughner v. Brooks*, 7 Ky. L. Rep. 599.

The surety on a guardian's bond is liable for interest only after demand of payment made upon him. *Pennsylvania Co. v. Swain*, 189 Pa. 626, 42 Atl. Rep. 297.

¹ *Constable v. Colden*, 2 Johns. 480.

² *Heath v. Guy*, 10 Mass. 371, overruling *Payne v. McInteer*, 1 id. 69.

³ *Vyse v. Wakefield*, 6 M. & W. 442; *Hodges v. Huleman*, 2 Dana, 396.

⁴ *Washington Bank v. Shurtleff*, 4 Met. 30; *Henning's Case*, Cro. Jac. 432.

⁵ *Troubar v. Hunter*, 5 Rawle, 257; *Sumner v. Beebe*, 37 Vt. 562.

⁶ *Fletcher v. Pynsett*, Cro. Jac. 102.

The general rule that the debtor must seek his creditor and tender the amount due does not apply when the debtor is a municipal or *quasi*-municipal corporation. In such a case, if the creditor desires to secure interest on the obligation he holds, he must present it at the treasury of the debtor; failing to do so, he will not be entitled to interest after its maturity, at least if funds were provided to pay the principal and interest due.¹ While it is the general rule that a depositor cannot maintain an action to recover his deposit until he has made a formal demand, and that the bringing of an action is not a sufficient demand, yet, "if the bank by words or conduct denies the depositor's right to his balance it becomes presently liable to an action without formal demand," and interest is recoverable as damages; as where it initiates proceedings which result in a transfer of the moneys of its depositors and thus puts it out of its own power to pay on their demand.² If a national bank goes into liquidation the necessity of a demand is dispensed with and interest on the liability of the shareholders runs from the time of liquidation.³ But this doctrine does not apply to a state bank for which a receiver is appointed at the instance of the superintendent of banks, there being no admission of insolvency on the part of the officers of the bank. In such a case the bringing of an action is a sufficient demand, and interposing a counter-claim by way of answer asking to have the deposit standing to the defendant's credit applied as a set-off against the plaintiff's claim should be treated as a demand.⁴ Interest on claims against an insolvent bank should

¹ *Holihan v. City of New York*, 33 N. Y. Misc. 249, 68 N. Y. Supp. 148; *Donnelly v. Brooklyn*, 121 N. Y. 9, 24 N. E. Rep. 17; *Friend v. Pittsburgh*, 131 Pa. 305, 17 Am. St. 811, 18 Atl. Rep. 1060, 6 L. R. A. 636; *South Park Com'rs v. Dunlevy*, 91 Ill. 49. See § 214.

The commencement of suit is sufficient demand upon a city to make it liable for interest on warrants from that time. *New Orleans v. Warner*, 175 U. S. 120, 147, 20 Sup. Ct. Rep. 44.

² *Chemical Nat. Bank v. Bailey*, 12

Blatch, 480; *Richmond v. Irons*, 121 U. S. 27, 64, 7 Sup. Ct. Rep. 788.

The bringing of an action held a sufficient demand. *Morse v. Rice*, 36 Neb. 212, 54 N. W. Rep. 308.

³ *Richmond v. Irons*, 121 U. S. 27, 64, 7 Sup. Ct. Rep. 788. *Contra*, *Patten v. American Nat. Bank*, 15 Colo. App. 479, 63 Pac. Rep. 424. The case first cited is not noticed by the Colorado court.

⁴ *Sickles v. Herold*, 149 N. Y. 332, 43 N. E. Rep. 852; *American Nat. Bank v. Patten*, *supra*.

be computed to the time the assignee was appointed.¹ If the transaction between the parties was valid and was only void as against proceedings in insolvency and upon action by the assignee, interest cannot be collected prior to demand.² The doctrine that taxes illegally assessed may be recovered with interest from the time of payment if paid under protest, and from the time of demand if paid without protest,³ is not applicable where payment has been made under protest and the taxpayer is entitled to an abatement, the sum to which he is entitled having been paid. In such a case interest runs only from the time repayment is demanded, and not from the date of the abatement.⁴ An agreement to pay a yearly salary, beginning on one date and expiring on another, is simply an agreement to pay so much for services by or for the year, and does not import that the stipulated sum is to be paid at a particular time. Hence interest is not recoverable until demand is made.⁵

There can be no question but that an action properly brought is a sufficient demand to entitle the creditor to interest. But aside from this proposition, the adjudications are not numerous as to what constitutes a demand. No doubt the demand must be sufficiently specific to inform the debtor of the claim made so that he can ascertain therefrom the amount he ought to pay by application of the standard of market value.⁶ A demand made before anything is due is ineffectual, and so, if it denies the debtor's right to a set-off, he being entitled thereto.⁷ A demand is not effectual if it is for a much larger sum than was due.⁸ Accounts rendered the debtor were headed with these words, "five per cent. interest charged after twelve months' credit." This was not a sufficient demand for the payment of a bill made out of many items, extending over a

¹ *Bank Commissioners v. Security Trust Co.*, 70 N. H. 536, 49 Atl. Rep. 113.

² *Lewis v. Burlington Savings Bank*, 64 Vt. 626, 25 Atl. Rep. 835.

³ *Boston & S. Glass Co. v. Boston*, 4 Met. 181; *Boston Water Power Co. v. Boston*, 9 Met. 199.

⁴ *Boott Cotton Mills v. Lowell*, 159 Mass. 382, 34 N. E. Rep. 367.

⁵ *Soule v. Soule*, 157 Mass. 451, 32 N. E. Rep. 663.

⁶ *Laycock v. Parker*, 103 Wis. 161, 79 N. W. Rep. 327.

⁷ *Union Bank v. Morgan*, 12 N. Z. 672.

⁸ *Hill v. South Staffordshire R. Co.*, L. R. 18 Eq. 154, disapproving *Mildmay v. Methuen*, 3 Drew. 91. See § 349.

considerable period. "If it is to mean anything specific it must be read as meaning that interest will be charged after one year from the date of each item, *reddendo singula singulis*. But, to my mind, it is impossible to read it like that. The intimation is general only."¹ A notice to a liquidator by a creditor demanding interest on his claim is not a sufficient demand under 3 and 4 Wm. IV., ch. 42, sec. 28, for present payment, so as to make the debt carry interest from the date of the notice.² A claim sent in under a winding-up order is not a demand within the statute.³ But it has been held that a summons taken out by a person claiming the refund of money paid a corporation under a void agreement is a sufficient demand under that statute.⁴

§ 352. When allowed on money had and received. The action for money had and received is equitable; whether interest shall be recovered depends upon the particular circumstances. In some cases it is said the defendant ought to refund the principal merely; and in others that he ought, *ex equo et bono*, to refund it with interest; each case depends on the justice and equity arising out of its facts.⁵ If the defendant has derived an advantage from the money, or committed some wrong in obtaining or disposing of it, or is in default in not paying it over, he will be charged with interest. Thus, where the common property is rented out by one tenant in common, he is accountable to his co-tenants for their share of the rents received, and liable for interest upon his receipts of rent from the end of the rent year, because, having another's money and using it, he should pay interest on it.⁶ A person who bought

¹ Williams v. French, 61 L. J. (Ch.) 22; Lautz v. Archdale, 11 T. L. Rep. 452.

² In re United Importers' Co., 7 N. Z. 220.

³ In re Herefordshire Banking Co., L. R. 4 Eq. 250.

⁴ Alison's Case, L. R. 15 Eq. 394.

⁵ Pease v. Barber, 3 Cal. 266; Marvin v. McRae, 1 Cheves, 61; Porter v. Nash, 1 Ala. 452.

Where a mother was the custodian of her son's money, without instructions, and invested portions of it

from time to time, keeping it separate from her own funds, and paid sums from time to time to him, she was liable for the interest actually received. Hughes v. Miller, 186 Pa. 381, 40 Atl. Rep. 492.

Interest on the claim of a principal against the estate of his deceased agent may be computed from the time demand is made upon the administrator. Shepherd v. Shepherd's Estate, 108 Mich. 82, 65 N. W. Rep. 580.

⁶ Early v. Friend, 16 Gratt. 21;

a slave with notice of a better title was decreed to deliver him and pay profits; and interest was charged against him upon the hires actually received by him from other persons from the date of his receipts, but not upon the profits of such slave while in his own possession without being hired, these being unliquidated and conjectural sums, which he was in no default in not paying.¹ If money is paid to the defendant under a mutual mistake, and fraud is not imputable to either party, interest cannot be recovered until after a demand.² So a party receiving from an administrator full payment of his debt against the estate on the supposition that it is solvent, [622] when afterwards sued to recover the excess above the ratable part, on the estate proving insolvent, it was held that interest was not recoverable until after a demand.³ But interest is recoverable from the time money was received if it was wrongfully obtained and fraudulently kept,⁴ unless the plaintiff has been guilty of laches in demanding it and the defendant has not derived advantage from its use.⁵ A mere depositary, bailee, stockholder or trustee is not liable for interest by merely having the money in his hands; there must be a wrongful use made of it, refusal to pay on proper demand, or some neglect of duty by which the principal or interest was lost.⁶

Jones v. Williams, 2 Call, 85; *Dow v. Adams*, 5 Munf. 21; *Nuckit v. Lawrence*, 5 Rand. 571; *Currier v. Kretzinger*, 162 Ill. 511, 48 N. E. Rep. 882, 58 Ill. App. 238. See *Leete v. Pacific Mill & Mining Co.*, 89 Fed. Rep. 480, construing the statute of Nevada to cover interest in such a case.

¹ *Baird v. Bland*, 5 Munf. 492.

² *Jacobs v. Adams*, 1 Dall. 52; *Simons v. Walter*, 1 McCord, 97; *Passenger R. Co. v. Philadelphia*, 51 Pa. 465; *Lynch v. Debiar*, 3 Johns. Cas. 392; *Sanders v. Scott*, 68 Ind. 120; *Georgia R. & B. Co. v. Smith*, 83 Ga. 626, 10 S. E. Rep. 235; *Cummings v. Bradford*, 15 Ky. L. Rep. 155, 22 S. W. Rep. 548; *Grim's Estate*, 147 Pa. 190, 23 Atl. Rep. 802; *Cranford v. Smith*, 93 Va. 623, 23 S. E. Rep. 245, 25 id. 657; *Ashhurst v. Field's Adm'r*,

28 N. J. Eq. 315; *Simons v. Walter*, 1 McCord, 97; *Northrop's Ex'rs v. Graves*, 19 Conn. 548, 50 Am. Dec. 264.

³ *Walker v. Bradley*, 3 Pick. 261; *Stevens v. Goodell*, 3 Met. 34.

⁴ *Manufacturers' Nat. Bank v. Perry*, 144 Mass. 313, 11 N. E. Rep. 81; *Atlantic Bank v. Harris*, 118 Mass. 147; *James Reynolds Elevator Co. v. Merchants' Nat. Bank*, 55 App. Div. 1, 67 N. Y. Supp. 397.

⁵ *United States v. Sanborn*, 135 U. S. 271, 10 Sup. Ct. Rep. 812.

⁶ *Luke v. Park*, 19 N. J. L. 108; *Ex parte Walsh*, 26 Md. 495; *Wade v. Wade's Adm'r*, 1 Wash. C. C. 477; *Huntley v. York Bank*, 21 Pa. 291; *Roach v. Jells*, 40 Miss. 751; *Reynolds v. Walker*, 29 id. 250; *Fitzgerald v. Jones*, 1 Munf. 150; *Mickle*

One who deposits money given to indemnify against loss by reason of his signing an injunction bond is not liable to the principal in such bond for interest allowed him on such deposit, there being no contract between them as to interest, and no other consideration for signing the bond than the benefit expected from the deposit.¹ A debtor who allows judgment to be taken against him without claiming a credit to which he was entitled may recover the money paid for which he received no credit, and interest thereon at the legal rate from the time of payment; he cannot recover the rate borne by the contract upon which the payment was made.²

§ 353. When allowed against agents, trustees and officers. An agent who receives money for his principal in the transaction of the latter's business is not liable for interest on it before a demand is made, unless he has received special instructions to remit as fast as collected, or is in default in neglecting to render his accounts; and the same rule applies to an attorney who has collected money for his clients.³ But

v. Cross, 10 Md. 352; Ruckman v. Pitcher, 20 N. Y. 9; Union Bank v. Solle, 2 Strobb. 390; Robinson v. Corn Exchange & Ins. Co., 1 Robert. 14; Jacot v. Emmett, 11 Paige, 142; Parsons v. Treadwell, 50 N. H. 356; Doxey v. Miller, 2 Ill. App. 30; Talbot v. National Bank, 129 Mass. 67, 37 Am. Rep. 302; Wood v. Robbins, 11 Mass. 504, 6 Am. Dec. 182; Bell v. Logan, 7 J. J. Marsh. 593; Vance v. Vance, 5 T. B. Mon. 521; Johnson v. Haggin, 6 J. J. Marsh. 581; Taylor v. Knox, 1 Dana, 391; Johnson v. Eicke, 12 N. J. L. 316; Knight v. Reese, 2 Dall. 182; Rayner v. Bryson, 29 Md. 473; Ingersoll v. Campbell, 46 Ala. 282; Dilliard v. Tomlinson, 1 Munf. 183; Karr's Adm'r v. Karr, 6 Dana, 5; Dexter v. Arnold, 3 Mason, 284; Candee v. Skinner, 40 Conn. 464; Stearns v. Brown, 1 Pick. 530; Wyman v. Hubbard, 13 Mass. 232; Newton v. Bennet, 1 Bro. Ch. 359; United States v. Curtis, 100 U. S. 119; United States v. Denvir, 106 id. 536, 1 Sup. Ct. Rep. 481; Scofield's Estate, 99 Ill.

513; Kattleman v. Guthrie, 142 Ill. 357, 31 N. E. Rep. 589; Mathewson v. Davis, 191 Ill. 391, 61 N. E. Rep. 68; Twohy Mercantile Co. v. Melbye, 83 Minn. 394, 86 N. W. Rep. 411; Bell v. Rice, 50 Neb. 547, 70 N. W. Rep. 25; Estate of Smith, 1 N. Y. Misc. 253, 22 N. Y. Supp. 1085; Boughton v. Flint, 74 N. Y. 476; Miller v. Elder, 7 Ohio Ct. Ct. 97; Thurber v. Sprague, 17 R. I. 634, 24 Atl. Rep. 48; Kittel v. Augusta, etc. R. Co., 28 C. C. A. 437, 84 Fed. Rep. 386; Anderson v. Pacific Bank, 112 Cal. 598, 44 Pac. Rep. 1063, 53 Am. St. 228, 32 L. R. A. 479; Barrere v. Soms, 113 Cal. 97, 45 Pac. Rep. 177.

¹Thouron v. Railway Co., 90 Tenn. 609, 18 S. W. Rep. 256.

²Walker v. Thomas, 8 Ky. L. Rep. 700 (Ky. Super. Ct.).

³Fish v. Seeberger, 154 Ill. 30, 39 N. E. Rep. 982, 47 Ill. App. 580; Dale v. Richards, 21 D. C. 312; Bischoffsheim v. Baltzer, 21 Fed. Rep. 531; Porter v. Grimsley, 98 N. C. 550, 4 S. E. Rep. 529; Neal v. Freeman, 85 N.

where an agent, having received money, unreasonably neglects to inform his principal of it, he is liable for interest from the time when he ought to have given such information.¹ Interest is allowed where the law by implication makes it the duty of the party to pay over money to the owner without previous demand.²

The liability of a trustee for interest depends upon general principles which may be varied according to the circumstances of each case. These principles are that he is not to make a profit out of the trust funds in his hands, and that he shall exercise that degree of diligence in relation to the trust estate which men of ordinary prudence exercise with respect to their own estates, and if any loss results from his failure in this respect, he, and not his *cestui que trust*, must bear it.³ Mere error of judgment is not sufficient to subject a trustee to punitive responsibility, nor does the law require of him extraordinary care, or make him an insurer of the trust property, or liable for losses upon an investment which may occur from depreciation of values if he has exercised reasonable care, dili-

C. 441; *Chase v. Union Stone Co.*, 11 Daly, 107; *Williams v. Storrs*, 6 Johns. Ch. 353. 10 Am. Dec. 340; *Crane v. Dygert*, 4 Wend. 675; *Hauxhurst v. Hovey*, 26 Vt. 544; *Lever v. Lever*, 2 Hill's Ch. 158; *Roland v. Martindale*, 1 Bailey's Eq. 226.

When a financial agent or attorney mixes the money of his principal with his own by depositing it in his general bank account, and draws it out and uses it in his own business, it is presumed that he has gained a benefit, and on his failure to show how much he has derived from its use he is chargeable with interest. When he has interest-bearing securities in his possession which belong to his principal it is presumed that he received interest thereon; and unless he explains away the presumption he will be charged therewith. *Blodgett's Estate v. Converse's Estate* 60 Vt. 410, 15 Atl. Rep. 100.

An agent who is not allowed com-

pensation should not be charged with interest on money of his principal which the former used in his business. *Riley v. Riley*, 14 Ky. L. Rep. 895.

¹ *Dodge v. Perkins*, 9 Pick. 368.

² *Dodge v. Perkins*, 9 Pick. 368; *Miller v. McCormick Harvesting Machine Co.*, 84 Ill. App. 571; *Ellery v. Cunningham*, 1 Met. 112; *Badell v. Janney*, 9 Ill. 193; *Nisbet v. Lawson*, 1 Ga. 275; *Bank of South Carolina v. Buire*, 3 Strobb. 439; *Anderson v. Georgia*, 2 Ga. 370; *Boyd v. Gilchrist*, 15 Ala. 849; *Harrison v. Long*, 4 Desaus. 111; *Hawkins v. Minor*, 5 Call. 118; *Kimbrel v. Glover*, 13 Rich. 191; *McRae v. Malloy*, 87 N. C. 196; *Winslow v. People*, 117 Ill. 152, 7 N. E. Rep. 135 (a demand need not be made upon a guardian for the money due his ward).

³ *Baker v. Lafitte*, 4 Rich. Eq. 392; *Dixon v. Hunter*, 3 Hill (S. C.), 204; *Tucker v. Richards*, 58 S. C. 52, 56 S. E. Rep. 3.

gence and prudence.¹ A trustee who has the custody and [623] management of funds, and uses them in his private business;² realizes interest by lending; neglects to render the fund productive when it was his duty to do so; fails to account when called upon; or is otherwise guilty of neglect, evasion, fraud, or any wrong administration, will be charged with interest, and even compound interest, according to the culpability of his conduct.³

¹ Estate of Cousins, 111 Cal. 441, 44 Pac. Rep. 182; Estate of Sarment, 123 Cal. 331, 55 Pac. Rep. 1015; Estate of Marre, 127 Cal. 128, 59 Pac. Rep. 385; J. I. Case Plow Works v. Edwards, 71 Ill. App. 655; Fitzgerald v. Paisley, 110 Iowa, 98, 81 N. W. Rep. 181; Briggs v. Walker, 102 Ky. 359, 43 S. W. Rep. 479; Palmer v. Palmer, 15 App. Div. 609, 44 N. Y. Supp. 808.

² "Whatever the actual intention of the trustee may be, the weight of authority seems to be that where he invests trust money in his individual name, he commits a breach of trust which subjects him to the same liability as if there had been a wilful conversion to his own use." White v. Sherman, 168 Ill. 589, 604, 48 N. E. Rep. 128, 61 Am. St. 132, citing Morris v. Wallace, 3 Pa. 319, 45 Am. Dec. 641; Stanley's Appeal, 8 Pa. 431, 49 Am. Dec. 530; McAllister v. Commonwealth, 30 Pa. 536; 2 Pomeroy's Eq., sec. 1079; Gilbert v. Welsch, 75 Ind. 557; Naltner v. Dolan, 108 Ind. 500, 58 Am. Rep. 61, 8 N. E. Rep. 289, and cases cited; De Jarnette v. De Jarnette, 41 Ala. 708.

One who receives money under an agreement to pay it over to a party when the title to certain property should be cleared is not liable for interest before that time merely because he deposited the money, with other funds, in his own name, there never being a time when the amount would not have been paid by the bank in which the deposit was made. Math-

ewson v. Davis, 191 Ill. 391, 61 N. E. Rep. 68; Matter of Barnes, 140 N. Y. 468, 35 N. E. Rep. 653.

³ In re Thomas's Estate, 26 Colo. 110, 56 Pac. Rep. 907; White v. Sherman, 168 Ill. 589, 61 Am. St. 132, 48 N. E. Rep. 128, 62 Ill. App. 271; Haines v. Hay, 169 Ill. 93, 48 N. E. Rep. 218; McCune v. Hartman Steel Co., 87 Ill. App. 162; Hodge v. Quiry, 9 Ky. L. Rep. 650; In re Brewster's Estate, 113 Mich. 561, 71 N. W. Rep. 1085; In re Assignment of Murdoch, 129 Mo. 488, 499, 31 S. W. Rep. 942; Wolfort v. Reilly, 133 Mo. 463, 34 S. W. Rep. 847; Miles's Estate, 2 Pa. Dist. Rep. 103; Noble's Estate, 178 Pa. 460, 35 Atl. Rep. 859; Re Hodges' Estate, 66 Vt. 70, 28 Atl. Rep. 663; Mathewson v. Davis, 191, Ill. 391, 61 N. E. Rep. 68; Wilkinson v. Washington Trust Co., 102 Fed. Rep. 28; Mades v. Miller, 2 D. C. App. Cas. 455; Adamson v. Reid, 6 Vict. L. R. (Eq.) 164; Eppinger v. Canepa, 20 Fla. 262; Cannon v. Apperson, 14 Lea, 553; Grant v. Edwards, 93 N. C. 488; Aldridge v. McClelland, 36 N. J. Eq. 288; Jackson v. Shields, 87 N. C. 473; Wilson v. Lineberger, 88 id. 416; Thurston, Matter of, 57 Wis. 104, 15 N. W. Rep. 126; Crosby v. Merriam, 31 Minn. 342, 17 N. W. Rep. 950; In re Sanderson, 74 Cal. 199, 15 Pac. Rep. 753; May v. Green, 75 Ala. 162; Riley v. McInlear's Estate, 61 Vt. 254, 17 Atl. Rep. 729, 19 id. 996; In re Hilliard, 83 Cal. 423, 23 Pac. Rep. 393; Moyer v. Fletcher, 56 Mich. 508, 23 N. W. Rep. 198; Brewer v. Ernest, 81

Trustees are also liable for interest on the principle that all profits made from the employment of the trust funds belong to the beneficiary, and that he is entitled to be indemnified for the loss, through their neglect or fraudulent management, of the profit and increase which would have arisen from a diligent and judicious performance of the trust. If interest is lost by negligence of the trustee, he is charged with interest, either simple or compound, as may be required to compensate that loss, which may be greater or less according to the degree of the delinquency. If in violation of the trust he mingles the trust funds with his own and uses them in his business, he does so at his peril; and if he refuses or neglects to give an account of the profits made, or makes an evasive or unsatisfactory one compound interest will be charged, with rests long or short, according to circumstances. The interest is thus compounded as a punishment for breach of trust and

Ala. 435, 2 So. Rep. 84; Winslow v. People, 117 Ill. 152, 7 N. E. Rep. 135; In re Newcomb, 32 Fed. Rep. 826; Van Doren v. Van Doren, 45 N. J. Eq. 580, 17 Atl. Rep. 805; Filmore v. Reithman, 6 Colo. 120; Lomax v. Pendleton, 3 Cal. 465; Voorhees v. Stoothoff, 11 N. J. L. 145; Jones v. Ward, 10 Yerg. 160; Amos v. Heatherly, 7 Dana, 48; Singleton's Heirs v. Singleton's Ex'r, 5 Dana, 97; Clay v. Hart, 7 Dana, 17; Nixon's Heirs v. Nixon's Adm'r, 8 id. 5; Hooper v. Winston, 24 Ill. 353; White's Heirs v. White's Adm'r, 3 Dana, 376; Miller v. Beverlys, 4 Hen. & Munf. 415; Quarles v. Quarles, 2 Munf. 321; English v. Harvey, 2 Rawle, 305; Callaghan v. Hall, 1 S. & R. 241; Yundt's Appeal, 13 Pa. 575, 53 Am. Dec. 496; Witman & Geisinger's Appeal, 28 Pa. 376; Bronseman v. Frank, id. 475; Verner's Estate, 6 Watts. 250; Roberts's Appeal, 92 Pa. 407; Bruner's Appeal, 57 id. 46; Kerr v. Laird, 27 Miss. 544; Pearson v. Darrington, 32 Ala. 227; Thomas v. School, 9 Gill & J. 115; Estate of

Isaacs, 30 Cal. 105; Jennison v. Hapgood, 10 Pick. 77; Guardianship of Dow, 133 Cal. 446, 65 Pac. Rep. 890; St. Paul Trust Co. v. Strong, 85 Minn. 1, 88 N. W. Rep. 256; Sinkler's Estate, 10 Pa. Dist. Rep. 399.

Where an executor or administrator owes the estate, and is solvent and able to pay, the amount of the debt will be considered in law and equity as so much money in his hands; but if it is shown that he has been and is unable to pay, he will not be charged with the debt as cash. Harker v. Irick, 10 N. J. Eq. 272; Baucus v. Stover, 24 Hun, 109; United States v. Eggleston, 4 Sawyer, 199; Terhune v. Oldis, 44 N. J. Eq. 146, 14 Atl. Rep. 638. But the proof of inability to pay must be complete and satisfactory; and if it does not show that he could not pay interest he is chargeable with it. Terhune v. Oldis, *supra*.

As to the liability of executors and administrators for interest under the statutes of Illinois, see Schofield's Estate, 99 Ill. 513.

as a substitute for the undisclosed profits.¹ A trustee is not [625] chargeable with compound interest unless he receives compound interest, or has been guilty of a gross abuse of his

¹ *Miller v. Lux* 100 Cal. 609, 35 Pac. Rep. 345, 639; *Bemmerly v. Woodward*, 124 Cal. 568, 57 Pac. Rep. 561; *Price v. Peterson*, 38 Ark. 494; *Barney v. Saunders*, 16 How. 539.

Profits may be recovered where executors have retained money in their hands for several years and invested it in business, making large profits, although no technical trust was created by the will. *Hertzler's Estate*, 192 Pa. 531, 43 Atl. Rep. 1028.

In the *Matter of Harland's Accounts*, 5 Rawle, 323, *Gibson, C. J.*, said: "It is a fundamental rule of equity that a trustee shall not make a profit of the fund for himself; and that substitution of interest for profits not ascertainable is but a modification of it. Such being the admitted basis of the rule, no colorable reason can be assigned why it should not be applied as well to an administrator who has used the trust moneys without having accounted for the profits, as to an executor or trustee bound by instructions or the nature of his office to invest for accumulation. If he trade with the moneys of the fund, he shall, like any other trustee, make good the loss or render the gain; and where it is indeterminate by reason of his refusal to account (always an index of fraud), the presumption is that it was at least equal to simple interest for the year, and that in his hands at the end of it, it became capital and made gain in its turn. If it were no greater in fact than simple interest for the period, he has no more to do, in order to get rid of the presumption of compound profits, than to show the truth by exhibiting the accounts. While he stands out the presumption that he made more than

the sum obtained by the method of computation employed against him is an irresistible one, else the result would make it worth his while to disclose the truth. If he kept no accounts he cannot murmur at the adoption of that rule of computation which is most beneficial to the fund, and but a reasonable penalty for his negligence. Interest is payable periodically; and the matter resolves itself into a question whether a trustee may superinduce a state of things that shall give him the benefit of its earnings in prejudice of the fund. Take the case of an executor plainly bound to accumulate, who deliberately disregards his testator's directions to reinvest, and becomes a borrower from the fund at simple interest; shall not the interest, as it falls due, be principal in his hands, as it would have been if he had received it of a stranger? In such a conjuncture, it is impossible to conjecture how the fund can be rightfully left in a less prosperous condition than it would have attained had he reinvested according to the terms of the will. To suffer a trustee to elude the conditions of the trust, by borrowing from it at simple interest, and using the proceeds for his own advantage, would offer an irresistible temptation to maladministration, by enabling him to benefit by his own wrong. That interest should not bear interest is not a dictate of justice; but the effect, in particular cases, of arbitrary enactment, founded, it is thought by some, on a questionable policy; and in a case distinctly out of the purview of the statute, where the statutory measure is arbitrarily but necessarily assumed for the computation of prof-

trust;¹ or, as is said in some cases, unless he has actually made such interest, or ought to have made it or is presumed to have

its, there is no imaginable reason why the product should not be compounded where there is reason to believe that the profits were compounded; or why the party beneficially entitled should not be put in the condition that a conscientious discharge of the trust would have put him. In a case of negligence or omission consistent with good faith, policy dictates a more indulgent course, such as was pursued in *Harvey v. English*, 2 Rawle, 303." *Schieffelin v. Stewart*, 1 Johns. Ch. 620, 7 Am. Dec. 507; *Frost v. Winston*, 32 Mo. 489; *Ogden v. Larrabee*, 57 Ill. 389; *Raphael v. Boehm*, 11 Ves. 92; *Barclay v. Andrew*, [1899] 1 Ch. 674; *Knott v. Cottey*, 16 Beav. 77; *Smith v. Lumpton*, 8 Dana. 73; *Torbet's Heirs v. McReynolds*, 4 Humph. 215.

¹*Kattelman v. Guthrie*, 142 Ill. 357, 31 N. E. Rep. 589, 43 Ill. App. 188; *Sutton v. Cotham*, 2 Tenn. Cas. 137; *Mathewson v. Davis*, 191 Ill. 391, 61 N. E. Rep. 68; *Ames v. Scudder*, 11 Mo. App. 168, 83 Mo. 189; *Thurston, Matter of*, 57 Wis. 104, 15 N. W. Rep. 126; *Alvis v. Oglesby*, 87 Tenn. 172, 10 S. W. Rep. 313; *Peelle v. State*, 118 Ind. 512, 21 N. E. Rep. 288; *Adams v. Lambard*, 80 Cal. 426, 22 Pac. Rep. 180; *Falkner v. Hendy*, 80 Cal. 636, 22 Pac. Rep. 401; *Rayner v. Bryson*, 29 Md. 473; *Vaughan v. Bibb*, 46 Ala. 153; *Armstrong v. Campbell*, 3 Yerg. 201, 24 Am. Dec. 556; *Turney v. Williams*, 7 Yerg. 172; *St. Paul Trust Co. v. Strong*, 85 Minn. 1, 88 N. W. Rep. 256; *Parker v. Simpson*, 180 Mass. 334, 358, 62 N. E. Rep. 401.

Interest is only to be compounded where the trustee has speculated with the trust funds and no other method can be adopted to ascertain

the profit he has made. *Kane v. Kane's Adm'r*, 146 Mo. 605, 48 S. W. Rep. 446.

Bryant v. Craig, 12 Ala. 354, is an instructive case upon this subject. Ormond, J., said: "As the guardian could not be guilty of negligence in not investing the money of his ward, unless the law required him to invest it, the first question which naturally presents itself is, what is the law upon that subject. Our statute law, though very full and particular as to the mode of appointing guardians, making settlements with them, etc., is silent upon this particular. It results, however, necessarily from the nature of the trust, that the estate of the ward should be profitably employed, as otherwise it would be consumed; and where it consists of money, this could only be by lending it out on good security. In England a trustee, whose duty it is to invest the money in his hands is exonerated from liability by investing it in the public funds, which, as the court would direct to be done on application, it will sanction if done without such application; and he will be exonerated from liability though the stock should fall in value. *Franklin v. Frith*, 3 Bro. Ch. 433; *Holmes v. Dung*, 2 Cox's Ch. 1. In *Smith v. Smith*, 4 Johns. Ch. 284, Chancellor Kent seems to think that personal security is insufficient, and that a trustee lending money must require adequate real security, or resort to public funds. Here are no public funds in which money may be safely and securely invested. At least there has been none until very recently, and it is not probable we shall be long burthened with a public debt. Personal security, no mat-

made it.¹ The general rule is that an agent or trustee is chargeable with the legal rate of interest in the absence of proof that the profits he has made by his misconduct are in excess

ter how good it was deemed at the time, would not be sufficient; and it may be added that, with us, real property is subject to such fluctuations that it is by no means an adequate security, and it may very well be doubted whether he would not be personally liable for any loan he may have made of the money without the sanction of the court, no matter what security he may have taken. Our statute appears to have intended to place the whole matter under the direction of the orphans' court, as it invests that court with power to direct a sale of the land of the ward, if the personal estate and the rents and profits of the realty were insufficient for his support; and it appears to follow necessarily that the same court would have the power to direct in what manner the money of the ward should be invested. It was the duty of the guardian, if he desired to exonerate himself from the payment of interest, to apply to the court for direction in the investment of the funds, who would have examined the proposed security, and whose approbation would have exonerated the guardian

from liability, if afterwards lost without his neglect. The guardian having omitted to make this application must pay interest on the funds in his hands, whether they have been profitable to him or not; and we next proceed to inquire whether this is such gross negligence as will authorize rests to be made in the account for the purpose of charging him compound interest. The general rule undoubtedly is, that where it is the duty of the trustee to invest the trust funds, and he fails to do so, he is chargeable only with simple interest. See cases already cited, and *Newton v. Bennet*, 1 Bro. Ch. 359, in the note to which Mr. Eden has collected all the authorities, establishing conclusively that for neglect merely the practice of the court is to charge interest at the rate of four per centum. Where the trustee is guilty of fraud or corruption, or where, in open violation of the trust, he applies the funds to his own use in trade; converts the property or securities, as for example, stock into money, and applies it to his own use; or otherwise corruptly and fraudulently abuses the trust

¹ *Hazard v. Durant*, 14 R. I. 25; *Burdick v. Garrick*, L. R. 5 Ch. 233; *Attorney-General v. Alford*, 4 De G., Macn. & G. 676; *Penny v. Avison*, 3 Jurist (N. S.), 62; *Cruce v. Cruce*, 81 Mo. 676. But see *Dissenger's Case*, 39 N. J. Eq. 227; *Eppinger v. Canepa*, 20 Fla. 262; *Latham v. Wilcox*, 99 N. C. 367, 8 S. E. Rep. 711.

Regardless of whether a trustee made profits in his business by the use of the trust funds, if he has used the money he is chargeable with compound interest (*Speiser v. Mer-*

chants' Exchange Bank, 110 Wis. 507, 524, 86 N. W. Rep. 243), from the date of their appropriation until that of final judgment, notwithstanding the granting of a new trial. *Faulkner v. Hendy*, 103 Cal. 15, 36 Pac. Rep. 1021.

In England the profits made must be paid to the trust unless it is impossible to prove what they were, in which case the trustee will be liable for trade interest. *Davis v. Davis*, [1902] 2 Ch. 314.

thereof.¹ A trustee invested funds in securities which were repudiated by the *cestui que trust* and condemned by the court. He was held liable for the legal rate of interest though the se-

reposed in him, he may be charged with compound interest.

"The first case, it is said, in which compound interest was charged against an executor is *Raphael v. Boehm*, 11 Vesey, 91. That was a case of gross misconduct, and violation of the terms of the trust, by embarking the funds in trade instead of investing them for the purpose of accumulation as directed by the will. The principle established by this case does not appear to have been followed in cases where the facts appear to be very similar. See *Ashburnham v. Thompson*, 13 Ves. 402; and *Tebbs v. Carpenter*, 1 Madd. 291. In this last cited authority all the cases are collated and elaborately examined; and although there was in that case a direction in the will that the assets should be invested in the public funds, which was not done, yet the vice-chancellor refused to allow compound interest. He sums up an elaborate and able review of the authorities thus: 'It appears, therefore, from this view of the authorities, that a distinction has been taken, as in every moral point of view there ought to be, between *negligence* and *corruption*, in executors. A special case is necessary to induce the court to charge executors with more than four per cent. upon the balances in their hands. The obligation on executors

to lay out balances not wanted for the exigencies in the testator's affairs is now better understood, since it has been settled that they are indemnified against any loss, in laying them out in the fund which the court sanctions,—the three per cents. If the executor has balances which he ought to have laid out, either in compliance with the express directions of the will, or from his general duty, even where the will is silent on the general subject, yet if there be nothing more proved, in either case, the omission to lay out amounts only to a case of *negligence* and not of *misfeasance*.'

"Chancellor Kent, in *Schieffelin v. Stewart*, 1 Johns. Ch. 620, 7 Am. Dec. 507, adopts the stringent rule laid down in *Raphael v. Boehm*, *supra*, without adverting to the distinction between neglect and fraud; but in the subsequent case of *Clarkson v. De Peyster*, Hopk. Ch. 424, the chancellor refused to allow compound interest in a case in all its material features not distinguishable from the case before us; and the decision was affirmed on appeal.

"The cases cited from the Tennessee and Kentucky reports are not applicable in this state. In both these states statutes exist requiring the guardian to invest the money of his ward. *Hughes v. Smith*, 2 Dana, 252; *Torbet v. McReynolds*, 4 Humph.

¹ *Estate of Cousins*, 111 Cal. 411, 44 Pac. Rep. 182; *In re Assignment of Murlough*, 129 Mo. 488, 31 S. W. Rep. 942; *Sanguinett v. Webster*, 153 Mo. 343, 54 S. W. Rep. 563; *Re Hodges' Estate*, 66 Vt. 70, 28 Atl. Rep. 663, 44 Am. St. 820; *Spencer v. Merchants' Exchange Bank*, 110 Wis. 597, 86 N.

W. Rep. 243; *Parker v. Nickerson*, 137 Mass. 487; *Cruce v. Cruce*, 81 Mo. 676; *Rochester v. Levering*, 104 Ind. 526, 4 N. E. Rep. 203, 54 Am. Rep. 334; *White v. Dutton*, 140 Mass. 351, 54 Am. Rep. 173, 4 N. E. Rep. 696. See *Munson v. Plummer*, 59 Iowa, 136, 42 N. W. Rep. 796.

curities bore a higher rate.¹ An agent who invests as his own the funds of his principal will be charged with interest at the legal rate in the jurisdiction where they were invested.² Where

215; vol. 1, Ky. Statutes, 768; Car. & Nicholson's Dig. 368.

"The charge of compound interest seems to be adopted as a punishment in those cases where, from the gross mismanagement of the trustee, it is difficult, if not impossible, to ascertain what the income of the estate would otherwise have been; but it may safely be asserted that no estate in money, under the most judicious management, can be made to yield compound interest at the rate of eight per centum.

"If it had been annually invested under the direction of the court, some delay must have been encountered in finding a person desirous to borrow and able to give the necessary security. It is not reasonable to presume that where so lent it would always be punctually paid, so as to be immediately reinvested; nor can it be doubted that it would frequently be necessary to coerce payment by suit; and that after every precaution had been taken, both principal and interest would occasionally be lost. The charge of compound interest, therefore, is unjust, because the estate could not have yielded that by any prudent management in the hands of the owner, nor had he been able to manage it himself. The mere omission of the guardian to apply to the court for authority to invest it, and the failure to make annual settlements, are now evidence of fraud, but establish negligence merely; and the court, therefore, acted correctly in refusing to allow compound interest.

"We come to the consideration of the remaining question. In stating

the account the judge of the orphans' court charged the guardian with interest on money received by him, and allowed him interest on the sums disbursed, calculating each from the time it accrued to the time of settlement. This was erroneous. The statute previously cited requires the guardian to render, at least once a year, an account of his receipts and disbursements. If this had been done, the disbursements would have been extinguished *pro tanto* by the interest which the guardian should have charged for the money of the ward in his hands, and he cannot place himself in a better condition by this neglect of duty than if he had performed it. It could not be tolerated that the guardian should hold the estate in his hands for a number of years, use the interest of the ward's capital, or, what comes to the same thing, neglect to apply for its investment, and encroach annually upon the capital for the support of the ward; for this is the effect of the mode of accounting adopted by the court.

"If it was shown that the guardian was compelled to keep on hand a certain sum of money to meet the expenditures of his ward, it would be the duty of the court not to charge interest on such sum. In the absence of such necessity, which is not shown, and which probably did not exist, it was the duty of the court to charge the guardian with interest on all money of the ward in his hands from the time of its receipt, and allow him interest on all disbursements from the time they were made; the interest due from

¹ Coghill v. Boyd, 7 J. Va. 1. ² Bischoffsheim v. Baltzer, 21 Fed. Rep. 531.

an agent contracted to invest money at ten per cent. and invested but part of it, using the balance, he was charged with that rate for the amount invested and the legal rate for the balance.¹ A guardian's misconduct subjected him to liability for compound interest, and he was charged with it at the highest legal rate up to the time the ward became of age, and thereafter, because at that time the debt assumed the nature of an ordinary one, at the lowest legal rate.² If the loss resulting from the trustee's neglect is less than the income of the

the guardian to extinguish *pro tanto*, or in full, as the case may be, the expenditure of the ward. For which purpose, if necessary, the court will make annual, or longer or shorter, rests in the account, so as to carry fully into effect the objects and purposes of the decree, but so as not in any manner to compound the interest against the guardian. These principles are clearly stated in the case of *De Peyster v. Clarkson*, 2 Wend. 77, and other cases."

In *Miller v. Beverlys*, 4 Hen. & Munf. 415, the court laid down this general rule: "that in all cases whatsoever, a trustee is liable to pay interest for the trust money in his hands, unless he can show that it was necessarily kept in hand for the purposes of the trust." *Banks v. Machen*, 40 Miss. 256; *Trotter v. Trotter*, id. 704; *Smithers v. Hooper*, 23 Md. 273; *Garrett v. Carr*, 1 Rob. (Va.) 196; *Rosser v. Depriest*, 5 Gratt. 6, 50 Am. Dec. 94.

In *Layton v. Hogue*, 5 Ore. 93, an executor purchased, through an agent, a parcel of land belonging to the estate under his care as such, and afterwards made permanent improvements and paid taxes. In a suit by the heirs this sale was set aside as fraudulent, and allowance was made to the defendants, who were the heirs of the fraudulent trustee, for the permanent improve-

ments and taxes, after deducting rents and profits; this, together with the amount paid at the fraudulent sale, was required to be paid back, but without interest. It was observed that to allow interest in such a case would be allowing them to reap advantage from the wrongful and inequitable act of their ancestor.

¹ *Rogers v. Priest*, 74 Wis. 538, 43 N. W. Rep. 510.

A decedent to whom money had been intrusted for investment informed its owner that it was earning five per cent. It was not shown that it earned more. The estate was liable for that rate until action was begun, and thereafter for the legal rate. *De Crano v. Moore*, 50 App. Div. 361, 63 N. Y. Supp. 585, 64 id. 3.

² *Armstrong v. Walkup*, 12 Gratt. 603; *Tanner v. Skinner*, 11 Bush, 120; *Clay v. Clay*, 3 Met. (Ky.) 518; *State v. Richardson*, 29 Mo. App. 595.

Where executors allowed money to remain on deposit without interest for five years they were charged with interest at four per cent. for the first year, and at six per cent. subsequently, after they were bound to pay the money to the legatees. They were not relieved from this liability because they did not know to whom to pay. *Almy v. Probate Court*, 18 R. L. 612, 30 Atl. Rep. 458.

fund at the statute rate of interest, he may be relieved on making it good.¹

Trustees are not ordinarily chargeable with interest for failing to invest funds until the lapse of a reasonable time after they have come to their hands. No absolute rule can be announced as to what constitutes such time because the conditions vary; six months has been regarded as sufficient under ordinary circumstances.² But there will be no exemption from the payment of interest during that period where the trust funds are mingled with those of the trustee.³ There is a tendency to lessen the time for making investments. The six months' rule grew out of the circumstances of an earlier time, and its applicability to existing conditions is doubted.⁴ Execu-

¹ *Livermore v. Wortman*, 25 Hun, 241.

Thus, if money is deposited subject to check, instead of upon certificate, he will be charged with interest at bank rates. In *re Brewster's Estate*, 113 Mich. 561, 71 N. W. Rep. 1085.

A trustee who withdraws funds from a bank paying interest on balances and deposits them in his own bank must pay such a rate of interest as he could reasonably have secured from the bank from which they were taken or from other reputable banks in the same region. *Dick's Estate*, 183 Pa. 647, 39 Atl. Rep. 2.

² In *re Thomas's Estate*, 26 Colo. 110, 56 Pac. Rep. 907; *Griffith's Estate*, 147 Pa. 274, 23 Atl. Rep. 556; *Crosby v. Merriam*, 31 Minn. 342, 17 N. W. Rep. 950; *Duncomb v. Duncomb*, 1 Johns. Ch. 508, 7 Am. Dec. 504; *Thurston, Matter of*, 57 Wis. 104, 15 N. W. Rep. 126.

³ *Noble's Estate*, 178 Pa. 460, 35 Atl. Rep. 859.

⁴ "The time," it was said in *Witmer's Appeal*, 87 Pa. 120, "should be such as the circumstances of each particular case would show to be reasonable," and was fixed at two

months. "But in view of the facility with which trust funds may now be deposited at interest until permanent investment can be had, it is at least questionable whether rests in the ordinary sense should be allowed at all." *Noble's Estate*, 178 Pa. 460, 35 Atl. Rep. 859.

Trustees have been held liable for interest for the whole of six months next after they received funds which they failed to invest, no excuse being offered. *Adamson v. Reid*, 6 Vict. L. R. (Eq.) 164.

In South Carolina the general rule is that an administrator is chargeable with interest from the beginning of the year in which he was appointed. *Koon v. Munro*, 11 S. C. 139. It is also a general rule that all funds received during the current year are to be regarded as unproductive until the end thereof, and all expenditures made during the course of the year should be regarded as made before the balance struck that is to bear interest. *Nicholson v. Whitlock*, 57 S. C. 36, 35 S. E. Rep. 412.

Under the Illinois statute an executor who fails to make annual reports and thus bring to the notice of the court the fact that legacies are unpaid is liable for ten per cent. in-

tors who act *bona fide*, under an irregular judgment, in retaining a larger sum than was necessary will not be liable for interest after the reversal of such judgment.¹ A trust for support and maintenance, if it does not direct that the expense thereof shall be paid out of the income, necessarily implies that a sufficient amount of cash is to be kept on hand to supply the current wants and expenses of the *cestui que trust*; and unless the trustee keeps an unnecessarily large balance on hand he is not chargeable with interest thereon.²

If funds are converted,³ or when received from the sale of trust property are not applied and paid over according to a trustee's duty,⁴ he is chargeable with interest from the conversion or time when it was his duty to pay the money.⁵ The executor of a deceased trustee who has become liable for compound interest is not bound to keep unearmarked funds which the trustee had mingled with his own invested, and inasmuch as the demand for the trust funds could not be satisfied until action by the probate court, the estate is not liable for interest after the trustee's death.⁶ In an accounting by a trustee there is no inflexible mode of computing the interest on annual balances. If it appears that the disbursements in any given year exceed the year's receipts the whole of the balance in the trustee's hands at the beginning of the year does not bear interest for twelve months, but the interest-bearing balance must be ascertained by adding to the annual balance found to be in his hands at the beginning of the year the receipts for the next year, and deducting from the sum thus ascertained the whole amount of the payments made during such year; the residue only will constitute the interest-bearing fund for that year.⁷ Public officers who fail to [628]

terest on the legacies after the expiration of two and one-half years. *Cox v. Cox*, 53 Ill. App. 84; *Boyd v. Swallows*, 59 id. 635.

¹ *Boys' Home v. Lewis*, 3 Ont. L. R. 208.

² *Griffith's Estate*, 147 Pa. 274, 23 Atl. Rep. 556.

³ *McKim v. Blake*, 139 Mass. 593, 2 N. E. Rep. 157.

⁴ *Judd v. Dike*, 30 Minn. 380, 15 N.

W. Rep. 672; *Yeatman's Appeal*, 103 Pa. 297.

⁵ *Shickler's Estate*, 13 Phila. 504; *Ramsey's Appeal*, 4 Watts, 71; *Tomlinson's Appeal*, 90 Pa. 224; *Miller v. Lux*, 100 Cal. 609, 35 Pac. Rep. 345, 639.

⁶ *Benmerly v. Woodward*, 124 Cal. 568, 57 Pac. Rep. 561.

⁷ *Tucker v. Richards*, 58 S. C. 22, 29, 36 S. E. Rep. 3.

pay over money in their hands, according to official duty, will be charged with interest from the time they should have paid it.¹ A prothonotary who legally receives fees due other officers is not liable to them for interest until after demand.² If a public officer whose duty it is to collect and receive money is bound for it at all hazards unless the law requires him to place it in a depository as the money of the public, he is not liable for interest on it although he may have mingled it with his own funds and received interest.³ But where the legal ownership of moneys coming into the hands of a state treasurer is in the state the right to interest paid on the deposit thereof to such treasurer on his official draft is in the state and may be recovered from the treasurer or his sureties.⁴ The damages resulting to a creditor from the escape of his debtor, against whom he has recovered judgment, includes the amount of the judgment with interest, and the sheriff is liable for the latter.⁵ In the case of a United States disbursing officer, from whom it is claimed funds were abstracted without his knowledge, he being innocent in reference thereto, interest cannot be recovered in a suit against him to recover the missing funds, no demand upon him being shown.⁶

§ 354. On money obtained by extortion or fraud. Money obtained wrongfully or by extortion or fraud is recoverable with interest from the time it was obtained;⁷ and if money

¹ *Gartley v. People*, 28 Colo. 227, 64 Pac. Rep. 208; *Sheridan v. Van Winkle*, 43 N. J. L. 125; *Cassady v. Trustees of Schools*, 105 Ill. 560; *Stern v. People*, 102 id. 540; *Commonwealth v. Porter*, 21 Pa. 385; *Magner v. Knowles*, 67 Ill. 325; *People v. Gasherie*, 9 Johns. 71, 6 Am. Dec. 263; *Slingerland v. Swart*, 13 Johns. 255; *Lawrence v. Murray*, 3 Paige, 400; *Board of Justices v. Fennimore*, 1 N. J. L. 242; *Hudson v. Tenney*, 6 N. H. 456; *Crane v. Dygert*, 4 Wend. 675; *Board of Supervisors v. Clark*, 25 Hun, 282.

² *Shafer v. McIlhane*, 1 Pa. Dist. Rep. 765, 154 Pa. 58, 26 Atl. Rep. 213.

³ *Commonwealth v. Godshaw*, 92 Ky. 435, 17 S. W. Rep. 737; *Shelton*

v. State, 53 Ind. 331; *Bocard v. State*, 79 Ind. 270; *Snapp v. Commonwealth*, 82 Ky. 173. See note to § 479.

⁴ *State v. McFetridge*, 84 Wis. 473, 505, 20 L. R. A. 223, 54 N. W. Rep. 1, 998; *Board of Supervisors v. Verkerke*, 128 Mich. 202, 87 N. W. Rep. 217; *Eshelby v. Cincinnati Board of Education*, 66 Ohio St. 71, 63 N. E. Rep. 856. See note to § 479.

⁵ *Dunford v. Weaver*, 84 N. Y. 445. See § 489.

⁶ *United States v. Denver*, 106 U. S. 538, 1 Sup. Ct. Rep. 481; *United States v. Butler*, 114 Fed. Rep. 582.

⁷ *Webster v. Douglas County*, 102 Wis. 181, 196, 77 N. W. Rep. 885, 78 id. 451, 72 Am. St. 870; *Burrough v. Abel*, 105 Fed. Rep. 366 (in the ab-

received to another's use is wrongfully withheld or disposed of it carries interest,¹ and so does money received by a party for property tortiously taken or converted by him.²

§ 355. Interest in actions for torts. In actions for [629] torts, in order to give the injured party full indemnity, interest is allowed in trover, or where any analogous remedy is sought, on the value of the property from the date of conversion;³ in trespass, also, on the value from the date of the tak-

sence of laches; if that has existed the recovery may not extend beyond the time suit was brought); *Woldert v. Nedderhut Packing Provision Co.*, 18 Tex. Civ. App. 602, 46 S. W. Rep. 378; *Commonwealth v. Press Co.*, 156 Pa. 516, 26 Atl. Rep. 1035; *Arthur v. Wheeler & W. Manuf. Co.*, 12 Mo. App. 335; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *Conyer's Adm'r v. Magrath*, 4 McCord, 218; *Winslow v. Hathaway*, 1 Pick. 211; *Trustees, etc. v. Lawrence*, 11 Paige, 80; *Boston & S. Glass Co. v. Boston*, 4 Met. 181; *Greenly v. Hopkins*, 10 Wend. 96; *Adkins v. Ware*, 35 Tex. 577; *Wood v. Robbins*, 11 Mass. 504, 6 Am. Dec. 182; *Clayton v. O'Connor*, 35 Ga. 193; *Kornegay v. White*, 10 Ala. 255; *Goddard v. Bulow*, 1 Nott & McCord, 45, 9 Am. Dec. 663; *Greggs v. Greggs*, 56 N. Y. 504; *Mason v. Waite*, 17 Mass. 560; *Shaw v. Gilbert*, 111 Wis. 165, 195, 86 N. W. Rep. 188; *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 20, 70 N. W. Rep. 289.

In *Chew v. Bank of Baltimore*, 14 Md. 299, a transfer of stock under a bill of sale and power of attorney executed by a lunatic was avoided, and it was held that the defendant should pay simple interest on the dividends accrued on the stock since the transfer, from the time the defendant knew of the lunacy. See *Lincoln v. Claflin*, 7 Will. 132.

¹ *Rapehe v. Emory*, 1 Dall. 349; *Shipman v. Miller*, 2 Root, 405; *Black*

v. Goodman, 1 Bailey, 201; *Simpson v. Feltz*, 1 McCord's Eq. 213, 16 Am. Dec. 602; *Commonwealth v. Crevor*, 3 Bin. 121; *Crosby Lumber Co. v. Smith*, 2 C. C. A. 97, 51 Fed. Rep. 63; *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 29 S. E. Rep. 182, 66 Am. St. 167, 40 L. R. A. 250.

² *McBeth v. Craddock*, 28 Mo. App. 380; *Chauncey v. Yeaton*, 1 N. H. 151.

³ *Arpin v. Burch*, 68 Wis. 619, 32 N. W. Rep. 681; *Bonesteel v. Orvis*, 22 Wis. 523; *Schmidt v. Nunan*, 63 Cal. 371; *Hudson v. Wilkinson*, 61 Tex. 610; *Grimes v. Watkins*, 59 id. 140; *Watson v. Harmon*, 85 Mo. 443; *Kamerick v. Castleman*, 29 Mo. App. 658; *Hyde v. Stone*, 7 Wend. 354, 22 Am. Dec. 582; *McCormick v. Pennsylvania Central R. Co.*, 49 N. Y. 303; *Dows v. National Exchange Bank*, 91 U. S. 618; *Taylor v. Knox*, 1 Dana, 400; *Bissell v. Hopkins*, 4 Cow. 53; *Richmond v. Bronson*, 5 Denio, 55; *Garrard v. Dawson*, 49 Ga. 434; *Wehl v. Butler*, 43 How. Pr. 5; *Schwerin v. McKie*, 51 N. Y. 180, 10 Am. Rep. 581; *Beals v. Guernsey*, 8 Johns. 446, 5 Am. Dec. 348; *Kennedy v. Whitwell*, 4 Pick. 466; *Johnson v. Sumner*, 1 Met. 172; *Hogg v. Zanesville Canal & Manuf. Co.*, 5 Ohio, 410; *Hepburn v. Sewell*, 5 Harr. & J. 212, 9 Am. Dec. 512; *Kennedy v. Strong*, 14 Johns. 128; *Ekins v. East India Co.*, 1 P. Wins. 395; *Thomas v. Sternheimer*, 29 Md. 368; *Fowler v. Havenport*, 21 Tex. 626; *Pease v. Smith*, 5

ing.¹ But if a statute fixes the damages for the wrongful cutting of timber at the highest market value thereof in whatsoever place, shape or condition, manufactured or unmanufactured, the same may have been at any time before the trial while in possession of the defendant, interest is not allowed on the value so found before judgment. By pursuing his statutory right the plaintiff waives that which he had independently of it.² In replevin interest is allowed to the plaintiff on the value of the property during the period of wrongful detention, and this is the ordinary measure of damages where no special damage is shown;³ but in the absence of any statute allowing damages to the defendant for wrongful detention by means of the suit interest is not recoverable by him in that action.⁴ Where chattels are destroyed, or their value diminished by negligence, interest is in some jurisdictions likewise a part of the compensation to which the injured party is en-

Lans. 519; *Vaughan v. Howe*, 20 Wis. 497; *Chauncey v. Yeaton*, 1 N. H. 151; *Varco v. Chicago, etc. R. Co.*, 30 Minn. 18, 13 N. W. Rep. 921; *Swanson v. Andrus*, 83 Minn. 505, 86 N. W. Rep. 465. See *Pierce v. Rowe*, 1 N. H. 179; *Hamer v. Hathaway*, 33 Cal. 117; *Northern Transportation Co. v. Sellick*, 52 Ill. 249; *Tarpley v. Wilson*, 33 Miss. 467; § 1109.

If there has been a recovery of profits lost by reason of the wrong done the property, interest cannot be allowed. *McGuire v. Galligan*, 53 Mich. 453, 19 N. W. Rep. 112.

In Montana interest cannot be recovered in an action for conversion for any period before judgment. *Randall v. Greenwood*, 3 Mont. 506; *Palmer v. Murray*, 8 id. 174, 16 Pac. Rep. 553, 8 Mont. 312, 21 Pac. Rep. 126.

¹ *Baker v. Railroad Co.*, 56 Vt. 302; *Platt v. Continental Ins. Co.*, 62 Vt. 166, 19 Atl. Rep. 627; *Blackie v. Cooney*, 8 Nev. 41; *Shepherd v. McQuilkin*, 2 W. Va. 90; *Beals v. Guernsey*, 8 Johns. 446, 5 Am. Dec. 348; *Bradley v. Geiselman*, 22 Ill. 494. See § 1096, also § 1026.

² *Smith v. Morgan*, 73 Wis. 375, 41 N. W. Rep. 532.

³ *Wegner v. Second Ward Savings Bank*, 76 Wis. 242, 44 N. W. Rep. 1096; *Schmidt v. Nunan*, 63 Cal. 371; *Brizsee v. Maybee*, 21 Wend. 144; *Bigelow v. Doolittle*, 36 Wis. 115; *Gillies v. Wofford*, 26 Tex. 76; *McDonald v. Scaife*, 11 Pa. 381, 51 Am. Dec. 556; *Scott v. Elliott*, 63 N. C. 45; *McDonald v. North*, 47 Barb. 530; *Robinson v. Barrows*, 48 Me. 185; *Oviatt v. Pond*, 29 Conn. 479. See § 1144.

In Delaware the allowance of interest is discretionary with the jury. *Boyce v. Cannon*, 5 Houst. 409.

⁴ *Chapman v. Kerr*, 80 Mo. 158, following *Pope v. Jenkins*, 30 id. 528, and disapproving *Woodburn v. Cogdall*, 39 id. 228, and *Miller v. Whitson*, 40 id. 101; *Andrews v. Costican*, 30 Mo. App. 29; *McCarty v. Quimby*, 12 Kan. 494; *New York, etc. R. Co. v. Estill*, 147 U. S. 591, 622, 13 Sup. Ct. Rep. 444, citing the text, but, following Missouri authority, holding that interest was not recoverable. See *Booth v. Ableman*, 20 Wis. 602.

titled.¹ This rule is not established in some states. The question was recently passed upon for the first time in Massachusetts.² The court, by Holmes, J., said: Interest "is allowed as of right in trover and other like actions; and although it is suggested that in such cases the defendant may be presumed to have had the use of the goods since the conversion, this is not necessarily the fact, and if it were would have no bearing on the indemnity due the plaintiff. . . . We will assume that the sum ultimately found by the jury cannot be said to have been wrongfully detained before the finding, in such a sense that interest is due *eo nomine*. But we have heard no reason suggested why, if a plaintiff has been prevented from having his damages ascertained, and, in that sense, has been kept out of the sum that would have made him whole at the time, so long that that sum is no longer an indemnity, the jury, in their discretion, and as incident to determining the amount of the original loss, may not consider the delay caused by the defendant. In our opinion they may do so; and, if they do, we do not see how they can do it more justly than by taking interest on the original damage as a measure."

In an action to recover for the value of goods destroyed, they having a market value susceptible of easy proof, the court thus vindicated the right to interest: A loss of property hav-

¹ Chicago, etc. R. Co. v. Schultz, 55 Ill. 421; Chapman v. Chicago, etc. R. Co., 26 Wis. 295, 7 Am. Rep. 81; Whitney v. Same, 27 Wis. 327; Buffalo & H. Turnpike Co. v. Buffalo, 58 N. Y. 639; Parrott v. Knickerbocker Ice Co., 46 id. 361; Hogg v. Zanesville Canal & Manuf. Co., 5 Ohio, 410; Walrath v. Redfield, 18 N. Y. 457; Hinds v. Barton, 25 id. 544; Kendrick v. Towle, 60 Mich. 363, 1 Am. St. 526; Mote v. Chicago, etc. R. Co., 27 Iowa, 22, 1 Am. Rep. 212 (carrier liable for interest on value of baggage stolen); Arthur v. Chicago, etc. R. Co., 61 Iowa, 648; Johnson v. Same, 77 id. 666; Fremont, etc. R. Co. v. Marley, 25 Neb. 138, 13 Am. St. 432, 40 N. W. Rep. 948; Galves-

ton, etc. R. v. Horne, 69 Tex. 643, 9 S. W. Rep. 440; Varco v. Chicago, etc. R. Co., 30 Minn. 18, 13 N. W. Rep. 921; Houston, etc. R. Co. v. Jackson, 62 Tex. 209; T. & P. R. v. Tankersley, 63 id. 57; Toledo v. Grasser, 12 Ohio Ct. Ct. 520; Watkins v. Junker, 90 Tex. 584, 40 S. W. Rep. 11. *Contra*, Damborst v. Missouri Pacific R. Co., 32 Mo. App. 350, and Missouri cases cited. See Black v. Camden & A. R. & T. Co., 45 Barb. 40; Richmond v. Bronson, 5 Demo. 55; Lakeman v. Grinnell, 5 Bosw. 625.

² Frazer v. Bigelow Carpet Co., 144 Mass. 126, 4 N. E. Rep. 620; followed in Ainsworth v. Lakin, 180 Mass. 307, 62 N. E. Rep. 746.

ing a definite money value is practically the same as the loss of so much money; the loss of the use of the property is practically the same as the loss of the use (or interest) of so much money. A just indemnity to the plaintiff required the addition to the value of the goods at the time of their destruction of the interest from that time to the date of judgment.¹ In Georgia the code provides that where an amount ascertained would be the damages at the time of the breach, it may be increased by the addition of interest from that time till the recovery. Though limited to breach of contract, the rule may be applied in actions *ex delicto* for the destruction of property, the measure of damage being the value of it; but this must be done by the jury, in its discretion, in the form of damages and not as interest.² In Pennsylvania there are discordant expressions in the opinions as to the right to interest in tort actions;³ the latest cases, however, establish the rule that it cannot be allowed as such, but that in computing the damages the time elapsed since the cause of action arose may be considered.⁴ In Indiana the jury in ascertaining the damages resulting to

¹ *Regan v. New York, etc. R. Co.*, 60 Conn. 124, 142, 25 Am. St. 306, 22 Atl. Rep. 503; *Burdick v. Chicago, etc. R. Co.*, 81 Iowa. 384, 54 N. W. Rep. 439; *Union Pacific R. Co. v. Ray*, 46 Neb. 750, 65 N. W. Rep. 773; *Coin v. Brownstown*, 126 Mich. 626, 86 N. W. Rep. 130; *Jacksonville, etc. R. Co. v. Peninsular Land, etc. Co.*, 27 Fla. 1, 140, 9 So. Rep. 661, 18 L. R. A. 33, disapproving *Ancrum v. Stone*, 2 Speers, 591; *Varco v. Chicago, etc. R. Co.*, 30 Minn. 18, 13 N. W. Rep. 921; *St. Louis, etc. R. Co. v. Biggs*, 50 Ark. 169, 6 S. W. Rep. 724; *Parrott v. Knickerbocker, etc. Ice Co.*, 46 N. Y. 361; *Georgia Pacific R. Co. v. Fullerton*, 76 Ala. 298.

² *Western & A. R. Co. v. Brown*, 102 Ga. 13, 29 S. E. Rep. 130; *Snowden v. Waterman*, 110 Ga. 99, 35 S. E. Rep. 309.

³ See *Pittsburgh R. Co. v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580; *Alleghany v. Campbell*, 107 Pa. 530, 52 Am. Rep. 478; *Railroad Co. v. Gesner*,

20 Pa. 242; *Delaware, etc. R. Co. v. Burson*, 61 id. 380.

⁴ *Plymouth v. Graver*, 125 Pa. 24, 17 Atl. Rep. 249, 11 Am. St. 867; *Pennsylvania, etc. R. Co. v. Ziemer*, 124 Pa. 560, 17 Atl. Rep. 187; *Emerson v. Schoonmaker*, 135 Pa. 437, 19 Atl. Rep. 1025; *Richards v. Citizens' Natural Gas Co.*, 130 Pa. 37, 18 Atl. Rep. 600; *Reading & P. R. Co. v. Balthaser*, 126 Pa. 1, 17 Atl. Rep. 518; *Brent v. Thornton*, 45 C. C. A. 214, 106 Fed. Rep. 35.

In *Richards v. Gas Co.*, *supra*, *Mitchell, J.*, said interest cannot "be recovered in actions of tort, or in actions of any kind where the damages are not in their nature capable of exact computation, both as to time and amount. In such cases the party chargeable cannot pay or make tender until both the time and the amount have been ascertained, and his default is not therefore of that absolute nature that necessarily involves interest for the delay. But

lands from the wrongful removal of material therefrom may, in their discretion, add interest to the damages without finding that there has been unreasonable delay of payment.¹

Where, through the defendant's negligence, a break in its reservoir wall occurred, in consequence of which there was a washout of the plaintiff's road-bed, interest was recoverable as matter of law on the ground that the cost of the necessary repairs was a definite sum which could have been approximately ascertained immediately after the injury was done. In consequence of the injury the plaintiff incurred cost in transferring passengers around the place where the washout occurred. As to this the sum in which it was damaged was not definitely ascertainable until a bill of particulars was rendered; from that time the defendant was liable for interest. Though distinct and separable items of damage resulted from the same cause each could be dealt with separately for the purpose of determining the right to interest.²

The tendency is to increase the number of actions in which the jury may allow interest as damages;³ but this may not be done where exemplary damages are given at discretion.⁴ There is a divergence of view as to the right to interest on damages resulting from the killing of animals by the negligence of railroad companies. Under the statute of Missouri,⁵ Colo-

there are cases sounding in tort and cases of unliquidated damages, where not only the principle on which the recovery is to be had is compensation, but where also the compensation can be measured by market value or other definite standards. Such are cases of the unintentional conversion or destruction of property, etc. Into these cases the element of time may enter as an important factor and the plaintiff will not be fully compensated unless he receive, not only the value of his property, but receive it, as nearly as may be, as of the date of his loss. Hence it is that the jury may allow additional damages in the nature of interest for the lapse of time. It is never interest as such, nor as a mat-

ter of right, but compensation for the delay, of which the rate of interest affords the fair legal measure."

¹ *Pittsburgh, etc. R. Co. v. Swinney*, 97 Ind. 586.

² *New York, etc. R. Co. v. Ansonia Land & Water Power Co.*, 72 Conn. 703, 46 Atl. Rep. 157.

³ *Lawrence R. Co. v. Cobb*, 35 Ohio St. 94; *Duryee v. Mayor*, 96 N. Y. 477; *Central R. Co. v. Sears*, 66 Ga. 409 (negligent killing of husband; time elapsed between death and trial, considered by jury).

⁴ *Western & A. R. Co. v. Young*, 81 Ga. 597, 12 Am. St. 318, 7 S. E. Rep. 912; *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. Rep. 684.

⁵ *De Stenger v. Hannibal, etc. R. Co.*, 73 Mo. 31.

rado,¹ Georgia,² Kansas,³ Texas,⁴ Indiana,⁵ and Illinois⁶ interest is not allowed. It is otherwise in Minnesota,⁷ Arkansas⁸ and Alabama⁹ from the time of the injury, and in Wisconsin¹⁰ from the commencement of the action. If the statute makes the company liable for double the damage the owner of the animal has sustained interest on the value of it is not recoverable.¹¹

In actions to recover for personal injuries juries have, according to many authorities, no discretion to allow interest. The sum awarded in gross for mental suffering and physical pain, loss of time and expenses incident to the injury, and for prospective suffering and disability is the full measure of recovery, and it cannot be added to by including damages for the detention of the sum awarded.¹² According to others, it is discretionary with the jury to award interest.¹³ In some states the jury may

¹ *Denver, etc. R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. Rep. 142.

² *Western & A. R. Co. v. McCauley*, 68 Ga. 818.

³ *Atchison, etc. R. Co. v. Gabbert*, 34 Kan. 132, 8 Pac. Rep. 218.

⁴ *St. Louis Southwestern R. Co. v. Chambliss*, 93 Tex. 62, 53 S. W. Rep. 343; *International, etc. R. Co. v. Barton*, 93 Tex. 63, 53 S. W. Rep. 1117.

⁵ *New York, etc. R. Co. v. Zumbaugh*, 12 Ind. App. 272, 39 N. E. Rep. 1058. Compare *Wabash R. Co. v. Williamson*, 3 Ind. App. 190, 205, 39 N. E. Rep. 455.

⁶ *Toledo, etc. R. Co. v. Johnston*, 74 Ill. 83.

⁷ *Varco v. Chicago, etc. R. Co.*, 30 Minn. 18, 13 N. W. Rep. 921.

⁸ *St. Louis, etc. R. Co. v. Biggs*, 50 Ark. 169, 6 S. W. Rep. 724.

⁹ *Alabama, etc. R. Co. v. McAlpine*, 75 Ala. 113; *Georgia Pacific R. Co. v. Fullerton*, 79 id. 298.

¹⁰ *Chapman v. Chicago, etc. R. Co.*, 26 Wis. 295, 7 Am. Rep. 81.

¹¹ *Brentner v. Chicago, etc. R. Co.*, 68 Iowa, 530, 23 N. W. Rep. 245, 27 id. 605.

¹² *Railroad v. Wallace*, 91 Tenn. 35, 17 S. W. Rep. 882; *Sargent v. Hamp-*

den, 38 Me. 581; *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. Rep. 684; *Western & A. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. 320, 7 S. E. Rep. 912; *Pittsburgh, etc. R. Co. v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580; *State v. Harrington*, 44 Mo. App. 301; *Sonnenfeld Millinery Co. v. People's R. Co.*, 59 id. 668; *Texas, etc. R. Co. v. Carr*, 91 Tex. 332, 43 S. W. Rep. 18.

¹³ *Wilson v. Troy*, 135 N. Y. 96, 32 N. E. Rep. 44, 31 Am. St. 817, 18 L. R. A. 449; *Duryee v. Mayor*, 96 N. Y. 477; *Mansfield v. New York, etc. R. Co.*, 114 N. Y. 331, 21 N. E. Rep. 735, 4 L. R. A. 566; *Jamieson v. New York, etc. R. Co.*, 11 App. Div. 50, 42 N. Y. Supp. 915, affirmed without opinion. 162 N. Y. 630; *Ell v. Northern Pacific R. Co.*, 1 N. D. 336, 42 N. W. Rep. 222, 12 L. R. A. 97, 26 Am. St. 621; *Johnson v. Same*, 1 N. D. 354, 42 N. W. Rep. 227; *Uhe v. Chicago, etc. R. Co.*, 3 S. D. 563, 54 N. W. Rep. 601; *Taylor v. Coolidge*, 61 Vt. 503, 24 Atl. Rep. 653; *King v. Southern Pacific Co.*, 109 Cal. 96, 41 Pac. Rep. 786; *Eddy v. Lafayette*, 163 U. S. 456, 16 Sup. Ct. Rep. 1082; *Brent v. Thornton*, 45 C. C. A. 214, 106 Fed. Rep. 35; *Western & A. R. Co. v. Calhoun*, 104 Ga. 384, 30 S. E. Rep. 868.

consider the time which has elapsed since the injury was sustained.¹ A doubtful proposition has been announced by one of the intermediate courts of Texas—that interest may be recovered from the date of bringing suit against a telegraph company to recover for a loss sustained in buying property because of the failure to deliver a message.² In Missouri and Kansas liability for interest in actions *ex delicto*, based upon mere negligence, is not determined by the injury sustained by the plaintiff, but depends upon whether any benefit would accrue to the defendant by reason of the wrong done by him.³

A distinction has been made in respect to interest, in cases of an agent or trustee becoming liable for property in his hands, between loss by negligence and malfeasance. Where his [630] liability is not for any actual or intended benefit to himself, as by conversion of the property to his own use, he is only liable for the value without interest; but if he has derived a private advantage out of the property he will be liable for interest.⁴

In actions for damages caused by collision, interest is allowed on the cost of repairs and rental value while the vessel is undergoing repairs.⁵ It is allowed on all pecuniary elements of damage resulting from torts, consisting of moneys, prop-

¹ *Zipperlein v. P. C. & St. L. R. Co.*, 8 Ohio Dec. 587. See § 1256.

In a tort action the verdict specified the damages to which the plaintiff was entitled at the time the wrong was done, and how much the interest thereon would amount to, and gave the totalsum as its verdict. The verdict was sustained, though interest was not recoverable as such. *Norton v. Parker*, 17 Ohio Ct. Ct. 715, ruled on the authority of *Railroad Co. v. Cobb*, 35 Ohio St. 94.

² *Western U. Tel. Co. v. Carver*, 15 Tex. Civ. App. 517, 39 S. W. Rep. 1021. Compare *Pacific Postal Tel. Cable Co. v. Fleischner*, 14 C. C. A. 166, 66 Fed. Rep. 899.

³ *Marshall v. Schricker*, 63 Mo. 308; *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 128 Mo. 224, 255, 27 S. W. Rep. 568, and cases referred to; *Atchison,*

etc. R. Co. v. Ayers, 56 Kan. 176, 42 Pac. Rep. 722.

⁴ *Marshall v. Schricker*, 63 Mo. 308; *Dawes v. Winship*, 5 Pick. 97, note; *Thompson v. Stewart*, 3 Conn. 171, 8 Am. Dec. 168; *Rootes v. Stone*, 2 Leigh, 650; *Ricketson v. Wright*, 3 Sumner, 335; *Short v. Skipwith*, 1 Brock. 103.

⁵ *Straker v. Hartland*, 2 H. & M. 570; *The Mary J. Vaughan*, 2 Bened. 47; *Mailler v. Express Propeller Line*, 61 N. Y. 312; *Warrall v. Munn*, 38 id. 151; *Whitehall Transportation Co. v. New Jersey Steamboat Co.*, 51 id. 369. See § 1294.

But where both vessels are at fault interest on the amount awarded is chargeable only from the date of the decree. *The Manitoba*, 122 U. S. 97, 7 Sup. Ct. Rep. 1158.

If strippings are rescued from the

erty or labor, the value of which is reasonably certain.¹ The rate of interest allowable in an action of tort is governed by the statute in force when the verdict is rendered² and the law of the forum.³

SECTION 6.

THE LAW OF WHAT PLACE AND TIME GOVERNS.

§ 356. **Importance of subject.** As interest is generally regulated by statutes, and these are not the same in all jurisdictions and fluctuate more or less in each, it is of great practical importance that definite rules or principles should exist for determining the force and effect of these laws, and by which of them any contract or liability is to be governed. Owing to the wide domain of commerce, international and interstate, questions of interest arising under statutory regulations and restrictions are not of local concern. They arise upon every form of indebtedness incident to that commerce; and often between parties widely separated, not only by distance but by national and state lines, each performing his part of the transaction at home, or in different jurisdictions and under [631] the influence of dissimilar laws. These transactions involve expenditures, independent or subsidiary contracts, and the performance of them in places having no common rate of interest.

§ 357. **General rule as to contracts.** The general rule is that the contract, in respect to its construction and force, in other words its meaning and validity, is governed by the law of the place where it is made and to be performed.⁴ This rule rests on the theory that it accords with the intention of the parties, if such intention was a legal one. The other rules

offending ship and the owners realize large sums therefrom the court will exercise its discretion in allowing interest thereon. The *Scotland*, 118 U. S. 507, 6 Sup. Ct. Rep. 1174.

¹ *Mauller v. Express Propeller Line*, *supra*; *Jay v. Almy*, 1 Woodb. & M. 262; *Remke v. Clinton*, 2 Utah, 230; *Grosvenor v. Ellis*, 44 Mich. 452, 7 N. W. Rep. 459; *Snow v. Nowlin*, 43 Mich. 383, 5 N. W. Rep. 443.

² *Salter v. Utica, etc. R. Co.*, 86 N. Y. 401, disapproving *Ewing v. Nearsink Steamboat Co.*, 23 Hun, 578.

³ *Bischoffsheim v. Baltzer*, 21 Fed. Rep. 531.

⁴ *Wittkowski v. Harris*, 64 Fed. Rep. 712; *Archer v. Dunn*, 2 W. & S. 327; *Ralph v. Brown*, 3 id. 395; *Findlay v. Hall*, 12 Ohio St. 610.

which are applied are also based on the same theory. Lord Herschell said in a recent case: Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question in each case with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary to enter upon the inquiry to which of these considerations the greatest weight is to be attributed, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated, are entering into a contract, to indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it.¹ If it is valid where made it is *jure gentium*, valid everywhere,² if it is not injurious to the public

¹ *Hamlyn v. Talisker Distillery Co.*, [1894] App. Cas. 202. See *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. Rep. 102; *Wayman v. Southard*, 10 Wheat. 1, 48; *Robinson v. Bland*, 2 Burr. 1077; *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 120; *Bigelow v. Burnham*, 83 Iowa, 120, 32 Am. St. 294, 49 N. W. Rep. 104; *Minor on Conflict of Laws*, § 181.

² *Reiff v. Bakken*, 36 Minn. 333, 31 N. W. Rep. 348; *Matthews v. Paine*, 47 Ark. 54; *Pearsall v. Dwight*, 2 Mass. 88, 3 Am. Dec. 35; *Willings v.*

Consequa, 1 Pet. C. C. 317; *De Sobry v. De Laistre*, 2 H. & J. 193, 3 Am. Dec. 535; *Trimby v. Vigner*, 1 Bang. N. C. 151; *Houghton v. Page*, 2 N. H. 42, 9 Am. Dec. 30; *Dyer v. Hunt*, 5 N. H. 401; *Andrews v. Pond*, 13 Pet. 65; *Whiston v. Stodder*, 8 Mart. 95, 13 Am. Dec. 281; *Bank of United States v. Donnelly*, 8 Pet. 361; *Wilcox v. Hunt*, 13 id. 378; *French v. Hall*, 9 N. H. 157, 32 Am. Dec. 341; *Andrews v. Creditors*, 11 La. 464; *Sutrad v. Mead*, 3 Conn. 253, 8 Am. Dec. 189; *Medbury v. Hopkins*, 3 Conn. 474.

rights of the people in the jurisdiction in which its enforcement is sought, or does not offend their morals, contravene their policy or violate public law,¹ and if valid where made is so everywhere.²

What is the place of contract is not always easy to determine; nor have the courts arrived at the same conclusion from the same or similar facts. The inquiry is made for two objects — one to ascertain the amount of interest which the creditor is entitled to receive on an agreement for interest generally, specifying no rate; the other to determine whether the contract, when it contains an agreement for a specific rate of interest, or on one which at its inception interest was taken, is usurious. It is a general rule that where the contract stipulates for interest it is payable agreeably to the law of the place where made, but if it is made with reference to the laws of another state or country and is to be performed there, the interest is to be calculated according to the law of the place where the contract is to be performed or the money paid. The place of performance is chiefly regarded; it locates the contract; the parties are presumed to have the law there in force in view in making their contract.³ Where no other place is

2 Kent's Com. 457 *et seq.*; Story's Conf. L., § 242; *Andrews v. Herriot*, 4 Cow. 510; *Watson v. Orr*, 3 Dev. 161; *Chartres v. Cairnes*, 4 Mart. (N. S.) 1; *Courtois v. Carpenter*, 1 Wash. C. C. 376; *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *Palmer v. Yarrington*, 1 Ohio St. 253; *Harper v. Hampton*, 1 H. & J. 453, 622; *Warrender v. Warrender*, 9 Bligh, 110.

¹ *Bartlett v. Collins*, 109 Wis. 477, 85 N. W. Rep. 703; *Edgerly v. Bush*, 81 N. Y. 199; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Hallam v. Telleren*, 55 Neb. 255, 75 N. W. Rep. 560.

² Cases cited in next to last preceding note; *United States v. La Jeune Eugenie*, 2 Mason, 409; *Van Schaick v. Edwards*, 2 Johns. Cas. 355; *Robinson v. Bland*, 2 Burr. 1077; *Touro v. Cassin*, 1 N. & McC. 173, 9 Am. Dec. 680; *Van Rumsdyk*

v. Kane, 1 Gall. 371; *Alves v. Hodgson*, 7 T. R. 241; *McAllister v. Smith*, 17 Ill. 328, 65 Am. Dec. 651; *Kanaga v. Taylor*, 7 Ohio St. 134; *Nichols & Shepard Co. v. Marshall*, 108 Iowa, 518, 79 N. W. Rep. 282.

³ *Robinson v. Queen*, 87 Tenn. 445, 3 L. R. A. 214, 10 Am. St. 690, 11 S. W. Rep. 38; *Baum v. Birchall*, 150 Pa. 164, 30 Am. St. 797, 24 Atl. Rep. 620; *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. Rep. 775; *Abt v. American Bank*, 159 Ill. 467, 42 N. E. Rep. 856, 50 Am. St. 175; *Shoe & Leather Bank v. Wood*, 142 Mass. 563, 8 N. E. Rep. 753; *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 458, 9 Sup. Ct. Rep. 469; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *Sutro Tunnel Co. v. Segregated Belcher M. Co.*, 19 Nev. 121, 7 Pac. Rep. 271, quoting the text; *Jaffray v. Dennis*, 2

specified for the performance of a contract, it is to be performed where made.¹ The law of that place determines its construction, obligation and place of payment.² If a contract is to be partly performed where made, and partly in other countries or states, the law of the place where it is made will govern

Wash. C. C. 253; *Cowqua v. Landeburn*, 1 id. 521; *Bushby v. Camac*, 4 id. 296; *Bank of Illinois v. Brady*, 3 McLean, 263; *Moore v. Davidson*, 18 Ala. 209; *Leffler v. McDermotte*, 18 Ind. 246; *Van Hemert v. Porter*, 11 Met. 210; *Winthrop v. Carleton*, 12 Mass. 4; *Ferguson v. Fyffe*, 8 Cl. & F. 121; *Cubbedge v. Napier*, 62 Ala. 518; *Cash v. Kennion*, 11 Ves. 311; *Robinson v. Bland*, 2 Burr. 1077; *Fanning v. Consequa*, 17 Johns. 511. 8 Am. Dec. 442; 3 Johns. Ch. 587; *Houghton v. Page*, 2 N. H. 42, 9 Am. Dec. 30; *Lapice v. Smith*, 13 La. 91, 33 Am. Dec. 555; *Mullen v. Morris*, 2 Pa. 85; *Slacum v. Pomery*, 6 Cranch. 221; *Champant v. Ranelagh*, Prec. Ch. 128; *Thompson v. Ketcham*, 4 Johns. 285; *Smith v. Smith*, 2 id. 235, 3 Am. Dec. 410; *Ruggles v. Keeler*, 3 Johns. 263, 3 Am. Dec. 482; *Van Schaick v. Edwards*, 2 Johns. Cas. 355; *Licardi v. Cohen*, 3 Gill. 430; *Lewis v. Owen*, 4 B. & Ald. 654; *Quin v. Keefe*, 2 H. Bl. 553; *Bainbridge v. Wilcocks*, Baldw. C. C. 536; *Royce v. Edwards*, 4 Pet. 111; *Smith v. Buchanan*, 1 East, 6; *Frazier v. Warfield*, 9 Sm. & M. 220; *Lloyd v. Scott*, 4 Pet. 205; *Hosford v. Nichols*, 1 Paige, 220; *Boyle v. Zacharie*, 6 Pet. 634, 618; *Ekins v. East India Co.*, 1 P. Wms. 395; *Barnes v. Newcomb*, 9 Cush. 46; *Bell v. Bruen*, 1 How. 169; *Andrews v. Pond*, 13 Pet. 77; *Scotfield v. Day*, 20 Johns. 102; *Healy v. Gorman*, 15 N. J. L. 328; *Arrington v. Gee*, 5 Ired. 599; *Irvine v. Barrett*, 2 Grant's Cas. 73; *Roberts v. McNeeley*, 7 Jones, 506, 78 Am. Dec. 261; *Swett v. Dodge*, 4 Sm. & M. 667; *Gaillard v. Ball*, 1 N. & McC. 67; *Peck v. Mayo*,

14 Vt. 33, 39 Am. Dec. 205; *Hunt v. Hall*, 37 Ala. 702; *Hanrick v. Andrews*, 9 Port. 9; *Chumasero v. Gilbert*, 24 Ill. 293; *Hawley v. Sloo*, 12 La. Ann. 815; *Little v. Riley*, 43 N. H. 109; *Bolton v. Street*, 3 Cold. 31; *Summers v. Mills*, 21 Tex. 77; *Whitlock v. Castro*, 22 Tex. 108; *Butler v. Myer*, 17 Ind. 77; *Bent v. Lauve*, 3 La. Ann. 88; *Howard v. Branner*, 23 id. 369.

¹ *Shipman v. Bailey*, 20 W. Va. 140; *Kavanaugh v. Day*, 10 R. L. 393, 14 Am. Rep. 691; *Pomeroy v. Ainsworth*, 22 Barb. 119; *Davis v. Coleman*, 11 Ired. 303; *Don v. Lippman*, 5 Cl. & F. 1; *De Wolf v. Johnson*, 10 Wheat. 367, 383; *Wilson v. Lazier*, 11 Gratt. 477; *Blodgett v. Durgin*, 32 Vt. 361, 78 Am. Dec. 597; *Thompson v. Ketcham*, 8 Johns. 189; *Short v. Trabue*, 4 Met. (Ky.) 299; *Peck v. Hibbard*, 26 Vt. 698, 62 Am. Dec. 605; *Gage v. McSweeney*, 74 Vt. 370, 52 Atl. Rep. 960.

² *Pritchard v. Norton*, 106 U. S. 124, 140, 1 Sup. Ct. Rep. 102; *Bryant v. Edson*, 8 Vt. 325, 30 Am. Dec. 472; *Bank of Orange v. Colby*, 12 N. H. 520; *Sherrill v. Hopkins*, 1 Cow. 103; *Clark v. Searight*, 135 Pa. 173, 20 Am. St. 868; *Bank v. Gibson*, 60 Ark. 269, 50 S. W. Rep. 39; *Farmers' Savings, Building & Loan Ass'n v. Ferguson*, 69 Ark. 352, 63 S. W. Rep. 797. See *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 62 N. E. Rep. 672. In this case an accommodation note, payable in Illinois, had been signed by a married woman in Alabama as surety for her husband. It was held that the contract was made in Alabama, though the note was first negotiated in Illinois.

unless a clear mutual intention is manifested that it shall be governed by the law of some other jurisdiction.¹

The place of contracting is, *prima facie*, where the instrument is dated; but if written, dated and signed in one place and delivered at another, the latter is the place of its consummation. A contract takes effect according to the law of the [633] place where it is consummated, or where, if it is written, it is delivered and put in force.² Where a note is expressly made payable at a designated place, its legal effect in this particular cannot be changed by parol evidence.³ But if it is payable generally, extrinsic evidence may be resorted to to show that it was intended to be paid at a particular place, and thereby subject it to the law of that place. In such case interest will be allowed at the rate established by the law in force there.⁴ A debt was payable in Great Britain, and the creditor agreed with the debtor, for the latter's accommodation, that it might be paid in one of the states in this country. It was held that the interest accruing upon it thereafter should be computed according to the rate in that state.⁵ If no place of payment or rate of interest is specified, and there is no proof of the intention of the parties as to the former, the instrument is payable anywhere and the rate of interest is determinable by the law of the jurisdiction in which suit is brought upon it.⁶ Contracts relating to real property are governed by the *lex rei sitæ*.⁷

§ 358. Rule as to notes and bills. Bills of exchange and promissory notes illustrate these principles in respect to the

¹ Bartlett v. Collins, 109 Wis. 477, 85 N. W. Rep. 703; Morgan v. New Orleans, etc. R., 2 Woods, 244. Edwards Brokerage Co. v. Stevenson, 160 Mo. 516. 61 S. W. Rep. 617, is similar to the Wisconsin case on the facts, but announces the opposite conclusion.

² Baum v. Birchall, 150 Pa. 164, 24 Atl. Rep. 620, 30 Am. St. 797; Hyde v. Goodnow, 3 N. Y. 266; Cook v. Litchfield, 5 Sandf. 330; Davis v. Coleman, 7 Ired. 424; Fant v. Miller, 17 Gratt. 47; Cook v. Moffat, 5 How. 295; Whiston v. Stodder, 8 Mart. (La.) 95, 13 Am. Dec. 291; Snaith v. Min-

gay, 1 W. & S. 87; Lenwig v. Ralston, 1 Pa. 139.

³ Thompson v. Ketcham, 8 Johns. 189; Frazier v. Warfield, 9 Sm. & M. 220.

⁴ Austin v. Imus, 23 Vt. 286; McKay v. Belknap Savings Bank, 27 Colo. 50, 59 Pac. Rep. 745; Eccles v. Herrick, 15 Colo. App. 350, 62 Pac. Rep. 1040. See Senter v. Bowman, 5 Heisk. 14.

⁵ Pearce v. Wallace, 1 Har. & J. 48.

⁶ Kopelke v. Kopelke, 112 Ind. 435, 13 N. E. Rep. 695.

⁷ Baum v. Birchall, 150 Pa. 164, 20 Am. St. 797, 24 Atl. Rep. 620. See § 362.

lex loci contractus. The maker of a note and the acceptor of a bill are bound to pay the money therein mentioned at the places severally specified for payment; to those places they have given express assent. They are the parties primarily bound, and the agreements appearing by the face of the paper are respectively theirs. The place of making the note or accepting the bill is that where the contract is made, and where, but for the appointment of another place for payment, they would be bound to perform it. As the place of performance, when expressly fixed, is the place of contract within the sense of the *lex loci*, these parties are held to pay the bill or note according to its interpretation and force by the law of that place.¹ Bills of exchange are usually addressed to a drawee at a particular place; the place so mentioned is that at which the drawer agrees that his bill shall be honored; and, when accepted, it is the place where the acceptor agrees to pay it unless the bill specifies another place of payment; the [634] place of payment is the place of contract, and the laws there in force govern it.²

The drawer of a bill and the indorser of a note or bill contract by the act of drawing and indorsing. Their contracts are implied. The undertaking of the former is that the drawee will accept the bill and pay the amount of it where, according to its face, it is payable: and that if the bill is dishonored and due notice of the dishonor is given him, he will himself pay the amount to the holder. His agreement, so implied, is not to pay at the place mentioned in the bill; but at the place where he draws it, and where, consequently, he is legally bound to perform, no other place of performance being implied or specified.³ The act of drawing is interpreted by the [635]

¹ *Joseph v. Lyon*, 9 Ky. L. Rep. 324 (Ky. Super. Ct.). See § 357.

A clause in a note providing for the payment of attorney's fees, if suit should be begun, they to be taxed as part of the costs, relates to the remedy, and will not be enforced by the courts of a state which hold such provisions void, though the agreement was valid in the state in which it was made. *Hallam v.*

Telleren, 55 Neb. 255, 75 N. W. Rep. 560.

² *Harrison v. Pike*, 48 Miss. 40; *Sturdivant v. Memphis Nat. Bank*, 9 C. C. A. 256, 60 Fed. Rep. 730; *Todd v. Bank*, 3 Bush, 626.

³ Story on Prom. Notes, § 339, note; Story on Bills, § 154.

Rothschilds v. Currie, 1 Q. R. 43, proceeded upon the opposite theory, that the law of the place of payment

law of the place where it is drawn. Its validity and effect are determined by that law;¹ and the money due there, by reason of the violation of the drawer's undertaking that the drawee should accept and pay according to the tenor of the bill, is the amount specified in it, together with interest, after his own de-

governed as to all the parties. It was the case of a bill drawn in England on, and accepted by, a house in France, payable at Paris, in favor of a payee domiciled in England, by whom it was indorsed there to an indorsee who was also domiciled there. The bill was dishonored at maturity, and due notice was given to the payee according to the law of France; but not, as it was suggested, according to the law of England. And it was held, in a suit brought by the indorsee against the payee, that the notice was good, being according to the law of France, the *lex loci contractus* of acceptance. In a note to § 339 of Story on Prom. Notes this decision is criticised by the author: "With the greatest deference for that learned judge (who delivered the opinion), it seems to me that the decision of the court is not sustained by the reasoning on which it purports to be founded. The court there admit that the notification of the dishonor is a parcel of the contract of the indorser; and, if so, then it must be governed by the law of the place where the indorsement was made, upon the very rules cited by the court from Pothier. The error (if it be such) seems to have arisen from confounding the contract of the acceptor with the contract of the drawer and the indorser." In a preceding part of the same note the learned author says: "The acceptor agrees to pay in the place of acceptance, or the place fixed for the payment (Cooper v. Waldegrave, 2 Beav. 272); but upon his default, the drawer and the indorser do not agree, upon due protest

and notice, to pay the like amount in the same place; but agree to pay the like amount in the place where the bill was drawn or indorsed by them respectively. Hence it is that the notice to be given to each of them must and ought to be notice according to the law of the place where he draws or indorses the bill, as a part of the obligations thereof. The drawer and indorser, in effect, contract in the place where the bill is drawn or indorsed a conditional obligation; that is, if the bill is dishonored, and due notice is given to them of the dishonor according to the law of the place of their contract, they will respectively pay the amount of the bill at that place. The law of the place of the acceptance or payment of the bill has nothing to do with their contract; for it is not made there, and has no reference to it." See Shanklin v. Cooper, 8 Blackf. 41, overruled in Hunt v. Standard, 15 Ind. 33, 77 Am. Dec. 79.

¹ Coghlan v. South Carolina R. Co., 142 U. S. 101, 111, 12 Sup. Ct. Rep. 150 and cases cited; Cooper v. Waldegrave, 2 Beav. 282; Ayrman v. Sheldon, 12 Wend. 439; Everett v. Vendryes, 19 N. Y. 436; Yeatman v. Cullen, 5 Blackf. 240; Slacum v. Pomery, 6 Cranch. 221; Powers v. Lynch, 3 Mass. 77; Williams v. Wade, 1 Met. 82; Trimble v. Vignier, 1 Bing. N. C. 151; Potter v. Brown, 5 East, 124; Hicks v. Brown, 12 Johns. 142; Hunt v. Standart, 15 Ind. 33, 77 Am. Dec. 79; Van Raugh v. Van Arsdaln, 3 Cal. 154, 2 Am. Dec. 259; Burrows v. Hannegan, 1 McLean, 315.

fault, if not fixed by the bill, at the rate allowed by the [636] law of the place of drawing.¹ The damages are to be ascertained by the same law,² for not having the money for the holder at the place where, according to the bill, it should have been paid. The contract implied from indorsement is in legal effect the same as that implied from drawing a bill; the language of an indorsement expressed in full is a bill of exchange.³ It is a new and substantive contract;⁴ and the obligations of the parties are to be determined according to the law of the country in which it is made.⁵ This seems now to be the doctrine of both the English and American courts; but it has not been established without dissent.⁶

¹ *Bailey v. Heald*, 17 Tex. 102; *Bank of United States v. United States*, 2 How. 711; *Raymond v. Holmes*, 11 Tex. 54; *Crawford v. Branch Bank*, 6 Ala. 12, 41 Am. Dec. 33.

In *Gibbs v. Fremont*, 9 Ex. 25, the action was by the indorsers of several bills of exchange drawn by the defendant in California, on B. at Washington, D. C. The bills were made payable to H., and were discounted by him at the place where they were drawn; they were dishonored, and the question was whether the plaintiff was entitled to recover against the defendant six per cent., the rate in W., where they were payable, or twenty-five per cent., the rate of interest in C., where they were drawn. The court gave the plaintiff interest according to the rate in C.

In *Hunt v. Standart*, *supra*, a note made and indorsed in Indiana was payable in New York. The indorsement was sufficient according to the laws of N. Y., but it was not sufficient under the laws of I. The question was by what law the sufficiency of the indorsement was to be tested. It was held that the indorsement was governed by the law of I., where it was made.

The following cases involved a similar question and were decided in the same way: *Ayrman v. Sheldon*, 12 Wend. 439; *Everett v. Vendryes*, 19 N. Y. 436; *Yeatman v. Cullen*, 5 Blackf. 240; *Williams v. Wade*, 1 Met. 82; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Burrows v. Hannegan*, 1 McLean, 315; *Holbrook v. Vibbard*, 3 Ill. 465; *Currie v. Lockwood*, 40 Conn. 349; *Lowry's Adm'r v. Western Bank*, 7 Ala. 120. See *Trabue v. Short*, 5 Cold. 293; *Short v. Trabue*, 4 Met. (Ky.) 299; *Artisans' Bank v. Park Bank*, 41 Barb. 599; *Trabue v. Short*, 18 La. Ann. 257; *Allen v. Kemble*, 6 Moore P. C. 314; *Allen v. Merchants' Bank*, 22 Wend. 215.

² *Slacum v. Pomery*, 6 Cranch, 221.

³ *Bayley on Bills*, ch. 5, § 3; *Story on Bills*, § 108; *Ayrman v. Sheldon*, 12 Wend. 439; *Ballingall v. Glosster*, 3 East. 482; *Heylyn v. Adamson*, 2 Burr. 674; *Ogden v. Saunders*, 12 Wheat. 213, 341.

⁴ *Slacum v. Pomery*, 6 Cranch, 221; *Edwards on Bills*, 263; *Everett v. Vendryes*, 19 N. Y. 436.

⁵ *Id.*; *McClintock v. Cummins*, 3 McLean, 158; *Mix v. State Bank*, 11 Ind. 521; *Butters v. Olds*, 11 Iowa 1.

⁶ *Shanklin v. Cooper*, 8 Blackf. 41, overruled in *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79; *Mullen v.*

The contract of the drawer or indorser in relation to the payment is twofold: that the acceptor or maker will pay according to the tenor of the paper the amount therein mentioned, at the specified time and place; and that in case the parties primarily bound fail to make such payment, then, upon due notice of such default, the drawer or indorser will pay that amount. The measure of their liability rests upon the theory that they should pay a sum which will be a full compensation to the holder for the acceptor's and maker's default, consisting of damages for being obliged to receive the money at a different place, and interest during the delay of payment. The interest that the primary parties are chargeable with is the rate of the country or state where the paper was payable. They are liable to that rate because the contract was to be there performed. Although these secondary parties did not agree to pay at the same place, they agreed to pay the same debt; that is, the face of the paper. Now, if the interest which the primary parties are liable for [637] is an incident to that debt, and follows it as the shadow follows the substance, why should not the subsidiary obligation in respect to the amount be the same as the primary? But the cases appear to proceed upon the principle that on the default of the primary parties, the immediate requisite steps being taken to render the conditional liability of the drawer and indorser absolute, the amount specified in the bill or note becomes their debt; that they are not responsible for the continued default of the principals; nor, therefore, liable for the interest chargeable to them; but only for their own default in not paying the sum which becomes their absolute debt, in pursuance of their contract as drawer or indorser. And their agreement is to pay at the place where their contract was made. They are liable on account of their own default to pay interest according to the law of that place. Their default for which interest is computed against them dates from receiving notice of the dishonor of the bill or note.¹

Morris, 5 Pa. 87; Hanrick v. Andrews, Thurn, L. R. 1 C. P. 463; Able v. Mo-
 9 Port. 10; Peck v. Mayo, 14 Vt. 33. Murray, 10 Tex. 350.
 39 Am. Dec. 205; Rothschild v. ¹Walker v. Barnes, 5 Taunt. 540.
 Currie, 1 Q. B. 43; Phillips v. Im It was held in this case that the

§ 359. **Bonds to the United States.** An apparent exception exists in the case of official bonds executed to the federal government. It sometimes happens that they are executed by the principals in one state and by the sureties in another or in different states. The rights and duties of sureties are known to be dissimilar in the several states. It has been decided, however, that such bonds must be treated as made and delivered and to be performed by all the parties at the seat of government, upon the ground that the principal is bound to account there; and therefore, by necessary implication, all the parties look to that as the place of performance, by the law of which they are to be governed.¹

§ 360. **Between parties in different states.** Where parties meet together, and face to face make contracts, the place of making is fixed with certainty; and also the place of performance where no other is designated. But all obligations [638] to pay money are not initiated in this manner. The same rule, however, applies to less formal or more complicated transactions. Interest is allowed according to the law of the place where an indebtedness arises, and where the money ought to be paid. In cases of accounts and advances between parties residing in different countries inquiry is made to ascertain, as a matter of fact, where, by their intention, the balance is to be repaid, whether in the country of the creditor or that of the debtor.² When ascertained, the law of that place governs as to interest. In the absence of any stipulation on the subject, or circumstances indicating a different intention, the party advancing money for another is entitled to interest at the rate established at the place where the advance is made; for the contract to refund, implied by law, is to pay with interest according to the rate which prevails where the transaction takes place.³ This rule was applied in favor of the consignee of a ship in South Carolina who paid certain charges

drawer of a bill which is dishonored by the acceptor is not liable to pay interest for the time which elapses between the day when the bill becomes due and the day when the drawer receives notice of the dishonor.

¹ Story Conf. L., § 290; *Cox v. United States*, 6 Pet. 172, 202; *Duncan v. United States*, 7 Pet. 435.

² *Grant v. Hooley*, 3 Sumn. 523.

³ *Winthrop v. Carleton* 12 Mass. 4; *Arnott v. Redfern*, 2 C. & P. 83, *Edwards on Bills*, 713.

on account of the last sickness and funeral of the master, in accordance with the custom of the port where the ship was. The owner, a resident of Massachusetts, was held liable to reimburse him according to the rate of interest of the place where the money was advanced.¹ So when a balance of account exists in favor of a commission merchant residing and doing business in one state, against his correspondent in another, the cause of action is deemed to arise where the creditor resided and did the business.² And in a case where an agent advanced his money at New Orleans for his principal, residing in another state, upon an undertaking of the principal to replace it by accepting and paying drafts drawn by the agent at New Orleans, it was held that the debtor was liable to pay New Orleans interest if he suffered the bills to be dishonored, as well as to meet any necessary loss on account of the difference of exchange.³

A Chinese merchant, residing at Canton, consigned goods to a merchant in New York to be sold by him, the net proceeds to be remitted to the consignor at Canton, at which place the goods were delivered to the agent of the consignee. The question was whether interest at twelve per cent., according to the custom of Canton, should be charged during the delay of payment, or whether the creditor was entitled only to the rate in New York. It was held that the goods consigned were at the risk of the consignor on their voyage to New York, and the entire duty of the consignee to make sale and remittance of the net proceeds was to be performed there. The duty of remitting meant no more than a delivery of the money on board a proper vessel at New York, to a suitable agent, for the purpose of being transported to Canton by the usual route, and duly consigned to the principal.⁴ Hence the place of contract may be determined in cases of this sort, where no other intention is manifest, by a rule of easy application: that advances ought to be deemed reimbursable at the place where they are made, and sales of goods to be accounted

¹ Winthrop v. Carleton, 12 Mass. 4. Dec. 466; Bainbridge v. Wilcocks,

² Coolidge v. Poor, 15 Mass. 427. Baldw. C. C. 536.

³ Lanusse v. Barker, 3 Wheat. 101; ⁴ Fanning v. Consequa, 17 Johns. 511, 8 Am. Dec. 442; Cartwright v. Milne v. Moreton, 6 Bin. 353, 6 Am. Dec. 442; Greene, 47 Barb. 9.

for where they take place or are authorized to be made.¹ So it has been held that if a trustee receives money as such in a foreign state, and applies it to his own use, he must account for interest according to the law of the place where it was received.² Loans bear the interest of the place where made unless payable elsewhere.³

§ 361. Same subject. On the same principle of paying indebtedness where it arises, moneys due on purchases will be referred to the law of the place where a party, personally or by letter, orders or requests to be supplied, or a seller negotiates and completes a sale, unless there is an agreement by note or otherwise to pay somewhere else.⁴ If a written obligation for the purchase-money, payable generally, is dated and delivered where the sale is actually consummated by negotiation of its terms and delivery of the property, and especially if one of the parties resides there, it is the place of contract; and this conclusion will not be affected though such obligation be signed by other parties as sureties or as co-obligors at other places.⁵

¹ Id.; *Grant v. Healey*, 3 Sumn. 523; *Bainbridge v. Wilcocks*, Baldw. C. C. 536; *Story Conf. L.*, §§ 283-285; *Hall v. Woodson*, 13 Mo. 462.

² *Bischoffsheim v. Baltzer*, 21 Fed. Rep. 531; *Neill v. Neill*, 31 Miss. 36.

³ *Consequa v. Willings*, Pet. C. C. 229; *Anonymous*, *Martin & Hayw.* 149; *Stewart v. Ellice*, 2 Paige, 604; *Hollis v. Covenant Building & Loan Ass'n*, 104 Ga. 318, 31 S. E. Rep. 215; *Bigelow v. Burnham*, 83 Iowa, 120, 32 Am. St. 291, 49 N. W. Rep. 104; *Thorn v. Alvord*, 32 N. Y. Misc. 456, 66 N. Y. Supp. 597; *Stepp v. National Life, etc. Ass'n*, 37 S. C. 417, 16 S. E. Rep. 134; *Coghlan v. South Carolina R. Co.*, 142 U. S. 101, 12 Sup. Ct. Rep. 150; *Clarke v. Taylor*, 69 Ark. 612, 617, 65 S. W. Rep. 110; *Columbus, S. & H. R. Co.'s Appeals*, 109 Fed. Rep. 177, 48 C. C. A. 275.

⁴ *Milliken v. Pratt*, 125 Mass. 374, 25 Am. Rep. 241; *McIntyre v. Parks*, 3 Met. 207; *Whiston v. Stodder*, 8 Mart. (La.) 95, 13 Am. Dec. 281.

⁵ *Arrington v. Gee*, 5 Ired. 590, is an instructive case upon the doctrine of *lex loci contractus*. A citizen of North Carolina took a number of slaves to Alabama and there sold them to a citizen of that state, who agreed to give him a bond, with sureties, for the price; this bond was executed by the principal at Mobile, Ala., where it bore date; afterwards two sureties signed it in North Carolina, where they resided; the bond mentioned no place of payment. It was held that the sureties, as well as the principal, were bound for the payment of interest according to the laws of Alabama.

The court say: "The contract of sale from which the bond sued on had its origin was made and completed in Alabama, and the money which the purchaser engaged to pay to the seller would, if not paid when due, thereafter bear interest at the rate of eight per cent.; it not being stipulated by the parties that the

[641] A contract for the payment of money entered into with such circumstances as alone would bring it under the operation of the laws of a particular place as the place of contract will not be withdrawn from the effect of those laws

payment should be made in any other place. For it is an undoubted principle of law that not only the validity of the contract depends on the *lex loci contractus*, but its effects, including the right of the creditor to interest and its amount, depends on it also. The only question in this case, then, is which is the *locus contractus*, so as to apply to this transaction the above-mentioned principle. We think clearly it is Alabama. Beyond question, that is true of the original contract: namely, that of the purchase, sale and delivery of the negroes. And 'the rate of interest which the debtor should pay is a part of that contract,' so that taking a new security here expressing that the rate of interest should be eight per cent., or including therein eight per cent. for interest accrued (unless it be a new contract for further forbearance here), would not be in violation of our law, but would be valid. *McQueen v. Burns*, 1 Hawks, 476. Such is even the case when a loan is made in one country and a subsequent collateral security is taken on real estate in another. *De Wolf v. Johnson*, 10 Wheat. 367. Much more must that be true when the security taken in a foreign country is merely personal. For the original contract obliged the debtor to pay a particular rate of interest and the new security is merely the means of more readily enforcing the performance of that obligation. If, then, Charles S. Gee, the principal debtor, had executed his note for this debt in this state, that would not have altered the rate of interest, provided the note should become payable when the debt would fall due according to the original

contract and did not designate some other place of payment; in other words, if the note was but a security for the pre-existing debt and in no respect changed its character.

"But in truth, this security by bond was given by him in Alabama, as well as the debt originally contracted there; and the bond is dated at Mobile, and specifies no other place of performance. Now, although it be true that the rule of the *lex loci contractus*, before stated, is subject to the modification that it must yield to the *lex loci in quo solveret*, yet that is only in those cases in which it appears from the contract that the performance is to be at some other place. For when a contract states that the parties had in view the law of another country, when they made it, then it is but right to say that the contract should be governed by the law the parties thus appear to have intended, rather than by that of the *loci contractus*. Thus notes made and dated in Dublin for £100 mean Irish and not English currency, unless they be payable on their face in England; in which latter case the money would be English. *Kearney v. King*, 2 B. & Ald. 301; *Sproule v. Legge*, 1 B. & C. 16; *Don v. Lippman*, 5 Clark & F. 1. For debts have no *situs*, and are payable everywhere, including the *locus contractus*; and therefore the law of that place shall govern, since it does not appear from the contract that the parties contemplated the law of any other place. There cannot be any other rule but that of the place of the origin of the debt, unless it be that where the creditor may be found; since the debtor must find the creditor for the

merely by taking security for the performance of the contract by mortgage upon lands situated in another jurisdic- [642] tion. Taking such security does not necessarily draw after it the consequence that the contract is to be fulfilled where the

purpose of making payment. But, manifestly, this last can never be adopted, because it would vary with every change of domicile or residence of the creditor. Then, as was observed by Lord Brougham in *Don v. Lippman*, a contract, payable generally, naming no place of payment, is to be taken to be payable at the place of contracting the debt, as if it was expressed to be there payable. Being payable everywhere, the rate of interest must be determined by the law of the origin, since there is nothing else to give a rule. . . . We are to suppose that as to Charles S. Gee the bond expressed that it was payable at Mobile. When the other executed it, can it also be supposed that they insisted that, as to them, the bond should be payable in North Carolina? Certainly not; for to say nothing more, it cannot be presumed that the same debt is payable at two different places, unless it be so expressed. It is said, indeed, that, as in our law the contract is several, it is the same thing as if these parties had given distinct notes in this state for the debt. But it is to be recollected that the bond is also joint; and therefore that all three of the obligors obliged themselves jointly to do the same thing; that is to say, to pay a certain sum of money; and the only question is, whether we are to understand them as contracting to pay the sum at one and the same place. For, if we are so to understand, there can be no doubt, from what has been already said, that the place is Mobile; and then, according to the rule that the interest is to be regulated by the law of the place of performance, the bond would bear

Alabama interest. There would have been nothing unlawful in taking a bond in this state for that interest, as we have before seen, as it would merely be a supplemental security for a previous lawful contract. Now, it is impossible to suppose that these defendants could have contemplated the payment being made here by them, and not at Mobile, by the principal. The very statement of the case is, that they executed the bond as the sureties of Charles S. Gee; and in the nature of things, therefore, they expected to be only secondarily liable, and they were to be liable for what he had bound himself. If that were not so it would lead to endless confusion. For, suppose a principal in Alabama and three sureties, one living and executing the bond in Louisiana, one in North Carolina and one in New York, would there be four distinct contracts as to the rate of interest? It would be absurd to hold so. In reality the contract of sureties, in reference to the question under consideration, is one of guaranty for the performance of his contract by his principal; and therefore each surety, no matter where he lives, must be liable for precisely the same, which is that for which the principal is liable, neither more nor less."

In *Findlay v. Hall*, 12 Ohio St. 610, three persons owed a debt in *New Mexico* on a promissory note payable there. Two of them assumed to renew it, and accordingly executed a new note at *Santa Fe*. Afterwards the third executed the same note in *Missouri*, with a knowledge of all the facts. It was held that he

security is taken. The legal fulfillment of a contract or a loan on the part of the bondsman is repayment of the money; and the security given is but the means of securing what he has contracted for, which in the eye of the law is to pay where he borrows unless another place of payment be expressly designated by the contract.¹ But when there is nothing else to indicate where the transaction took place, or where the contract to pay is to be performed, the law of the place where the real estate is situated on which the money is secured will govern as to the rate of interest. A marriage settlement, though made in another state, was held to bear interest according to the law of South Carolina because secured on lands in that state.² Creditors residing in Pennsylvania, where the limit of interest is six per cent., held a mortgage made in the state of New York upon lands situate in that state. In the absence [643] of anything indicating where the securities were payable, or showing that a different rate of interest from that of New York was intended, the rate of that state was adopted.³ The general doctrine is that the law of the place where the contract is made is to determine the rate of interest, when the contract specifically gives interest; and this will be the case though the loan be secured by a mortgage on lands in another state unless there are circumstances to show that the parties had in view the laws of the latter place in respect to interest. When that is the case the rate of interest of the place of payment is to govern.⁴ Where a mortgage is a mere incident to the debt, as security for the performance of a personal obligation, it will, as a security, follow the condition of the contract in respect to interest.⁵

ratified the agreement made by his co-debtors, and that the new note was to be regarded as made in and to be governed by the laws of New Mexico in respect to the stipulation for interest.

¹Shipman v. Bailey, 20 W. Va. 640; Sheldon v. Haxtun, 91 N. Y. 124; De Wolf v. Johnson, 10 Wheat. 367; Varick v. Crane, 4 N. J. Eq. 128; Story's Conf. L., § 287a; Kavanaugh v. Day, 10 R. I. 393, 14 Am. Rep. 691; Hosford v. Nichols, 1 Paige, 220; Butters v. Olds, 11 Iowa, 1; South

Missouri Land Co. v. Rhodes, 54 Mo. App. 129; Farmers' Savings, Building & Loan Ass'n v. Fergusou, 69 Ark. 352, 63 S. W. Rep. 797.

²Quince v. Callender, 1 Desaus. 160. See § 357, at end.

³Lewis v. Ingersoll, 3 Abb. App. Dec. 55.

⁴Central Trust Co. v. Burton, 74 Wis. 329, 43 N. W. Rep. 141; 2 Kent's Com. 460; De Wolf v. Johnson, 10 Wheat. 367.

⁵Sands v. Smith, 1 Neb. 108, 93 Am. Dec. 331; Fitch v. Remer, 1

There is a tendency manifested in some recent cases to limit the rule that the validity of a contract is to be determined by the law of the place of its performance to contracts which are purely personal, and to favor the view that the transfer of lands and the execution of liens thereon are governed by the laws of the place where such property is situate. In a North Carolina case¹ a loan was made to a citizen of that state by a Georgia corporation, application therefor being made to a branch of the corporation located in North Carolina, to whom payments were to be made, though the contract recited that it was solvable in Georgia. The loan was secured by a mortgage of land in the latter state. The opinion contains a quotation from a Georgia case,² in which, speaking of a loan made by the defendant to the plaintiff in New York, but secured by mortgage on land in Georgia, where the borrower resided, the court said: There was not one contract for making the notes, and another for securing them by a conveyance, but a part of one and the same contract was expressed in the notes, and a part in the deed executed at the same time. There was no intention to make a loan without having it secured both by the notes and the deed. It was, therefore, impossible to accomplish the object without calling in the laws of Georgia as a part of the transaction. New York had no law which could make any contract conveying land situated in Georgia operative or obligatory. As the law of Georgia would thus be essential with respect to a part of the transaction, that law, if possible, ought to be applied to the whole. There was no intention to make a mere personal contract, but the scheme was to make one partly personal and partly confined by its very nature to a given *situs* — the state of Georgia. In other recent cases the place of performance has been given its usual con-

Biss. 337; *Cope v. Wheeler*, 41 N. Y. 303; *Williams v. Fitzhugh*, 37 N. Y. 414.

¹*Meroney v. Atlanta Building & Loan Ass'n*, 116 N. C. 882, 21 S. E. Rep. 924, 47 Am. St. 841. In *Faison v. Grandy*, 128 N. C. 438, 38 S. E. Rep. 897, the same rule was applied though the loan was made in another state. *Shannon v. Georgia State*

Building & Loan Ass'n, 78 Miss. 955, 30 So. Rep. 51, is to much the same effect.

²*Jackson v. American Mortgage Co.*, 88 Ga. 756, 15 S. E. Rep. 812. See *Thompson v. Edwards*, 85 Ind. 414; *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172; *Pine v. Smith*, 11 Gray, 38; *Building & Loan Ass'n v. Griffin*, 90 Tex. 480, 39 S. W. Rep. 656.

trolling effect notwithstanding the negotiations were conducted and the property securing the debt was situated in a state the laws of which forbade the rate of interest agreed to be paid.¹

Contracts and securities executed to take the place of others previously made for the same debt will be construed in the light of the antecedent facts, and by the law which governed the former contracts or securities, if executed and to be performed in the same place; but they may by new provisions be brought under other laws.

§ 362. Where usury is involved. On the question of usury courts have another function than that of merely interpreting the contract of the parties to effectuate their intention. If the contract is tainted with usury the intention of the parties is wholly or in part set aside and frustrated.² In determining, therefore, the place of contract with a view to disposing of the defense of usury, courts do not limit themselves to a consideration of where, by the terms of the agreement, the parties say it was made or to be performed. The transaction in its incipient details is looked into, and, even if fair on its face and conformable to the law, it may be shown to be a transaction belonging to a different place and to include unlawful interest.³

[644] When the contract specifying the amount reserved is express, its form will not hinder the inquiry whether the parties resorted to it as a means of disguising usury in violation of the law of the state where it was made and to be executed; and in arriving at this intention all the facts are to be taken into

¹ *Ware v. Bankers' Loan & Investment Co.*, 95 Va. 680, 64 Am. St. 826, 29 S. E. Rep. 744, and other Virginia cases cited; *Maynard v. Hall*, 92 Wis. 565, 66 N. W. Rep. 715; *Building & Loan Ass'n v. Logan*, 14 C. C. A. 133, 66 Fed. Rep. 827; *Brower v. Life Ins. Co.*, 86 Fed. Rep. 748.

² *Church v. Malloy*, 9 Hun, 148.

³ *Pratt v. Adams*, 7 Paige, 615; *McAllister v. Smith*, 16 Ill. 328; *Clayes v. Hooker*, 6 Thomp. & C. 448, 4 Hun, 231; *Agricultural Nat. Bank v. Sheffield*, 4 Hun, 421; *Richardson v.*

Brown, 9 Baxter, 242; *Meroney v. Atlanta Nat. Building & Loan Ass'n*, 112 N. C. 842, 17 S. E. Rep. 637.

"It appears that the rule as to the law of contracts made in one state to be performed in another is modified or softened, when applied to contracts for interest, so that the intentions of the parties are effectuated, as a concession to trade and commerce." *Bigelow v. Burnham*, 83 Iowa, 120, 49 N. W. Rep. 104, 32 Am. St. 294.

consideration.¹ Two citizens of Massachusetts cannot make a contract in that state payable there or in New York, and agree to be governed by the law of Iowa or California, and thereby avoid the consequence of the agreement for the payment of usurious interest. Nor can a citizen of one state make his note in another to a resident there, payable in a third, with interest as allowed in a fourth.² Parties by a mere mental operation cannot import the law of one state into another for the purpose of altering the character of a loan made in the latter and to be there retained, without any undertaking or duty to use the money anywhere else, or any understanding that in respect to the use or repayment of it the loan shall differ from any other.³

But where there is no intention to evade the laws against usury parties whose transactions for legitimate purposes extend into several states may conform their interest contracts to the law of the state where the debt is contracted or to the law of that where it is to be paid; in other words, they may adopt the highest rate allowed by the law of either. There are many cases in this country which illustrate both parts of this proposition.⁴ A leading case arose and was decided in Louisiana upon a note given in that state, payable in New York, for a large sum, bearing interest at ten per cent., the

¹ *Arnold v. Potter*, 22 Iowa, 194; *Building & Loan Ass'n v. Griffin*, 90 Tex. 480, 39 S. W. Rep. 656; *Meroney v. Atlanta Building & Loan Ass'n*, 116 N. C. 882, 47 Am. St. 841, 21 S. E. Rep. 924; *Falls v. United States Savings, Loan & Building Co.*, 97 Ala. 417, 38 Am. St. 194, 24 L. R. A. 174, 13 So. Rep. 25; *Hayes v. Southern Home Building & Loan Ass'n*, 124 Ala. 663, 26 So. Rep. 527; *Jackson v. American Mortgage Co.*, 88 Ga. 756, 15 S. E. Rep. 812; *Odum v. New England Mortgage Security Co.*, 91 Ga. 305, 18 S. E. Rep. 131.

Notes in favor of the defendant were, by their terms, payable in the state of its domicile. They were made in another state and secured by a mortgage of land situated there;

the maker was a resident of such state, and through a series of years had made all payments of dues and interest in the state of his residence to an officer of the local board established there and operated by the defendant under its charter. The usury laws of such state were applicable to the notes. *Shannon v. Georgia State Building & Loan Ass'n*, 78 Miss. 955, 30 So. Rep. 51; *Building & Loan Ass'n v. Griffin*, 90 Tex. 480, 39 S. W. Rep. 656.

² *Arnold v. Potter*, 22 Iowa, 194.

³ *Cope v. Wheeler*, 41 N. Y. 204; *Jackson v. American Mortgage Co.*, 88 Ga. 756, 15 S. E. Rep. 812; *Stannell v. Georgia Loan & Trust Co.*, 90 Ga. 227, 22 S. E. Rep. 895.

⁴ *Miller v. Tiffany*, 1 Wall. 298.

legal rate of Louisiana, that of New York being only seven. The defense of usury was set up; but it was held that the note was not usurious; that, although it was payable in New York, the interest might be stipulated for either according to the law of Louisiana or that of New York.¹ In a Wisconsin case the loan was made in that state, by parties residing there, and for use there; but the note given was payable in New York, with interest at a higher than the legal rate of that state, and was [645] transferred to a New York bank, and afterwards renewed by a note, made and signed by a part of the makers in Wisconsin and by one in New York; this note was given for the same amount, provided for the same rate of interest as the other, and was also payable in New York. It, however, was made to the payee in the first note, which was thus paid by that party. The facts are discussed in the opinion, and considerable emphasis is put upon the conclusion that it was a Wisconsin transaction. Upon the point that merely making the note payable in New York did not make it a New York contract, Cole, J., said: "The authorities . . . are too clear and emphatic and leave no room for doubt. They certainly establish the proposition that if the rate of interest be specified in the contract, and it be according to the law of the place where the contract was made, though the rate be higher than is lawful by the law of the place where payment is to be made, still the contract will be valid and binding."²

¹ Depeau v. Humphreys, 8 Mart. (N. S.) 1.

² Richards v. Globe Bank, 12 Wis. 692; Kilgore v. Dempsey, 25 Ohio St. 413, 18 Am. Rep. 306; Bank of Georgia v. Lewin, 45 Barb. 310; Balme v. Wombough, 38 id. 352; Houston v. Potts, 64 N. C. 33; Duncan v. Helm, 23 La. Ann. 418; Andrews v. Pond, 13 Pet. 77; Pratt v. Adams, 7 Paige, 615; Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205; Chapman v. Robertson, 6 Paige, 633; Fitch v. Remer, 1 Biss. 337; Atwater v. Rodofson, 4 Am. L. Reg. 549, 2 Handy, 19; Merchants' Bank v. Griswold, 9 Hun, 561; Berrien v. Wright, 26 Barb. 208; Carnegie v. Morrison, 2 Met. 381;

Kellogg v. Miller, 2 McCrary, 395; Wayne County Bank v. Law, 81 N. Y. 566, 37 Am. Rep. 593; Pancoast v. Travelers' Ins. Co., 79 Ind. 172; Thornton v. Dean, 19 S. C. 583, 45 Am. Rep. 796; New England Mortgage Security Co. v. Vader, 28 Fed. Rep. 265; Brown v. American Finance Co., 31 id. 516; United States v. North Carolina, 136 U. S. 211, 222, 10 Sup. Ct. Rep. 920; Coad v. Home Cattle Co., 32 Neb. 761, 49 N. W. Rep. 757, 29 Am. St. 465; Mott v. Rowland, 85 Mich. 561, 48 N. W. Rep. 638; Smith v. Parsons, 55 Minn. 520, 57 N. W. Rep. 311; Sturdivant v. Memphis Nat. Bank, 9 C. C. A. 256, 60 Fed. Rep. 730.

Where the evidence showed that a note which purported on its face to have been made in Iowa was in fact made and delivered in New York, where the payee resided, and it did not appear where the indebtedness for which it was given was incurred or where the consideration for it was delivered, or that there was any agreement as to the place of payment, the presumption was indulged that it was payable in Iowa and it was sustained as valid under the laws thereof, though it would have been void if it were a New York contract.¹ On a second appeal it appeared that the money loaned was paid to the borrower in New York. This was immaterial, in view of the rule that a citizen of one state may loan money to a citizen of another state and contract for the rate of interest legal in the latter.²

§ 363. Same subject. The same liberal rule is applied to contracts for a greater rate than that allowed by the law of the place where they are made, such stipulated rate not exceeding that allowed at the place of payment.³ An instructive case upon this point was decided in Iowa in 1867. A resident of that state negotiated a loan in Massachusetts. The notes were dated at Keokuk, Iowa, but were delivered in Massachusetts, and the money there received; they were payable in New

¹ *Bigelow v. Burnham*, 83 Iowa, 120, 49 N. W. Rep. 104, 32 Am. St. 294.

² *Bigelow v. Burnham*, 90 Iowa, 300, 57 N. W. Rep. 865, 48 Am. St. 442.

³ *Hayes v. Southern Home Building & Loan Ass'n*, 124 Ala. 663, 26 So. Rep. 527; *Ames v. Benjamin*, 74 Minn. 335, 77 N. W. Rep. 230; *Long v. Long*, 141 Mo. 352, 44 S. W. Rep. 341; *Central Nat. Bank v. Cooper*, 85 Mo. App. 393; *Bennett v. Eastern Building & Loan Ass'n*, 177 Pa. 233, 55 Am. St. 723, 34 L. R. A. 595, 35 Atl. Rep. 681 (compare the last case with *Southern Building & Loan Ass'n v. Riggle*, 4 Pa. Dist. Rep. 617); *Commission Co. v. Carroll*, 194 Tenn. 489, 500, 58 S. W. Rep. 314; *Neal v. New Orleans, etc., Ass'n*, 100 Tenn. 607, 46 S. W. Rep. 755; *National Mutual*

Building & Loan Ass'n v. Ashworth, 91 Va. 706, 22 S. E. Rep. 521; *Nickels v. People's Building, Loan & Saving Ass'n*, 93 Va. 380, 25 S. E. Rep. 8; *Ware v. Bankers' Loan & Investment Co.*, 95 Va. 680, 64 Am. St. 826, 29 S. E. Rep. 744; *Buchanan v. Drivers' Nat. Bank*, 5 C. C. A. 83, 55 Fed. Rep. 223; *Building & Loan Ass'n v. Logan*, 14 C. C. A. 133, 66 Fed. Rep. 827; *Hieronymus v. New York Nat. Building & Loan Ass'n*, 101 Fed. Rep. 12; *Coghlan v. South Carolina R. Co.*, 142 U. S. 101, 12 Sup. Ct. Rep. 150; *Vermont Loan & Trust Co. v. Dygert*, 89 Fed. Rep. 123; *Brower v. Life Ins. Co.*, 86 Fed. Rep. 748; *Lines v. Mack*, 19 Ind. 223; *Newman v. Kershaw*, 10 Wis. 333; *Bolton v. Street*, 3 Cold. 31; *Butters v. Olds*, 11 Iowa, 1; *Cogle v. Fleck*, 93 U. S. 344.

York, and included interest at a higher rate than was allowed by the law of Massachusetts or New York, but legal in Iowa. The payment of the notes was secured by a trust deed of Iowa land, acknowledged by the borrower in Massachusetts, and by [646] his wife in Iowa, to an Iowa trustee.¹ The notes, though dated in Iowa, were delivered and therefore had their legal inception in Massachusetts; the deed of trust, though conveying Iowa lands, being a mere security, would not change the *situs* of the loan; the securities were delivered and the money loaned received in Massachusetts. These facts could not influence the interpretation of the contract, but they were material on the question of its validity in respect to the defense of usury. Stating the case according to its legal effect, independently of the question of usury, it was briefly this: A loan was obtained in Massachusetts, and a contract was there made for its repayment in New York. Had the notes contained a promise generally to pay interest, without specifying the rate, there can be no doubt that the law of New York would have interpreted that promise, and the rate of that state would have been adopted. The courts of any state or country where suit on the note might be brought would have adopted that rate because it would be deemed of the substance of the contract. If the notes, instead of being founded on a loan, had been given for lottery tickets sold and delivered in a state where such sales were unlawful, and were written payable in a state where such sales were not unlawful, there can be no doubt that the illegality of the consideration by the law of the state where the sale took place would vitiate and render the note invalid everywhere. The circumstance that the maker of the note was a resident of Iowa would give no recourse to the laws of that state to determine the force and effect of the interest contract and supply the rate, in the one case supposed; nor would his residence in a state permitting traffic in lottery tickets affect the question of illegality in the other. Chancellor Kent says:² "According to the case of *Thompson v. Powles*,³ it is now the received doctrine at Westminster Hall that the rate of interest on loans is to be governed by the law of the place where the money was to be *used* or paid, or to which the loan

¹ *Arnold v. Potter*, 22 Iowa, 194.

² 2 Kent's Com. 461.

³ 2 Sim. 211.

has reference.”¹ And since the letter of a contract does not preclude inquiry into the facts and situation of the parties to establish usury, it is doubtless equally competent to show [647] where the loaned money was intended to be used and other facts to repel such a charge. In delivering the opinion of the court in the Iowa case, just mentioned, Wright, J., said: “The plaintiff claims that the parties in good faith contracted with reference to the laws of this state, intending to make this an Iowa contract, and upon this subject the court instructed as follows: ‘If defendant went to Boston and urged the loan and promised ten per cent. under the laws of Iowa, and all the arrangements and contracts were made as to the laws of Iowa in good faith, and no more than ten per cent. was contracted for, then the defense fails and the plaintiff can recover.’ Our opinion is that if the parties acted in good faith, that is, if there was no intention to evade the law, it was competent for them thus to contract, and that the defense could not avail; . . . the parties may, in good faith, contract with reference to the law of the place where the payer resides, and where the property, upon which the security is taken is located.”²

§ 364. Same subject. As a promissory note or bill of exchange has no validity until it has been delivered, such paper may be dated, signed, indorsed and written payable in any place for a greater rate of interest than is there allowed, and not be subject to the defense of usury by the law of that place, if it is afterwards delivered and has its inception where the rate of interest therein specified is lawful; if such delivery is upon an actual transaction at the place where it occurs, as by the instrument being there discounted. Such a note or bill will be regarded as though made where it is delivered.³

¹ See *Cockle v. Flack*, 93 U. S. 344; *Cope v. Wheeler*, 41 N. Y. 303.

² *Scott v. Perlee*, 39 Ohio St. 63, 48 Am. Rep. 421; *Jones v. Rider*, 60 N. H. 452. See § 361.

³ *Kuhn v. Morrison*, 75 Fed. Rep. 81; *Pratt v. Adams*, 7 Paige, 636; *City Savings Bank v. Bidwell*, 29 Barb. 325; *Bowen v. Bradley*, 9 Abb. Pr. (N. S.) 395; *First Nat. Bank v. Morris*, 1 Hun, 689; *Connor v. Donnell*, 55 Tex. 167.

But the delivery of the security for the payment of money and the handing of the latter to the borrower are not conclusive as to the place where the contract was made. *Coad v. Home Cattle Co.*, 33 Neb. 761, 49 N. W. Rep. 757, 29 Am. St. 465.

A note secured by mortgage on land in Tennessee was given for a loan negotiated in Connecticut, but was executed in North Carolina and delivered and made payable in New

It is the first delivery of the executed instrument which determines the law by which its validity is to be tried. If the original delivery is made where the execution took place and where the instrument is payable, any subsequent use of it then

Jersey. In the absence of any different understanding between the parties, the laws of New Jersey controlled on the question of usury. *Hubble v. Morristown Land Co.*, 95 Tenn. 585, 32 S. W. Rep. 965.

A bond dated in North Carolina and delivered in Virginia specified no place of payment, and was held to be subject to the usury laws of the former; but if it had appeared that it was given pursuant to a contract made in Virginia, it is suggested that it would have been otherwise. *Morris v. Hockaday*, 94 N. C. 286.

In *Tilden v. Blair*, 21 Wall. 241, a draft dated in one state and drawn by a resident thereof on a resident of another state, and accepted by the latter purely for the accommodation of the drawer, and returned to him for negotiation in the state of his residence, the proceeds to be used there, and payment of it to be made by him, was negotiated to an innocent holder for value. Held, that it was to be governed by the law of the state in which it was dated and drawn, though by the terms of its acceptance it was payable at the acceptor's residence; and if by the law thereof the holder is entitled to the sum to be paid for it, though he bought it usuriously, he may recover such sum, notwithstanding the law of the state where the acceptance was made declared the contract void for usury.

In the first edition of this work the author expressed his dissent from the doctrine laid down in *Jewell v. Wright*, 30 N. Y. 259, 86 Am. Dec. 372. Subsequent decisions in New York have more clearly explained the ruling there made and settled the

law more nearly in harmony with the text than it was understood to be before they were made. In *Wayne County Savings Bank v. Low*, 81 N. Y. 566, 570, 37 Am. Rep. 533, *Rapallo, J.*, says: "In *Dickinson v. Edwards*, 77 N. Y. 573, 33 Am. Rep. 671, the decision in *Jewell v. Wright* was adhered to, and it was held that where a promissory note was made in this state by a resident thereof, bearing date and by its terms payable in this state, with no rate of interest specified, and was delivered to the payees without consideration, to be used by them for their accommodation, without restriction, and was first negotiated by them in another state at a rate lawful there but greater than that allowed by law in this state, it was usurious and void, there being no evidence in the case of any intention on the part of the maker that the note should be discounted or used out of this state. That case, as well as *Jewell v. Wright*, was distinguished from *Tilden v. Blair*, 21 Wall. 241, expressly upon the ground that in *Tilden v. Blair*, although the acceptance was made payable in New York by the acceptors who were residents of New York, yet, after having accepted in New York, they returned the acceptance to the drawer in Illinois for the purpose and with the intention that it should be negotiated by him in that state. And this court says in its opinion in *Dickinson v. Edwards* that that was the controlling fact in *Tilden v. Blair*, and that the ruling consideration was the intention of the acceptors that the draft should be used in Illinois, while in *Jewell v. Wright* and in the case then before

contemplated by the parties cannot affect its validity.¹ If preliminary negotiations for a loan are made in one state, and it is agreed that the security shall be executed and recorded in the state of the borrower's residence, the contract is complete

the court there was nothing to show an intention on the part of the maker of the note to give authority to deal with it otherwise than as the law of this state would allow. The case of *Bank of Georgia v. Lewin*, 45 Barb. 340, and other cases are distinguished from *Jewell v. Wright* on the same ground, and it may safely be said that the case of *Dickinson v. Edwards* rests upon the ground that there was no evidence of knowledge or intention on the part of the maker of the note that it was to be used out of this state, and that, in the absence of such proof, it must be governed by the law of the place of payment.

"In the present case the fact which was wanting in *Jewell v. Wright* and *Dickinson v. Edwards* clearly appears, and the case is brought within the principle of *Tilden v. Blair*, and the cases which have followed it. The note now in suit was dated and made payable in New York, but it was made for the express purpose of being used in renewal of another note for the same amount then held by the plaintiffs, a bank in Pennsylvania. The note in suit was actually written in Pennsylvania in the form in use in that state, by the cashier of the plaintiff, at the defendant's request, and forwarded by the cashier to the defendant for signature, and was signed by the defendant in New York, and then mailed by him to the plaintiff in Pennsylvania, together with a check for the discount at the rate of eight per cent. per annum, which was lawful in Pennsylvania. The

note and interest were consequently received by the plaintiff in Pennsylvania, and all this was done in performance of a previous agreement which had been entered into in Pennsylvania between the plaintiff and the defendant. All that was done by the plaintiff in New York was simply in execution of that agreement, and as is said in *Dickinson v. Edwards* in citing *Tilden v. Blair*, the designation of the place of payment of the note was an incidental circumstance for the convenience of the maker and not an essential part of the contract or with the intent to affix a legal consequence to the instrument. It cannot be contended that a party who goes into another state and there makes an agreement with a citizen of that state for a loan or forbearance of money, lawful by the laws of that state, can render his obligation void by making it payable in another state according to whose laws the contract would be usurious. Neither can it be claimed that because the obligation, instead of being signed in the state where the contract was made, is signed in another state and sent by mail to the place of the contract, it must be governed by the usury laws of the place where it was signed." See *Sheldon v. Haxtun*, 91 N. Y. 124; *Western Transportation & C. Co. v. Kidderhouse*, 87 id. 430; *Merchants' Nat. Bank v. Southwick*, 67 How. Pr. 393; *Rowen v. Bradley*, 9 Abb. Pr. (N. S.) 395.

In *Hanrick v. Andrews*, 9 Port. 9, a loan was made in New York, and

¹ *Merchants' Nat. Bank v. Southwick*, 67 How. Pr. 394.

and the papers are delivered to the lender when they are put in possession of the proper officer to be recorded, though they are subsequently mailed to the creditor.¹

[648] How is a contract to be considered which is usurious where it was made, and also by the law of the place where, by its terms, it is to be performed by payment? If the interest [649] est allowed by the law of the place of performance is higher than that permitted by law where the contract was made, the parties may, as has been before stated, stipulate for [650] the higher interest without incurring the penalties of usury. But if the contract is made payable in another state [651] for the mere purpose of evading the usury law of the place where it was made the form of the transaction will not [652] sustain it. The contract will be disposed of by the law of the state in which it is made. The court will decide according [653] to the real object of the parties.² An action was brought on a bill of exchange drawn in New York, payable in Alabama, for an antecedent debt, which included a sum, in addition, greater than the interest in either state for the time of forbearance. The court say: the defendants allege that the contract was not made with reference to the law of either state, and was not intended to conform to either; that a rate of interest forbidden by the law of New York, where the contract was made, was reserved on a debt actually due; and that it was concealed under the name of exchange in order to evade the law. If this defense be true, and shall be so found by the jury, the question is not which law shall govern in executing the contract, but which is to decide the [654] fate of a security taken upon a usurious contract which neither will execute. Unquestionably it must be the law of

the interest was paid there on it, and the bill there drawn payable in Alabama, without interest—and it was held to be governed by the law of New York, and usurious. The interest contract was made and performed in that state at the time of the loan. The court held that an instrument, as to its form, and the formalities attending its execution, the mode of construing it, the mean-

ing to be attached to the expressions by which the parties have contracted, and the nature and validity of the contract, is subject to the law of the place where it is made; and that the law of the place where it is to be executed must regulate its performance.

¹ Kellogg v. Miller, 2 McCrary, 395.

² Story's Conf. L., § 293a.

the place where the agreement was made and the instrument taken to secure its performance. It was remarked that a contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last mentioned case the agreement was permitted by the *lex loci contractus*; and will even be enforced there if the parties be found within that jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made.¹ What would be the fate of a contract made with express reference to the law of the place of payment, though stipulating interest above the rate allowed there, as well as where it was made, is not decided by that case. The contract, if intended to evade the usury law of New York, and usurious, if governed by that law, is void. But if made with reference to the law of Alabama, and usurious by it, it is not wholly void. A contract of the latter kind is in part enforced by that law. May parties in New York, where the limit of interest is seven per cent., make a contract in a transaction which legitimately extends into Alabama for the payment of money there at a rate exceeding both the rate of New York and that of Alabama, and have the benefit of the law of the latter state to determine their rights, if the defense of usury be made?

In an Indiana case a resident of that state borrowed money there of a domestic corporation upon a draft drawn there on New York, specifying six per cent. interest for the time it had to run; it was discounted at the rate of twelve per cent., and the question was, by what law the fate of the contract was to be determined. It was held to be an Indiana contract because the transaction was a loan made there, and because the bill specified the Indiana rate of interest.²

A resident of Massachusetts applied to a citizen of New York for a loan, and the latter agreed to lend him a sum at eight per cent. on security of real estate situate in Mas- [655] sachusetts; the lender wrote the borrower to send him the note and mortgage, which were accordingly sent, and the lender

¹ *Andrews v. Pond*, 13 Pet. 65.

² *Mix v. Madison Ins. Co.*, 11 Ind. 117.

caused the loan to be paid over to the borrower in Massachusetts. Hence, the contract sued on had its legal inception in New York; and the consideration therefor, the loan, passed to the maker of the note in Massachusetts; the contract was held to be governed by the law of that state, though the agreed rate of interest was usurious by the law of both states. It was deemed a Massachusetts contract because the important facts of the transaction took place in that state.¹ An important case in New York seems to answer the question just stated.² A New York corporation negotiated a loan of two bank corporations of Philadelphia; the bargain was made in New York, and the contract for repayment, in the form of certificates of deposit, was made there, stating the deposit of the money loaned with the borrowing corporation in New York; these certificates were payable on time, at Philadelphia, with interest at six per cent., the legal rate in Pennsylvania. The loan was to be in depreciated paper, but was paid in an equivalent of cash funds; and the difference between the amount received and that stated in the certificates of deposit, it was claimed, rendered it usurious by the laws of both states. Without deciding absolutely whether the contract was usurious, a majority of the court concurred in the conclusion that if it was usurious by the laws of both states it should be governed by the law of Pennsylvania, where the loan was to be repaid.

In an Illinois case³ a suit in chancery was commenced for the purpose of settling the rights of different creditors in the proceeds of a mortgage given for their common benefit. The demand of one creditor, a bank, was upon acceptances of bills of exchange drawn and accepted in Indiana, and payable in New York. These bills were based upon actual transactions, namely, the shipment of hogs and cattle. Where the transactions took place does not very distinctly appear; but from some indications in the report it is inferred that they occurred in Indiana. Two of the bills were purchased by the bank [656] with a reservation of seven and a half per cent. interest, which was greater than the amount allowed by law in either Indiana or New York; and the question was discussed, by the

¹ *Pine v. Smith*, 11 Gray, 38.

³ *Adams v. Robertson*, 37 Ill. 45.

² *Curtis v. Leavitt*, 15 N. Y. 9-296.

law of which state the fate of the security should be determined. It was held that the law of Indiana was to govern because the contract was made there.¹

¹ On a rehearing of this case the court adopted an opinion prepared by one of the judges who sat at the first hearing but not at the second. In this the writer said: "Great conflict of opinion has prevailed in respect to the laws affecting the validity of contracts made in one country but to be performed in another. The laws of a country where a contract is made are obligatory upon the parties, and, upon principle, no contract declared void by these laws ought to be enforced in any other country. As an exception to the rule, it has been held that no nation is bound to take notice of or to protect the revenue laws of another country; but this exception has no foundation in principle, although it is so firmly established that courts cannot now overturn it. No man ought to be heard in a court of justice to enforce a contract founded in or arising out of moral or political turpitude, or in fraud of the just rights of the country in which the contract was made. Story's Conf. L., p. 435. The laws of every country allow parties to enter into obligations with reference to the laws of the country where such obligations are to be performed; and although such obligations may not be in accordance with the laws of the country where they are made, as regards obligations to be performed in that country, they may be strictly in accordance with such laws as to obligations to be performed in other countries. The right to enter into contracts with reference to the laws of another country is one allowed by nations for the convenience of those transacting business within their respective territorial limits, to enable them to obtain such rights as

they could have secured in the country where the contract is to be performed, by a just observance of its laws. No nation can justly be required to allow persons subject to its laws to enter into contracts without reference to and not in accordance either with its own laws or with the laws of the country where the contract is to be performed. A limitation in the laws of all nations of the right to enter into contracts to be performed in other countries requires that they shall be in accordance with the laws of the country where they are made, or else in accordance with the laws of the country where they are to be performed. The laws of a country have no extraterritorial force, and do not prohibit persons from doing any act or making any contract in another country. The courts of any country may refuse to enforce contracts made in another country where they are immoral or unjust, or where the enforcing of them would injure the rights, interests or convenience of that country or its citizens; but the laws of a country, as such, have no operation or effect upon acts done or contracts made beyond its territorial limits. The rights enforced by courts, where contracts are made in one country to be performed in another, are those given by the law of the country where the contract was made, and such rights are to be enforced in the country where the contract is to be performed, not as a matter of right, but as a matter of comity extended towards the country where the contract was made. Persons making contracts with reference to the laws of the country where such contracts are to be performed may expressly

[657] § 365. Same subject. By the interest laws of many states usurious contracts are not wholly void. In states where there is any interest limit there are various provisions under which the debtor may defend on the ground of usury, either [658] against the excess of interest above the legal rate, against the entire interest, or against the whole interest and some portion of the principal. Some question has arisen how far the courts of one state, in which the remedy is sought on such contracts made in another state, will enforce such statutes as laws governing the contract. It is a general rule that

or impliedly stipulate for the rights and benefits given by the laws of that country as part of the contract; and the laws of the country where the contract is made secure to the parties the rights and benefits thus agreed upon, in the same manner as if the laws in reference to which they contracted were incorporated into the contract.

"In determining the consequences attendant upon making a contract in one country, to be performed in another, which is not in accordance with the laws of either country, we should inquire which country's laws have been violated. As, for example, the laws of Illinois allow parties to contract for interest at the rate of ten per cent., while the laws of New York allow only seven per cent. Persons who make contracts in Illinois for interest at the rate allowed by its laws violate no law of the state of New York, and are not subject to the penalties imposed by the laws of that state upon persons who enter into contracts within its territorial limits in violation of such laws. A creditor who has made no contract in New York does not violate its laws by receiving money from his debtor in that state, or undertaking in another state to receive it there. The laws of Indiana allow persons to contract for interest at the rate of six per cent. in case

the contract is to be performed in that state, and at the rate of seven per cent. if the contract is to be performed in New York, but prohibit contracting for a greater rate in either case. Persons entering into contracts in Indiana, reserving a greater rate of interest than is allowed by its laws in such cases, thereby violate the laws of that state, and incur the penalties imposed for such violation. The courts of neither state will enforce the contract, because the rights asserted under it are in violation of the laws of the state where it was made. The fate of such a contract depends upon the laws of the place where it was made, being subject to the legal consequences attendant upon the violation of those laws. *Andrews v. Pond*, 13 Pet. 65. In *McAllister v. Smith*, 17 Ill. 328, 65 Am. Dec. 651, this court held that pleas setting forth that bills of exchange upon which the suit was brought were made in Illinois and payable in the state of New York, under a contract not in accordance with the laws of either state, ought not to have been stricken from the files for immateriality. While the reversal of the judgment in the court below upon that ground was undoubtedly correct, upon a careful review of the subject we are not satisfied with all the reasons given on that occasion."

penal laws are strictly local; confined in their operation to the territory of the power enacting them, and affect nothing more than they can reach.¹ The statute of New York limits the rate of interest to seven per cent., and declares void all usurious contracts and securities. Any contract governed by this law, and which would be held void there, would be held void everywhere.² The effect of this statute is penal, and for this reason the courts hold that statutes taking away the forfeiture or diminishing it may be made to apply to existing contracts.³ The contract in such cases has no legal inception; the illegality in its origin prevents its coming into being, the law being more potent than the will of the parties. When money is parted with on the face of such an agreement it is irrecoverable, forfeited; not by judicial sentence; not because the law prescribes a fine graduated to the sum lent at usury; but because the law is passive and will not aid a party who has voluntarily risked his money in an unlawful venture. The recognition by the courts of other states of this innate infirmity of the contract, involving a forfeiture of everything of value invested in it, though that be a penalty for making a forbidden contract, is not deemed the enforcement of the penal laws by the effect of which such contracts are void *ab initio*. The same principle applied to a contract which by the *lex loci* is avoided in part would require the same abatement of the debt when sued for in another state.

By the statute of Iowa the creditor is entitled, in an action for a usurious debt, to recover only the principal, without [659] interest or costs; but the courts of that state are directed in such action to give judgment for ten per cent. interest to the school fund of the county. The creditor loses the interest, but the debtor is relieved only from paying the excess over ten per cent. In an action in Illinois upon a contract made in the former state the plaintiff was permitted to recover only accord-

¹ Folliott v. Ogden, 1 H. Bl. 135;

Ogden v. Folliott, 3 T. R. 733; Wolff v. Oxholm, 6 M. & S. 99; The Antelope, 10 Wheat. 123; Scoville v. Canfield, 14 Johns. 338, 7 Am. Dec. 467; Commonwealth v. Green, 17 Mass. 515; Sutherland on Statutory Construction, §§ 12-14.

² See § 357.

³ Curtis v. Leavitt, 15 N. Y. 9, 229; Welch v. Wadsworth, 30 Conn. 140, 79 Am. Dec. 236; Parmelee v. Lawrence, 44 Ill. 405; Wood v. Kennedy, 19 Ind. 68; Pollock v. Glazier, 20 id. 262.

ing to the same rule; that is, the principal without interest.¹ There, of course, the penalty to the school fund was not adjudged; nor could the provision in regard to costs be executed. The court say: "Here unlawful interest was contracted for and the interest was incorporated with the principal, and the law in effect says that the interest shall be expunged from the note, and it shall be read and adjudged the same as if the principal sum alone had been expressed in dollars and cents. And this law, entering into and forming part of the contract, goes with it wherever it goes. It is admitted that such would be the effect of this law if it had declared that the plaintiff should have judgment for nothing. How much more so in common sense when it allowed him to take judgment for the principal sum borrowed. The distinction in the two cases is not only without reason, but is against all reason and all sound law and the philosophy of the law."

The statute of Massachusetts fixes the rate of interest at six per cent. If more is reserved the contract is not void, but the defendant recovers full costs, and the plaintiff forfeits threefold the amount of the whole interest reserved, and shall have judgment for the balance only which shall remain due after deducting the threefold amount. In an action in Iowa upon a contract claimed to be usurious under the laws of Massachusetts the trial court instructed the jury that "this court will not enforce the penal statute of another state relating to usury when that statute does not make the contract wholly void; and, therefore, the statute of Massachusetts is not to be considered by the jury." This was held, on appeal, to be erroneous, and that the legal effect of the contract could not vary in different states; and it is according to such effect that all courts are bound to enforce contracts.²

¹ Barnes v. Whitaker, 22 Ill. 606.

² Arnold v. Potter, 22 Iowa, 194. In this case Wright, J., said: "If the law affixed a penalty, and the defendant was in this case seeking to collect it; or if, as under our statute, the defendant forfeited a certain amount to the school or other fund, and we were asked to declare the same, we would have cases to which

the instruction in question would apply. Is forfeiture the same as penalty in this connection? This is easily answered. If the law attaches a penalty as the consequence of an act, it may be sued for and recovered; but it will be enforced alone in the state declaring the same. If, on the other hand, a person's property may be forfeited or lost by

In a recent case¹ the loan was negotiated in Connecticut, the note and mortgage securing its payment were executed in North Carolina, the land mortgaged was situated in Tennessee and the note and mortgage were delivered and made pay-

some fault or offense, the forfeiture is not enforced, except in the prosecution of the fault or offense: and if the party guilty of the fault seeks to enforce the contract which he has obtained as the fruit of such offense, he can take no part of the forfeiture. And when he declares and seeks to recover upon such a contract in another state, if the courts of that state hold that his contract shall be carried out as interpreted by the laws of the state where made, they inflict upon him no penalty; they are not enforcing the penal laws of another state, but enforcing the statute of a sister state so far as it effects a discharge of the claim. Gambling is punished by our statute, and a gambling contract is void. Suppose our laws declared that a party holding such a contract might recover one-half and no more. Now, the penalty, the penal statute, would not be enforced in another state, but, in an action upon the contract there, the holder would be limited in his recovery to the one-half. The Massachusetts statute not only uses the word 'forfeit,' but says the plaintiff shall only have judgment for so much; thus unmistakably keeping up the distinction between a law of this kind and one penal in its nature. But take other illustrations. A stockholder fails to comply with the terms of the articles in the payment of his stock, and these articles declare that for such non-compliance his share shall become forfeited. Will any one pretend that this is a penalty within the meaning of the law?

Then, again, equity recognizes the distinction when it is said that a party will *always* be relieved from a penalty, if compensation can be made, because it is deemed as a mere security; and yet, though compensation can be made, relief will not always be given against a *forfeiture*. So, again, we speak of a forfeiture in case of a breach of a covenant, but never of it as a *penalty*. So of a penalty as contradistinguished from liquidated damages, but never of *forfeiture* in the same connection. Then, again, of *forfeiture* as a recompense to an injured party for the wrongful or illegal act of another, by which the latter loses his interest in the thing. But penalty carries a very different idea. It is the punishment inflicted for not executing a prior obligation, the object being to insure the primary engagement of covenant. Bouvier's Inst., vol. 1, 292; 2, 116; 4, 217." The learned judge, referring to *Sherman v. Gasset*, 9 Ill. 521, maintaining a different doctrine, said: "It was decided by a divided court, Lockwood, J., delivering the opinion of six of the judges, and Koerner, J., the dissenting opinion of the other three. We do not propose to examine it at length. The argument of the majority of the court strikes us as being based upon improper assumptions, and as equally inconclusive in its reasoning; and most pertinently does the dissenting opinion dispose of the whole argument by saying: 'To maintain that we are bound to declare a usurious contract

¹ *Hubble v. Morristown Land Co.*, 95 Tenn. 585, 32 S. W. Rep. 905. See *Kuhn v. Morrison*, 75 Fed. Rep. 81.

able in New Jersey. The rate of interest stipulated for was usurious under the laws of New Jersey and under those of Tennessee. In a suit to foreclose the mortgage it was ruled that the contract was governed by the laws of New Jersey, and that it might be enforced in Tennessee, less the excessive interest. It was said: We cannot presume that this contract is usurious and void by the laws of New Jersey. That fact must be made to appear by proof, and has been established. But, it requiring proof to establish the usurious contract under those laws, it follows, under our own decisions in such cases, that the note is not avoided, but only the usury. If this were a Tennessee contract, the usury appearing on the face of the note would avoid the whole contract; but, it being a New Jersey contract, and thereby necessitating proof *aliunde* the contract to show the usury, the contract is only avoided to the extent of the usury.

[660] It is obvious that where the *lex loci* provides that the interest contract shall not be void, but declares certain consequences of the usury, and, among them, that a deduction shall be made in any action brought upon the contract from the amount to which it purports to entitle the creditor, such consequences are penal in their nature in the same sense, and no other, as the law which declares the whole contract void.

[661] Neither law means, in an absolute sense, what it says by "void," and "not void." If a usurious contract were absolutely *void* anybody could allege its invalidity. But the law confines the privilege of making that objection to the debtor party to the contract, and those standing in certain relations of privity to him. The law which declares the contract void, itself qualifies the declaration by specifying certain effects of the usury which substantially obliterate a part of the contract from its inception.¹

wholly void, when the laws of the place of contract make it so, whereby the creditor is deprived of the whole of his claim, but that we are not bound to regard the law where it provides for a forfeiture only, by which the creditor loses but a part of his claim, seems to involve a singular inconsistency. It, in other

words, involves the following remarkable syllogism: The law everywhere avoids usurious contracts, when they are declared wholly void by the law of the place. This contract was void in part, and consequently it is good in whole."

¹ Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. Rep. 403.

The statute which makes usury a total or partial defense may hamper it by making it depend on some special method of local practice, and thereby confine its allowance to the courts of the state by whose law the contract and the remedy are governed. This is illustrated by a case in Massachusetts, upon a note usurious by the law of New Hampshire, by which law the benefit of the defense depended on the defendant offering a particular mode of trial; that is, by the oath of the parties. If the usury was thus proved a certain amount was required to be deducted from the principal and interest due on the contract in assessing damages. These provisions were held to apply to the remedy, and, of course, to extend only to suits brought in New Hampshire; they could have no effect when a remedy was sought in the courts of another state.¹

If a usurious contract is wholly abandoned and the securities given to insure its performance are canceled, a subsequent promise by the borrower to pay the money he borrowed is binding. *Sheldon v. Haxtun*, 91 N. Y. 124; *Hammond v. Hopping*, 13 Wend. 505; *Kilbourn v. Bradley*, 3 Day, 356, 3 Am. Dec. 273; *House v. Planters' Bank*, 57 Ga. 95.

Willis v. Cameron, 11 Abb. Pr. 245, proceeds wholly upon the ground that the statute of usury of Massachusetts, which applied to the contract in question, is penal, and therefore that the deduction of threefold the amount of the whole interest reserved can only be allowed in the courts of that state. *Hilton, J.*: "The second defense, though very ingeniously pleaded, must, I think, be regarded as sham. It assumes to be a defense in bar of the plaintiff's right to recover anything upon the note in suit:—whereas, by the statutes of Massachusetts, as interpreted by the courts of that state (*Kendall v. Robertson*, 12 Cnsh. 156), although the rate of interest there is declared to be six per cent. per annum on all contracts for the pay-

ment of money, yet the taking of a greater sum does not avoid the entire contract, but merely imposes upon the person taking it, by way of penalty, a forfeiture of threefold the amount of interest unlawfully reserved, *and no more*; and which is to be allowed to the defendant in the action upon the contract when he establishes the fact of taking such unlawful rate, together with his full costs in the suit; or when the illegal interest has been paid, the party paying it may recover it back threefold. (See *De Wolf v. Johnson*, 10 Wheat. 367, as to the effect of such a statute.) It will not, I suppose, be contended that the defendant, if he had paid the illegal interest, could maintain an action in this state to recover the penalty thus imposed by the statute of Massachusetts upon the party receiving it; and this being the case I think it must follow, as a necessary consequence, that he cannot, in this state, avail himself of the statute, by way of defense." See *Sherman v. Grossett*, 9 Ill. 521.

¹ *Gale v. Eastman*, 7 Met. 14. The distinction between the law of the contract and the remedy is very dis-

§ 366. The law of what place governs the rate as damages. Interest before a debt is due is the creature of agreement; afterwards it is given by law as damages for detention of the money; but it may be governed as to rate by contract. In the absence of contract the amount is regulated by law. [663] And there is much authority for saying that the law which governs the rate is that of the place where the debt is payable.¹ That law is supposed to have been in the minds of the parties when the debt was contracted; at all events, the money is deemed to be worth the legal rate of interest at the place where it was the debtor's duty to pay it. The creditor may bring suit wherever a court can obtain jurisdiction, but the damages for detention of the debt have generally been assessed according to the law of the place where payment was due, if that law is shown.² This rule does not appear to be recognized in Massachusetts, except in respect to contracts containing an express or implied agreement to pay interest. It is now declared settled that in an action there upon a note made

tinently stated by Shaw, C. J., who delivered the opinion of the court in this case: "The general rule is that those provisions of law which determine the construction, operation and effect of a contract are part of the contract and follow it, and give effect to it wherever it goes; but that in regard to remedies, the *lex fori*, the law of the place where the remedy is sought, must govern. We therefore cannot be governed by the law of New Hampshire, which professes only to regulate the remedy on a usurious contract. The law of Massachusetts, though somewhat analogous, cannot apply because, although the *mode* of enforcing the law against usury is by applying it to the remedy, yet the law to be enforced is the law of Massachusetts. The law of this commonwealth, declaring what shall be the rate of interest, and what contracts shall be deemed usurious, also directs, when suits are brought, what deductions

shall be made; but it is suits brought on *such* contracts; that is, contracts made in violation of its own provisions."

¹ Healy v. Gorman, 15 N. J. L. 328; Evans v. Clark, 1 Port. 358; Evans v. Irvin, id. 390; Hall v. Kimball, 58 Ill. 58; Hoppins v. Miller, 17 N. J. L. 185; Burton v. Anderson, 1 Tex. 93; Gibbs v. Fremont, 9 Ex. 25; Bushby v. Camac, 4 Wash. C. C. 296; Winthrop v. Carleton, 12 Mass. 4; Jaffray v. Dennis, 2 Wash. C. C. 253; Lanusse v. Barker, 3 Wheat. 101; Winthrop v. Pepon, 1 Bay, 463; Gaillard v. Ball, 1 Nott & McC. 67; Robinson v. Bland, 2 Burr. 1077; Thompson v. Ketcham, 4 Johns. 285; Cocke v. Conigmaker, 1 A. K. Marsh. 254; Porter v. Munger, 22 Vt. 191; Crawford v. Simonton, 7 Port. 110; Evans v. White, Hemp. 296; Peck v. Mayo, 14 Vt. 33. 39 Am. Dec. 205.

² 2 Par. on Con. 585; 2 Par. on Notes and Bills, 370; Fanning v. Consequa, 17 Johns. 511, 8 Am. Dec. 442; Cham-

payable on a day certain in another state, without any agreement express or implied to pay interest, the plaintiff can only recover at the legal rate in Massachusetts, although less than such rate in the state where the note was made and payable.¹ In Indiana if a note sued upon was made in another state and does not provide for interest nor specify the place of payment, the court will award interest according to the local law.² In Illinois the rule is that if a foreign contract is silent as to the rate of interest the *lex fori* will determine the rate to be allowed, if any, in absence of proof of the law of the place of the contract. Where the rate of interest sought to be recovered is greater than that allowed by the *lex fori*, and the

bliss v. Robertson, 23 Miss. 302; Gage v. McSweeney, 74 Vt. 370, 52 Atl. Rep. 969.

¹ Ayer v. Tilden, 15 Gray, 178, 77 Am. Dec. 355; Ives v. Farmers' Bank, 2 Allen, 236.

In Ayer v. Tilden the action was upon a New York note in which there was no agreement for the payment of interest. Hoar, J.: "That rate is six per cent. from the maturity of the note. The interest is not a sum due by the contract, for by the contract no interest was payable, and is not, therefore, affected by the law of the place of the contract; it is given as damages for the breach of the contract, and must follow the rule in force within the jurisdiction where the judgment is recovered. Grimshaw v. Bender, 6 Mass. 157; Eaton v. Mellus, 7 Gray, 566; Barringer v. King, 5 Gray, 9. The contrary rule has been held to be applicable when there was an express or implied agreement to pay interest. Winthrop v. Carleton, 12 Mass. 4; Von Hemert v. Porter, 11 Met. 210; Lannusse v. Barker, 3 Wheat. 101. Perhaps it would be difficult to support the decision in Winthrop v. Carleton upon any sound principle; because the court in that case held that interest could only be computed

from the date of the writ; thus clearly showing that it was not considered as due by the contract, and yet adopted the rate of interest allowed at the place of the contract. But the error would seem to be in not treating money paid at the implied request of another as entitled to draw interest from the time of payment. An objection to adopting the rule of the rate of interest in the jurisdiction where the action is brought, as the measure of damages, may be worthy of notice; that this rule would allow the creditor to wait until he could find his debtor or his property within a jurisdiction where a much higher rate of interest was allowed than at the place of contract. But the debtor could always avoid this danger by performing his contract; and the same difficulty exists in relation to the action of trover and replevin. If such a case should arise, it might with more reason be argued that the damages should not be allowed to exceed those which would have been recovered in the state where the contract was made and to be performed." See Chase v. Dow, 47 N. H. 405.

² Kopelke v. Kopelke, 112 Ind. 435, 13 N. E. Rep. 695; Shaw v. Rigby, 34 Ind. 575, 43 Am. Rep. 98.

law of the place of payment is pleaded and proved, and it allows a greater rate of interest than is recoverable where the remedy is sought, the *lex loci* may be invoked to show the legality of the contract and the intention of the parties to it.¹ In Kentucky interest may be recovered on a note executed in another state at the stipulated rate until its maturity, but thereafter interest will be computed at the rate prescribed by the law of Kentucky.² Interest as damages, in the absence of a contract, is governed by the law of the forum.³

A cause of action arising under a foreign statute is vindicated in the tribunal of another country upon principles of comity. The *lex fori* is referred to and compared with and measured by the *lex loci* for two reasons: one that the party defendant may not be subjected to different and varying responsibilities, and the other, that the tribunal trying the action may know that it is not lending itself to enforce a right which it does not recognize and which is against the public policy of the forum; reference is not made to the law thereof as creating the cause of action enforced.⁴ Hence, where a foreign statute restricts the right to recover to a sum named in it, interest will not be added though it is provided for in a statute of the forum. The right to interest is inseparable from the right to damages and as truly and of the essence of the defendant's liability as is the sum named in the statute.⁵

[664] § 367. Allegation and proof of foreign law. Courts of one state do not take judicial notice of the laws of other states or countries. Hence, where a contract is sued out of the jurisdiction within which it is to be performed, and the plaintiff seeks to recover interest according to the law of the place of contract, he must set forth that law in his pleading and prove it on the trial.⁶ Interest, though generally regu-

¹ Morris v. Wibaux, 159 Ill. 627, 651, 43 N. E. Rep. 837; Robinson v. Holmes, 75 Ill. App. 203.

² Joseph v. Lyon, 9 Ky. L. Rep. 324 (Ky. Super. Ct.).

³ Carson v. Smith, 133 Mo. 606, 34 S. W. Rep. 855; Goldard v. Foster, 17 Wall. 123; Bischoffsheim v. Baltzer, 21 Fed. Rep. 531.

⁴ Per Finch, J., in Wooden v. West-

ern New York & P. R. Co., 126 N. Y. 10, 26 N. E. Rep. 1050, 22 Am. St. 803, 13 L. R. A. 458.

⁵ Kiefer v. Grand Trunk R. Co., 12 App. Div. 28, 42 N. Y. Supp. 171, affirmed without opinion, 153 N. Y. 688.

⁶ Hubble v. Morristown Land Co., 95 Tenn. 585, 32 S. W. Rep. 965; Commission Co. v. Carroll, 104 Tenn. 489, 58 S. W. Rep. 314; Robinson v.

lated by statute, is not necessarily so; it may, in the absence of statute, be payable, and its rate governed by custom.¹ Where the rate of another state is alleged to be established by statute the party so alleging it should prove the statute, as foreign statutes are required by the law of the forum to be proved. But if the allegation does not specify that the foreign rate is so established, the court would not assume that the foreign rate was governed by a written law. It would [665] seem to be as competent to take judicial notice of the statutory rate of another state as that the rate of another state is fixed by statute. The rate of another state, and the law, written or unwritten, which is the foundation of it, is matter of fact to be alleged, proved, and found by the jury.²

Holmes, 75 Ill. App. 203; *Morris v. Wibaux*, 159 Ill. 651, 43 N. E. Rep. 837; *Balfour v. Davis*, 14 Ore. 47, 12 Pac. Rep. 89; *Ramsey v. McCauley*, 2 Tex. 189; *Swett v. Dodge*, 4 Sm. & M. 667; *Davidson v. Gohagin*, 2 Bibb, 634; *Richardson v. Williams*, 2 Port. 239; *Jaffray v. Dennis*, 2 Wash. C. C. 253; *Peacock v. Banks, Minor*, 387; *Hunt v. Mayfield*, 2 Stew. 124; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Nalle v. Ventress*, 19 La. Ann. 373; *Ingraham v. Arnold*, 1 J. J. Marsh. 406; *Johnson v. Williams*, id. 489; *Russell v. Shepherd*, Hardin, 44; *Pawling v. Sartain*, 4 J. J. Marsh. 238; *Cavender v. Guild*, 4 Cal. 250; *Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318.

In *Foden v. Sharp*, 4 Johns. 183, action was brought against the acceptors of a bill of exchange drawn and payable in England. On the inquiry of damages the only evidence was the bill and a protest for non-payment. The jury allowed seven per cent. interest, the rate where the action was brought. The court ordered a reduction of the interest to five per cent., the rate in England, of which the court seemed to take judicial notice.

In *Schell v. Stetson*, 12 Phila. 187,

a suit upon a New York judgment rendered for costs, the court took judicial notice of the fact that the laws of that state allowed interest on such judgments, and assumed that it was bound to do so by virtue of the federal constitution. But this is not a tenable position. *Clark v. Child*, 136 Mass. 344.

In an action on a note payable in New York a plea of usury setting forth the statute of that state, the plea not being demurred to, but allowed to stand for trial, is sufficient to admit the statute in evidence whether the sum on which usury was to be paid, the time when the contract was made, when payable, and the amount of usury agreed upon be pleaded or not. *Odom v. New England Mortgage Security Co.*, 91 Ga. 505, 18 S. E. Rep. 131.

¹ *Young v. Godbe*, 15 Wall. 562.

² See cases cited in n. 1. § 366. In *Kermott v. Ayer*, 11 Mich. 181, suit was brought on a Canada note. The court held that it could not take judicial notice of the rate of Canadian interest; and it also held that it was not a presumption of law that the rate of interest in a foreign country is the same as that established in Michigan by statute. *Campbell, J.*,

Where there is an allegation of a foreign rate of interest of the place of contract, differing from the rate at the place where the action is brought, unsupported by proof; or, in the absence of any allegation of the rate where the contract is payable, whether interest should be denied altogether, or should be allowed according to the rate fixed or permitted by the law of the forum, does not appear to be entirely settled. [666] In Texas it is held that no interest at all can be recovered upon a contract payable in another jurisdiction, unless the rate there prevailing is alleged and proved.¹ So in Alabama.² The more general rule, and, as we think, the more

said: "The evidence of the attorney from Canada concerning the Canadian law of interest could not properly be received to show the terms of a Canadian statute. Foreign statutes cannot be proved by parol, without some showing why secondary evidence becomes necessary. This doctrine has been recognized in this court in *People v. Lambert*, 5 Mich. 349, 75 Am. Dec. 49, and is the settled American doctrine. 1 Greenl., §§ 587-8.

"The rate of interest is a matter of such common notoriety that there might be reason for excepting it from this general rule, and there is no doubt that, in many cases, it has been proved by parol, without objection. But there would be danger in allowing such an exception as an arbitrary one; and the mistakes made in works current among business men on the rates of interest in different states show that business knowledge of statutory provisions is not always reliable. We have been in some doubt whether, for this reason, there was not error in admitting the evidence objected to. But it does not appear that Canadian interest is regulated by statute; and we are not justified in making any inference not required by facts set out, in order to establish error; the presumption must always be in favor of the

judgment. It is, therefore, affirmed." But, in *Talbot v. Peebles*, 6 J. J. Marsh. 200, on a similar record, the court thus treated the subject. The only witness who was sworn to prove the rate of interest in Illinois stated that the legal rate was six per cent. Consequently, if he proved anything, he proved that the rate of interest in Illinois was fixed by law. The law must necessarily be a public and written law; for if it be not a positive statute, enacted by the legislature of Illinois, it must be some pre-existing statute of England or Virginia, recognized by the constitution of Illinois, or must be an express provision of her constitution.

Where the plaintiff seeks to recover interest by virtue of a contract made in a foreign state the defendant is bound to show any infirmity in the contract under the laws thereof. If he admits the validity of the contract such proof need not be made. *Dearlove v. Edwards*, 166 Ill. 619, 46 N. E. Rep. 1081.

¹ *Wheeler v. Pope*, 5 Tex. 262; *Able v. McMurray*, 10 id. 350; *Prigdon v. McLean*, 12 id. 420; *Ingram v. Drinkard*, 14 id. 351. See *Cooke v. Crawford*, 1 id. 9, 46 Am. Dec. 93; *Burton v. Anderson*, 1 Tex. 93.

² *Evans v. Clark*, 1 Port. 388; *Peacock v. Banks, Minor*, 387; *Spain v. Grove*, id. 177.

reasonable one, is, in such case, to allow interest according to the *lex fori*.¹ The law of the forum is adopted in some states, in the absence of proof of the rate at the place of contract, on the principle that it should be presumed, until the contrary is shown, that the law of the state where the contract was to be performed is the same as of that where the action is brought.²

§ 36S. Effect of change in law of place of contract. One branch of the present inquiry remains to be considered; that is, what is the effect of changes in the law in regard to the rate of interest while the contract on which the question of interest arises is pending, or after the principal becomes due. At first blush the principle which fixes the rate by the law of the place of contract might seem to require the rate to be the same throughout the period of forbearance or default as at the making of the contract, or when the contract duty or liability to pay interest attaches. It is so when interest is expressly or tacitly agreed to be paid. But where it is recoverable for mere default in not paying money due either *ex contractu* or *ex delicto* it is governed by the law in force when the interest accrues; the rate will change to conform to the law if any change takes place.³

¹ Surlott v. Pratt, 3 A. K. Marsh. 174; Chumaseo v. Gilbert, 26 Ill. 39, 24 id. 651; Deem v. Crume, 46 Ill. 69; Goddard v. Foster, 17 Wall. 123; Prince v. Lamb, 1 Ill. 378; Lougee v. Washburn, 16 N. H. 134; Hall v. Woodson, 13 Mo. 462; Hall v. Kimball, 58 Ill. 58; Booty v. Cooper, 18 La. Ann. 565; Leavenworth v. Brockway, 2 Hill, 201; Kopelke v. Kopelke, 112 Ind. 435, 13 N. E. Rep. 695; Shaw v. Rigby, 84 Ind. 375, 43 Am. Rep. 96; Thomas v. Beckman, 1 B. Mon. 34. See Gordon v. Phelps, 7 J. J. Marsh. 619; Whidden v. Seelye, 40 Me. 247, 63 Am. Dec. 661.

² Hallam v. Tederen, 55 Neb. 255, 75 N. W. Rep. 560; Fitzgerald v. Fitzgerald & Mallory Construction Co., 41 Neb. 374, 472, 59 N. W. Rep. 838; Law v. Crawford, 67 Mo. App. 150; Desnoyer v. McDonald, 4 Minn. 515; Fouke v. Fleming, 13 Md. 393; Mar-

tin v. Martin, 1 Sm. & M. 176. See De La Chaunette v. Bank of England, 9 B. & C. 208; Kermott v. Ayer, 11 Mich. 181.

³ Watkins v. Junker, 90 Tex. 584, 40 S. W. Rep. 11; Gulf, etc. R. Co. v. Humphries, 4 Tex. Civ. App. 333, 23 S. W. Rep. 556; State v. Guenther, 87 Wis. 673, 58 N. W. Rep. 1105; Wilson v. Cobb, 31 N. J. Eq. 91; Jersey City v. O'Callaghan, 41 N. J. L. 349; White v. Lyons, 42 Cal. 279; Stark v. Olney, 3 Ore. 88; Firemen's Fund Ins. Co. v. Western Refrigerating Co., 162 Ill. 322, 44 N. E. Rep. 746; Stickler v. Giles, 9 Wash. 147, 37 Pac. Rep. 293; Sanders v. Lake Shore, etc. Ry. Co., 91 N. Y. 641; First Nat. Bank v. Fourth Nat. Bank, 84 Id. 412; O'Brien v. Young, 95 id. 428.

A statute changing the rate of interest cannot operate retrospectively so as to diminish the amount due

[667] In a California case, decided in 1859, suit was brought against an administrator for the balance of an account due from his intestate. It did not appear when the account was made. It had been presented to the defendant, who rejected it. The case was tried without a jury. The account was found to be correct by the trial court, and interest allowed on the balance for a certain time at the Mexican rate, which prevailed until an interest statute was adopted increasing the rate, and from the time that statute took effect at the rate fixed thereby. This was held to be erroneous. Baldwin, J., announced this general principle: that interest is governed by the law in force at the time and place of contracting.¹ Later cases in that state recognize the distinction above stated.

under the rate established by a prior statute. *Reese v. Rutherford*, 90 N. Y. 644.

Under a statute requiring a county treasurer if he has not funds to pay an order when presented to indorse it "not paid for want of funds," and expressing that from the date of such indorsement the order shall bear legal interest, it has been held that the legal rate in effect at the time the indorsement is made enters into the contract as a part of it, and is not affected by a subsequent statute reducing the rate. The opinion lays some stress upon the rule of construction which forbids giving statutes a retroactive operation; but more weight is given to the question of legislative power. *Union Savings Bank & Trust Co. v. Gelbach*, 8 Wash. 497, 24 L. R. A. 359, 36 Pac. Rep. 467 (two judges dissenting); *Williams v. Shoudy*, 12 Wash. 362, 41 Pac. Rep. 169. *Seton v. Hoyt*, 34 Ore. 266, 43 L. R. A. 634, 75 Am. St. 641, 55 Pac. Rep. 967, is to the same effect, as is *Shipley v. Hacheney*, 24 Ore. 303, 55 Pac. Rep. 971.

In a subsequent Washington case it was ruled that a statute reducing the legal rate of interest had no effect upon state warrants issued and

presented for indorsement prior to the time it took effect. In this case there was no such statute as is referred to in the preceding paragraph, and the ruling is rested on the custom to pay interest on such warrants. It is said, referring to the county order case: "If such was the force of an agreement to pay interest provided by the statute, the same force should be given to an agreement to pay interest authorized by a custom so long recognized and acquiesced in as to have the force of a statute." *State v. Bowen*, 11 Wash. 432, 39 Pac. Rep. 648.

¹ *Aguirre v. Packard*, 14 Cal. 171, 73 Am. Dec. 645; *Prairie State Loan & Building Ass'n v. Nubling*, 64 Ill. App. 329; *Abner v. York*, 19 Ky. L. Rep. 643, 41 S. W. Rep. 309.

It is said in *State v. Guenther*, 87 Wis. 673, 58 N. W. Rep. 1105, though the issue did not demand the statement, that "on a contract which stipulates for interest, interest at the agreed rate, or, in the absence of an agreed rate, at the rate prescribed by law at the date of the contract, will be the rate recoverable until the repayment of the principal sum." *Spencer v. Maxfield*, 16 Wis. 178. A change of the legal rate would not

In the absence of a contract to pay interest it is only allowed as damages for failure to pay money due; and it is competent for the legislature to fix the amount which shall be recovered.¹ Interest for money lent may be recovered, though the loan was made when the law was otherwise.² This point was decided in New York, in 1839, in a case which presented the question in this form. After the debt sued upon became due, and while interest as damages was accruing, the legislature passed a general interest law which provided that "for the purpose of calculating interest a month shall be considered the twelfth part of a year, and as consisting of thirty days; and interest for any number of days less than a month shall be estimated by the proportion which such number of days shall bear to thirty." The assistant vice-chancellor said: "I am of opinion that when an account is stated after this provision went into effect, including items arising before, the interest must be computed in the manner therein directed upon the prior as well as the subsequent items from the passage of the act. The terms of the section are sufficiently comprehensive for this. They are for the purpose of calculating interest, etc. The only objection is whether an unlawful retrospective effect is given to the statute. To put the point more clearly: If a promissory note was dated before the 1st of January, 1830 (when [668] that act was passed), and was sued for afterwards, the interest should be computed at three hundred and sixty-five days to a year for the time down to that date and three hundred and sixty days subsequently. The statute in question does in effect raise the rate of interest. Suppose it did so in terms, changing it to eight per cent., and then a prior demand is sued upon. Now, where interest is not specified in a contract, as a part of it, it is allowed as damages for the refusal to pay the debt. The rate of interest is undoubtedly subject to the existing law during the continuance of that law. But is there any implied contract between the parties restricting the interest to such rate? A fresh demand of the debt, and a refusal, is a new assertion of a right, and imposes a new liability upon the party;

affect the rate of interest recoverable upon such a contract."

² *Dilworth v. Sinderling*, 1 Bun. 488, 2 Am. Dec. 469.

¹ *White v. Lyons*, 42 Cal. 279; *Randolph v. Bayne*, 44 Cal. 366.

so does a neglect without a new demand. The damages are imposed for this renewed violation of a contract. I do not perceive that in this the great principle of treating statutes as prospective only in their operation is infringed. The new law takes effect upon a new violation of an obligation. It has no retrospective effect upon previous rights. The previous right was to discharge the debt with interest at a given rate. That right has not been asserted. By the general rule of law, if there was no statute regulating interest, damages of an uncertain amount would be recoverable for the detention of money, as for that of any other property. The statute then prescribes that for the continued refusal or neglect to discharge the debt those damages shall be at another rate of interest.”¹

¹ *Bullock v. Boyd*, 1 Hoff. Ch. 294. The assistant vice-chancellor continued the discussion upon authority. He said: “There are some English cases which bear upon this question. By the terms of the act (2 Charles. 2), no person from and after the 29th of September, 1660, upon any contract, shall, from and after the said 29th of September, take, etc., more than at the rate of six per cent. The interest under the previous act was eight per cent. In the case of *Walker v. Penry* the point was whether, where interest upon a mortgage, made before the statute, had been paid at the rate of eight per cent., so much of the extra two per cent. as accrued after the act of 1660 should be applied in reducing the principal. The mortgagee had entered in 1675. Lord Chancellor Jeffries decided that the statute had reference only to subsequent contracts, and would give no relief; but he gave interest at six per cent. only from the entry in 1675. On a rehearing he adhered to his opinion. See 2 *Vernon*, 42 and 78. Mr. Ord cites this case as settling that the statute had no effect upon prior contracts (on *Usury*, p. 40); and Mr. Comyn treats the question as undecided. The latter writer notices,

however, the subsequent reversal of the decree upon a bill of review. See 2 *Vernon*, 145. Both writers have omitted to state that the case was first determined by Lord Nottingham upon a bill of foreclosure, who held that the extra two per cent. should go towards reducing the principal. Then, upon a bill to redeem, Lord Jeffries determined as before stated. Upon the bill of review Lord Commissioner Trevor said: ‘Being there was a decree already made he would not reverse,’ but Lord Rawlinson and Hutchins held that the act had a retrospect, and makes it unlawful to take more than six per cent. upon any contract, whether made before or after the act of parliament. The note of the decree in Mr. Raithby’s edition plainly shows that they meant six per cent. after the new statute of 1660. Thus, so far as this case goes, we have the authority of Lord Nottingham and Commissioners Rawlinson and Hutchins against the opinion of Lord Jeffries. But there is also the express authority of Sir Matthew Hale to the same effect. *Hedworth v. Primate*, Hardress, 318. By Hale, chief baron: ‘Since the new act which reduces interest to six per cent., more shall not be allowed upon

§ 369. Same subject. There is a distinction made in [669] respect to the nature of the obligation to pay interest, subsequent to maturity, between cases where there is an express or tacit agreement to pay it before maturity of the principal

any contract, though made before the statute, by reason of the words of the statute, which are,' etc. He then notices the difference in the language of the act and that of the 21 Jac. 1, cap. 27.

"His observations reconcile also the position in 1 Eq. Cas. Ab. 288, pl. 1, and in Hawkins' Pleas of the Crown, 82, § 10, that under the statute of usury (12 Anne, ch. 16) there was no retrospect to any debt contracted before its passage. The language is express, limiting its operations to contracts made after the 29th of September, 1714.

"There is another case (Procter v. Cooper, Prec. in Ch. 116), in which the master of the rolls held, upon a bill to redeem a mortgage made before 1660, that interest should be allowed at eight per cent. to the time of the passage of the act. See Bodley v. Bellamy, 1 W. Black, 267.

"The case of Towler v. Chatterton (6 Bing. 258) is also of weight upon this question. By an act of 9 George IV., c. 14, called Lord Tenterden's act, passed May 9, 1828, it was provided that in actions of debt, or in cases grounded on any simple contract, no acknowledgment or promise by words only should be sufficient evidence of a new or continuing contract, whereby to take any case out of the enactment of the statute of limitations; but such acknowledgment or promise must be made or contained by or in some writing signed by the party chargeable thereby. The act also contained a provision that it should not go into effect until the 1st of January, 1829. The action was *assumpsit*, and commenced in Hilary term, 1829. The

debt was then of more than six years' standing. In February, 1828, a declaration was made by parol to pay, under instruction from the judge to find upon that point. The judge then nonsuited the plaintiff on the ground that the promise should have been in writing under the statute. The court of common pleas refused to set aside the nonsuit. Two other cases were cited in the judgment upon the same statute to the same effect. One of them was before Lord Tenterden, where the action had been brought before the statute went into effect, though not tried until afterwards.

"I have carefully read the leading cases in the courts of our own country upon the subject of retrospective statutes, especially Dash v. Van Kleeck, 7 Johns. 477, in which the strength of the old supreme court of our state was fully put forth. I see nothing in the principles there advocated, or the decision there made, to change the result I have arrived at. Calder v. Bull, 3 Dall. 386; Bedford v. Shilling, 4 S. & R. 401, 8 Am. Dec. 718; Woart v. Winnick, 3 N. H. 473, 14 Am. Dec. 384; Hackley v. Sprague, 10 Wend. 113; Sayre v. Wisner, 8 Wend. 66." Stark v. Olney, 3 Ore. 88; Perrin v. Lyman, 32 Ind. 16; Woodruff v. Scruggs, 27 Ark. 26, 11 Am. Rep. 777.

But see Cox v. Marlatt, 36 N. J. L. 339, 13 Am. Rep. 451. In this case the court decided that the rate of interest which a judgment will bear immediately after its rendition cannot be changed by subsequent legislation. Scudder, J., said: "The effect of a judgment is to fix the rights of the parties thereto by the solemn

debt, and cases in which there is no interest contract what-[670] ever. It is true that some courts hold that if the agreement is to pay the debt, with interest at a specified rate on a day certain, and does not expressly stipulate the interest afterwards, the interest obligation expires at the day fixed for payment; and the interest which the debtor is obliged to pay while he detains the money after it is due is only computed at the legal rate as damages.¹ In these courts, on the doctrine [671] that the interest agreement has no effect after maturity, doubtless the interest after that time would be computed at whatever might be the legal rate, changing the rate in the computation as the legal rate may change. The rule, however, as we have before stated, is more generally to continue the rate agreed on before maturity until the debt is paid or put in judgment.² But there is yet another distinction:—courts which concur in continuing the interest rate, if agreed on for the period of credit, to payment or judgment, differ in the reasoning by which they reach that result; and this difference will naturally produce a divergence on the point we are now discussing. When the agreement in respect to the rate of interest before maturity is construed as tacitly continuing so long as the debt remains in contract unpaid, the interest after maturity rests on a basis of contract, and is not subject to be reduced or altered by any law subsequently enacted.³ But

adjudication of a court having jurisdiction. How these rights can be affected by subsequent legislation is not apparent. This contract of the highest authority cannot be disturbed so long as it remains unreversed and unsatisfied. Changing the rate of interest does not affect existing contracts or debts due prior to such enactment, whether they be evidenced by statute, judgment or agreement of the parties. Such has been the uniform course of decision in our courts. . . . If it be said that the interest is given as damages for the detention of the debt, and that the damages are greater when seven per cent. interest can be had than when only six per cent. can be obtained, and for such detention after

the rate is increased there should be additional damages allowed, the answer is that there can be no such second assessment where the amount of the debt or liability has been once adjudged, and the cause of action remains the same. The interest is the measure of damages for the detention, and that must relate to the time when the amount is fixed by the entry of the judgment." See *North River Meadow Co. v. Shrewsbury Church*, 22 N. J. L. 424, 53 Am. Dec. 258.

¹ See § 309.

² *Id.*

³ *Lee v. Davis*, 1 A. K. Marsh. 397, 10 Am. Dec. 746; *Association v. Eagleson*, 60 How. Pr. 2.

when the continuance of the rate agreed on before maturity is not put upon the ground that the agreement continues it, but upon the theory that the rate which was agreed to before maturity as a just compensation for the use must be deemed a just and proper compensation afterwards for the detention of the money, then the rate rests not upon the contract, and is not so fixed as to be beyond the effect of subsequent legislation which is plainly intended to modify it.

This distinction is illustrated by two cases in Connecticut. In one of them¹ the action was brought upon a promissory note, made payable in that state, for a specified sum, "with taxes, and interest at the rate of fifteen per cent. after maturity." Here the contract in respect to interest after maturity was not a tacit, but an express, contract. The difference is immaterial so far as the effect is concerned. A tacit agreement is as inviolable as an express contract. Notes which provide for interest, generally, and are construed to mean interest until paid, are equivalent to the contract made in the case just mentioned. When that note was made the law of Connecticut permitted parties to contract for any rate of interest. But before it matured an act was passed which provided that no greater rate of interest than seven per cent. should be re- [672] covered for money loaned "for the time after the money loaned becomes due." It was held that the fifteen per cent. was to be regarded as interest recoverable under the contract, and not as damages; that the act was not intended to apply to contracts in which there was an agreement as to the rate of interest after maturity, and if it was intended to apply to such contracts then existing, it was so far unconstitutional and void as impairing their obligation.

The other case² was an action upon a note made in 1869, and payable in Connecticut in three years, with interest at seven and three-tenths per cent. per annum. The statute in force when this note was made provided that when interest was reserved at a higher rate than six per cent. the contract should be void so far as related to interest. In 1872 an act

¹ Hubbard v. Callahan, 42 Conn. 521, 19 Am. Rep. 561. See Hagood v. Ark'n, 57 Tex. 511.

² First Ecclesiastical Society of Suffield v. Loomis, 42 Conn. 570, approved in Hinman v. Goolyeed, 96 id. 210, 14 Atl. Rep. 801.

was passed "validating and confirming" usurious contracts, and providing that they might be enforced. It will be observed that this note contained a promise of interest which was general as to time, and in Connecticut meant from date to maturity. If not affected by usury, nor changed by subsequent legislation, the conventional rate would be continued, not as an agreed rate, but as a just one, being considered just after maturity because the parties had adopted it during the period of credit.¹ In 1873 the validating act of 1872 was repealed. It was held that the contract in this note was validated by the act of 1872, and the repeal of it could not annul the validating effect. The note, with the agreed interest to maturity, was recoverable; but the interest afterwards at the conventional rate, not being secured by the contract, was unaffected by these acts, and the conventional being in excess of the legal rate when the note was made, it could not be deemed a just rate.²

It results from this brief review of the adjudications that whenever interest after maturity of the debt is not fixed by an agreement of the parties, binding for that purpose by the law of the place of contract, it is competent for the legislature [673] of that jurisdiction to change the rate to be computed as damages; and by parity of reason it is fair to conclude also that a statute enacted in another jurisdiction where the remedy is sought, applying the law of the forum to the computation of such interest as damages, would be valid. On the other hand, if the interest after maturity is fixed by contract, valid for that purpose by the law of the place of contract, whether it be by a promise in express terms of interest after maturity at a specified rate, or by a promise of interest at a specified rate generally, it is as sacred and secure against the impairing effect of subsequent legislation as the agreement before maturity or for payment of the principal itself.³

§ 370. *Same subject.* The question has been considerably discussed and differently decided by the courts, whether a contract for the payment of money which is subject to be

¹ *Beckwith v. Trustees, of Hartford, etc.* R., 29 Conn. 268, 76 Am. Dec. 599.

³ *Lee v. Davis*, 1 A. K. Marsh. 397, 10 Am. Dec. 746; *Association v. Eagleson*, 60 How. Pr. 9.

² See *Simpson v. Hall*, 47 Conn. 417.

avoided either wholly or in part for usury can afterwards be validated by legislation so as to deprive the debtor entirely of that defense.¹ A usurious contract, although declared wholly or in part void, is not void in an absolute sense; it is only voidable at the election of the debtor. When he elects to avail himself of the defense the effect of the law in discharging any part of the obligation to pay the principal of the debt and lawful interest is a penalty, and is imposed not so much to benefit or relieve the debtor as to maintain by this sanction the general policy of the law of restricting interest transactions within what are deemed reasonable limits, regard being had for the general welfare. It is even regarded as unconscientious and inequitable for him to claim and accept such a discharge.² It is, at all events, purely statutory, and is not distinguishable in principle from penal damages given in certain actions in which simple or actual damages are allowed to be doubled or trebled. Although the usurious contract may be so far void, if the debtor chooses to set up the defense of usury, that the creditor may not be able to sustain an action for the whole or even a part of the debt for reasons of policy, yet a moral [674] obligation remaining to perform the contract, it would be going very far to say that the legislature may not, in furtherance of the original intention of the parties, add a legal sanction to that obligation when those reasons have ceased or such policy is abandoned;³ especially as the repeal of a penalty provided by law would have this effect, and thereby establish matters in the condition in which it was the intention of all concerned to place them.⁴

¹ See *Mitchell v. Doggett*, 1 Fla. 371; *Springfield Bank v. Merrick*, 14 Mass. 322; *Wood v. Kennedy*, 19 Ind. 68; *Perrin v. Lyman*, 32 Ind. 16; *Morton v. Rutherford*, 18 Wis. 398, 86 Am. Dec. 778.

² *Curtis v. Leavitt*, 15 N. Y. 9. An action for the original consideration of a usurious contract, with legal interest thereon, is maintainable without the aid of a curative statute. *Wallace v. Goodlett*, 194 Tenn. 670, 58 S. W. Rep. 343.

³ See *Lewis v. McElvain*, 16 Ohio. 347; *Trustees v. McCaughy*, 2 Ohio

St. 155; *Johnson v. Bentley*, 16 Ohio, 97; *Boyce v. Sinclair*, 3 Bush. 204; *Hess v. Werts*, 4 S. & R. 361; *Syracuse Bank v. Davis*, 16 Barb. 188; *Bleakney v. Farmers', etc. Bank*, 17 S. & R. 64, 17 Am. Dec. 635; *Satterlee v. Matthewson*, 16 S. & R. 191; *Menges v. Wertman*, 1 Pa. 218; *Woodruff v. Serugs*, 27 Ark. 30, 11 Am. Rep. 777; *Perrin v. Lyman*, 32 Ind. 16; *Gibson v. Hubbard*, 13 Mich. 211; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 256; *Woolley v. Alexander*, 99 Ill. 188.

⁴ *Himman v. Goodyear*, 56 Conn.

The privilege of a debtor to repudiate his contract by pleading usury; or the privilege, by making an unconscionable defense, to have the benefit of a penalty given by statute for a violation of law, is not a vested right.¹ Statutes which take away the defense of usury in respect to existing contracts, or produce the same effect by expressly validating and confirming them, are generally, and by a decided weight of authority, sustained.² When they go no farther than to bind a party by

210, 14 Atl. Rep. 804; First Ecclesiastical Society v. Loomis, 42 Conn. 570; Johnson v. Utley, 79 Ky. 72.

¹Jenness v. Cutler, 12 Kan. 500; Ayers v. Probasco, 14 id. 175.

"But, the legislature has no power to substitute one penalty for another except where that which is substituted is, as in the present case, in effect a mere reduction or modification of the original penalty, and where a penalty is once released or abrogated it ceases to be subject to legislative control." Woolley v. Alexander, 99 Ill. 188. See Hardin v. Trimmer, 27 S. C. 110, 3 S. E. Rep. 46; Maynard v. Marshall, 91 Ga. 840, 18 S. E. Rep. 403.

²Id.; Hardway v. Lilly, 48 S. W. Rep. 712 (Tenn. Ct. of Ch. App., affirmed orally by the supreme court; see Wallace v. Goodlett, 104 Tenn. 670, 676, 58 S. W. Rep. 343, which is to the same effect); Pattison v. Jenkins, 33 Ind. 87; Andrews v. Russell, 7 Blackf. 474; Grimes v. Doe, 8 id. 371; Thompson v. Morzan, 6 Minn. 292; Parmelee v. Lawrence, 48 Ill. 331; Curtis v. Leavitt, 17 Barb. 309, 15 N. Y. 9; Wood v. Kennedy, 19 Ind. 68; Rathbun v. Wheeler, 29 Ind. 601; Washburn v. Franklin, 36 Barb. 599; Wilson v. Hardesty, 1 Md. Ch. 66; Pollock v. Glazier, 20 Ind. 262; Burns v. Anderson, 68 id. 181; Sager v. Schneewind, 83 id. 204; Danville v. Pace, 25 Gratt. 1, 18 Am. Rep. 663; Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. Rep. 408.

Mr. Justice Matthews, writing the opinion in the case last cited, said in reference to some of the other cases referred to in this note: "These decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is that the right of a defendant to avoid his contract is given to him by statute for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he (the borrower) has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. Read v. Plattsouth, 107 U. S. 568, 2 Sup. Ct. Rep. 208, and see Lewis v. McElvain, 16 Ohio, 347; Johnson v. Bentley, id. 97; Trustees v. McCaughy, 2 Ohio St. 152; Satterlee v. Matthewson, 16 S. & R. 169, 2 Pet. 380; Watson v. Mercer, 8 Pet. 88."

a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy, and not of constitutional power.¹ The legislature has power to impose on all debtors interest from the date of the enactment for delay in the payment of money already due.² [675]

The repeal of a statute giving a judicial remedy upon contracts usurious on their face does not defeat a suit brought, under the repealed act, on such a contract and which was undecided in the appellate court when the repealing statute was enacted, there being in effect a general statute declaring that "the repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any pro-

The Virginia code of 1873, ch. 15, § 13, provides that if by a new law, repealing a former law, any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, with the consent of the parties affected, be applied to any judgment pronounced after the new law takes effect. Under this it has been ruled that though the statute of usury in force when a contract was made declares it to be null and void, if at the time a judgment is rendered on the contract the statute has been amended so as to avoid a usurious contract only so far as the interest is concerned, such statute should govern. *Mosby v. St. Louis Mut. Ins. Co.*, 31 Gratt. 629; *Bain v. Savage*, 76 Va. 905.

¹ *Cooley's Const. Lim.*, p. 374. See *Head v. Ward*, 1 J. J. Marsh. 280; *Outen v. Graves*, 7 id. 629; *Cox v. Marlatt*, 36 N. J. L. 389, 13 Am. Rep. 454; *Pond v. Horne*, 65 N. C. 84; *Williams v. Smith*, id. 87.

It was held in *Mucklar v. Cross*, 32 N. J. L. 423, that a bond made in 1865, when the legal rate of interest was six per cent., conditioned for the

payment of the principal sum in five years after date, with lawful interest for the same, payable annually, at such rate as then was or thereafter might be fixed upon as the legal rate of interest in that state by the legislature, did, after the passage of the act of March 15, 1866, increasing the legal rate of interest to seven per cent., carry interest at such increased rate, though that act in terms only applied to contracts made after its passage; the increased rate of interest being payable, not by virtue of the statute, but by force of the agreement of the parties.

In *Drake v. Latham*, 50 Ill. 270, suit was brought on a ten per cent. note. This note was made while the law of 1849 was in force, which only allowed six per cent. to be contracted for, and forfeited the excess. The act of 1857 repealed all the penalties; but it was held that the creditor could not, as a mere effect of that repeal, recover a larger rate than he might lawfully have contracted for. *Simpson v. Hall*, 47 Conn. 417.

² *Dunne v. Mastick*, 50 Cal. 244.

ceeding commenced under and by virtue of the statute repealed."¹ Such statute inures to the benefit of a citizen of another state who acquired the usurious obligation in the state in which it was enacted and who sued in the state of his domicile to enforce the lien given to secure the payment of the sum loaned, although his suit was brought before the law was enacted, and the right thereby given was not affected because of the repeal of the statute by reason of the provision saving rights of action after its repeal.² A decree rendered prior to the enactment of a statute authorizing the recovery of principal and legal interest on a note or other contract, notwithstanding a stipulation on its face for an usurious rate of interest, refusing foreclosure of a mortgage because of the disclosure of such a stipulation, is not an adjudication upon the merits that will defeat a suit to enforce the same mortgage, to the extent of the principal and legal interest due, brought after such enactment.³

SECTION 7.

INTEREST AS AN INCIDENT TO THE PRINCIPAL.

§ 371. **Interest due by agreement a debt.** With a certain propriety interest may be said always to be an incident to the principal; not only when it is a part of the contract, but also when it is allowed as damages. In the former case it is, however, not strictly an incident; or rather, it is more than that. There must be a principal sum; but after interest has accrued it is no longer dependent on the principal; it does not necessarily follow it. Conventional interest is of itself a debt, and payment of the principal alone will not affect the right to recover the interest;⁴ and yet it is so allied to the principal that if it is recovered without recovery of the interest, when the latter is not secured by a separate instrument, it is barred; not

¹ Wallace v. Goodlett, 104 Tenn. 670, 58 S. W. Rep. 343.

² Kendrick v. Kyle, 78 Miss. 278, 23 So. Rep. 951.

³ Wallace v. Goodlett, *supra*.

⁴ Watts v. Garcia, 40 Barb. 656; Howe v. Bradley, 19 Me. 31; Canfield v. Eleventh School District, 19 Conn. 529; Still v. Hall, 20 Wend. 51;

Stone v. Bennett, 8 Mo. 51. See Foster v. Harris, 10 Pa. 45.

Where the debt only was seized and condemned by the enemy in war, it was held that the interest due might not be recovered by the original creditor. Bordley v. Eden, 3 Har. & McH. 167.

[676] because it cannot exist as a valid demand distinct from the principal, but because demands arising upon one agreement for principal and interest due to the same party at the same time cannot be divided and each made the subject of a separate action. In that respect there is no difference between [677] principal and interest;¹ an action brought for one would

¹ In *Doe v. Warren*, 1 Me. 48, 10 Am. Dec. 25, suit was brought on a promissory note payable with interest annually. The chief justice says: "What is interest? It is an accessory or incident to the principal; the accessory is a constantly accruing one. The former is the basis, or the substance, from which the latter arises, and on which it rests."

In *Howe v. Bradley*, 19 Me. 31, Shepley, J., says: "The holder in such cases may maintain a suit to recover the interest payable before the principal, but cannot have a separate action for it after the principal becomes due and while it remains unpaid, because he may recover it in an action for the principal." The question in this case was whether an indorser of a note on which interest became due before the principal was payable was entitled to the same notice in respect to the interest as in regard to the principal, in order to be held liable for it. It was held he was not; that if on the note becoming due it was dishonored, and the indorser then duly notified, he was fixed not only for the principal and interest then maturing, but also for interest which was payable before and not paid.

In *Chinn v. Hamilton*, Hemp. C. C. 428, the court said: "The promise to pay the debt, and the promise to pay the interest from the date of the contract, are two separate and distinct promises or undertakings; one may be performed without performing the other. In declaring upon a covenant or a parol contract in writ-

ing containing various undertakings, the plaintiff has his election to complain of the breach of one or of all of the covenants or promises. If he complains of the breach or non-performance of one only of the covenants or promises, he thereby admits that the others have been performed. The intendment is to be made most strongly against the pleader, and as he complains of the breach of only one of the covenants or obligations, the presumption arises that the others have been performed. It at all events waives any right of action upon them; for having sued upon the contract once he is forever barred from suing again [in respect to any cause that existed at the time of that suit and which might have been included in it]. It will not be allowed to split up the various covenants and promises contained in one contract and sue upon each of them; he can have but one recovery upon one contract, which then becomes merged in the judgment of the court."

This language must be understood as referring to the facts then before the court — to a contract for principal and for interest, both due. It is broad, but is obviously not used in so general a sense as to be applicable to a contract requiring a series of acts to be performed at different times. A suit for a breach in respect to the first would not necessarily involve the whole contract, and the judgment would not merge it so far as it contained other executory provisions. For instance, a note or

bar both, whether included in the claim or recovery or not. If a claim against an estate has been allowed by the administrator as presented, no interest being demanded, the claimant cannot thereafter collect interest on the sum allowed.¹ In England the principle is said to be that though a mortgagee cannot be compelled to take payment of interest for less than the stipulated time, yet if he puts an end to the security by realization, or if by the intervention of a third party, under the interpleader rule, the mortgagor's property is realized; from the moment the principal money gets into the pocket of the lender interest ought to stop.² This rule was applied where principal and interest, secured by a bill of sale, was payable in equal monthly instalments, and the borrower authorized the lender to sell, and out of the proceeds deduct the sum for which he was liable. Interest ceased to run on the making of the sale.³ But interest made payable before the principal is due may be sued for alone before the latter becomes due.⁴

§ 372. **Interest as damages accessory to principal.** Interest which is allowed as damages, and which is not liquidated, nor covered by any contract to pay it, is strictly incidental to the debt. It cannot exist after the debt ceases by payment or otherwise,⁵ though payment is made after suit brought.⁶ Being

other instrument may provide for instalments of principal or interest. Undoubtedly successive actions could be brought for their recovery. Yet it is quite as clear that all instalments of either interest or principal or both, due at the time of bringing action, must be declared for in one action; at all events the judgment will be a bar in respect to all.

A judgment determining the title to and ownership of securities is conclusive between the parties in a subsequent action to recover the interest upon such securities collected by the defeated party prior to such judgment; but a claim for interest on securities collected by the defend-

ant is not necessarily a part of an action to determine the title to such securities. *Govin v. De Miranda*, 9 N. Y. Misc. 684, 30 N. Y. Supp. 550, 79 Hun. 329, 29 N. Y. Supp. 347.

¹ *Matter of Warrin*, 56 App. Div. 414, 67 N. Y. Supp. 763.

² *Forster v. Clowser*, [1897] 2 Q. B. 362.

³ *West v. Diprose*, [1900] 1 Ch. 337.

⁴ *Greenleaf v. Kellogg*, 2 Mass. 568; *Cooley v. Rose*, 3 id. 221; *Catlin v. Lyman*, 16 Vt. 44; *Hastings v. Wiswall*, 8 Mass. 455; *Estabrook v. Moulton*, 9 id. 258, 6 Am. Dec. 64; *Bannister v. Roberts*, 35 Me. 75; *Scott v. Liddell*, 98 Ga. 24 25 S. E. Rep. 935.

⁵ *Bronx Gas & Electric Co v. New*

⁶ *Davis v. Harrington*, 160 Mass. 278, 35 N. E. Rep. 711.

accessory and incidental to the principal, it adheres to and follows it; ownership of the fund on which the interest accrues includes the interest. Where attached property becomes by process of law changed into money in the officer's hands, and is invested by him so as to produce interest, the accretion does not belong to the officer, but to the party entitled to the money;¹ and where a debt is attached before it is due the garnishee is liable for interest thereon from the time it is payable.² A specific legacy carries interest from the death of the testator; it becomes then the property of the legatee.³ The interest which

York, 29 N. Y. Misc. 402, 60 N. Y. Supp. 548; *Graves v. Saline County*, 43 C. C. A. 414, 104 Fed. Rep. 61, citing the text; *Walton v. United States*, 61 Fed. Rep. 486; *Los Angeles v. City Bank*, 100 Cal. 18, 34 Pac. Rep. 510; *Brouner Brick Co. v. M. M. Canda Co.*, 18 N. Y. Misc. 681, 42 N. Y. Supp. 14; *Pacific R. v. United States*, 158 U. S. 118, 15 Sup. Ct. Rep. 766; *Stewart v. Barnes*, 153 U. S. 456, 15 Sup. Ct. Rep. 849; *Moore v. Fuller*, 2 Jones, 205; *Tillotson v. Preston*, 3 Johns. 229; *Burr v. Burch*, 5 Cranch C. C. 506; *Jacot v. Emmett*, 11 Paige, 142; *Consequa v. Fanning*, 3 Johns. Ch. 587; *Gillespie v. Mayor*, 3 Edw. 512; *Southern Central R. Co. v. Moravia*, 61 Barb. 180; *Potomac Co. v. Union Bank*, 3 Cranch C. C. 101; *Dixon v. Parkes*, 1 Esp. 110; *Fake v. Eddy's Ex'r*, 15 Wend. 76; *Johnston v. Brannan*, 5 Johns. 268; *Williams v. Houghtaling*, 5 Cow. 36; *People v. New York County*, 5 Cow. 331; *Stevens v. Barringer*, 13 Wend. 639; *American Bible Society v. Wells*, 68 Me. 572, 28 Am. Rep. 82; *Cutter v. Mayor*, 92 N. Y. 166. The rule applies with equal force where the principal is extinguished by a statute. *Johnson v. District of Columbia*, 31 Ct. of Cls. 395.

¹ *Richmond v. Collamer*, 38 Vt. 68; *Jackson v. Smith*, 52 N. H. 9; *Farley v. Moore*, 21 id. 146; *Chase v. Monroe*, 40 N. H. 427.

² *Cross v. Brown*, 19 R. I. 220, 33 Atl. Rep. 147.

³ See *Ingraham v. Postell's Ex'r*, 1 McCord Ch. 94; *Hilyard's Estate*, 5 W. & S. 30; *Angerstein v. Martin*, 1 Turn. & Russ. 232; *Hewett v. Morris*, id. 241; *Jones v. Ward*, 10 Yerg. 160; *Huston's Appeal*, 9 Watts, 472; *Beal v. Crafton*, 5 Ga. 301; *Stephenson v. Axson*, Bailey's Eq. 274; *Graybill v. Warren*, 4 Ga. 528; *Yandt's Appeal*, 13 Pa. 575, 53 Am. Dec. 496; *Darden v. Orguin*, 5 Cold. 211; § 344.

A. received \$6,000 from B. and in consideration thereof executed a bond by which he bound himself to pay the interest on that sum, or so much thereof as might be necessary for B.'s support to B. for life, and at her death to pay the principal and what might remain unexpended of the interest to C. A. was held liable for interest at the legal rate, six per cent., according to the legal effect of the bond, and not the interest received by him from his investment of the money. *Granger v. Pierce*, 112 Mass. 244. See *Cory v. Leonard*, 56 N. Y. 494.

It is observed in the course of discussion in a recent case that where a demand of damages constitutes the very ground of the action, it would seem that the rule would be different. If, for instance, in covenant on the part of the lessee to repair a building, the lessor should prove per-

accrues on a claim against an estate, both before and after its allowance, is a part of the claim and entitled to preferential payment to the same extent as the principal.¹ The law will not frustrate the intention of parties to reserve the right to interest. Thus, where a drawee made a payment "on account" upon a draft, payable without interest and only upon the completion of a contract, and the draft was not then surrendered, but was retained as an evidence of debt, it was inferred that it was the intention of the parties that interest should be payable, and the holder of the draft was entitled to recover it from the date of the drawee's being notified that the contract was completed.²

SECTION 8.

INTEREST UPON INTEREST.

[678] § 373. **Compound interest.** Strictly, all interest which is computed upon interest is compound interest. But that which is commonly denominated such is interest annually or at other successive periods added to the principal to bear interest for the next interest period; in other words, interest computed with annual rests, or rests at the end of the longer or shorter interest periods, regularly adding the interest for the preceding period to the principal, thenceforth to bear interest. Compound interest in this latter sense is never computed by way of damages except against persons acting in a fiduciary capacity,³ who grossly abuse their trust in respect to money.⁴ Nor will a contract in advance to pay such interest be enforced in several states; in others it will be.⁵ But after

formance, the plaintiff might still be entitled to have the jury pass upon the question of his damages, however small they might be, because in such a case the right to damages constitutes the right of action. But this doctrine has no application to an action of *assumpsit*. *Stewart v. Barnes*, 153 U. S. 456, 14 Sup. Ct. Rep. 849.

¹ *Eddy v. People*, 187 Ill. 304, 58 N. E. Rep. 397.

² *Peck v. Granite State Provident Ass'n*, 21 N. Y. Misc. 84, 46 N. Y. Supp. 1042.

³ *Rosenbaum v. Pendleton*, 9 Ohio Dec. 642, 646; *Stokely v. Thompson*, 34 Pa. 210; *Stevens Implement Co. v. South Ogden Water Co.*, 20 Utah, 267, 58 Pac. Rep. 843.

The assignee of a mortgage in possession has no right to cast interest to the time he took possession and make that a new principal upon which to calculate interest. *Lewis v. Small*, 75 Me. 323.

⁴ See § 353.

⁵ Such contracts are valid in Oregon, *New England Mortgage Co. v. Vader*, 28 Fed. Rep. 265 (compare

simple interest has accrued an agreement that it shall thereafter bear interest is valid.¹ Such interest, when contracted for at the time the debt accrues or the loan is made, is refused on grounds of policy as tending to usury and oppression.² But

Levens v. Briggs, *infra*; in Dakota, Hovey v. Edmison, 3 Dak. 449; South Carolina, Bowen v. Barksdale, 33 S. C. 142, 11 S. E. Rep. 640; and Georgia, Merck v. American Freehold Land & Mortgage Co., 79 Ga. 213, 233, 7 S. E. Rep. 265; Ellard v. Scottish-American Mortgage Co., 97 Ga. 329, 22 S. E. Rep. 893. In Maine a promise to pay compound interest is valid, but the court will not declare an implied promise. Bradley v. Merrill, 91 Me. 340, 40 Atl. Rep. 132. In Nebraska parties may contract that overdue instalments of interest shall bear interest if the whole interest does not exceed the legal rate. Hallam v. Telleren, 55 Neb. 255, 75 N. W. Rep. 560. Such contracts have been sustained in other states: Hale v. Hale, 1 Cold. 233, 78 Am. Dec. 490; Vaughan v. Kennan, 38 Ark. 114; Mueller v. McGregor, 28 Ohio St. 265; McNairy v. McNairy, 1 Tenn. Cas. 329; Bowman v. Duling, 39 W. Va. 619, 20 S. E. Rep. 567. They have been declared void in these cases: Levens v. Briggs, 21 Ore. 333, 28 Pac. Rep. 15, 14 L. R. A. 188; Van Benschooten v. Lawson, 6 Johns. Ch. 313; Breckinridge v. Brooks, 2 A. K. Marsh. 335, 12 Am. Dec. 401; Bowman v. Neely, 151 Ill. 37, 37 N. E. Rep. 840; Fleet v. Lockwood, 17 Conn. 243; Drury v. Wolfe, 134 Ill. 294, 25 N. E. Rep. 626; Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99; Catlin v. Lyman, 16 Vt. 44; Perkins v. Coleman, 51 Miss. 298; Boggess v. Goff, 47 W. Va. 139, 34 S. E. Rep. 741.

An agreement to pay compound interest does not avoid the entire contract; the court will simply refuse to enforce the payment of in-

terest upon interest. Hochmark v. Richler, 16 Colo. 263, 26 Pac. Rep. 818; Bowman v. Neely, 137 Ill. 443, 27 N. E. Rep. 758.

¹ Hochmark v. Richler, 16 Colo. 263, 26 Pac. Rep. 818; McConnell v. Barber, 86 Hun, 360, 33 N. Y. Supp. 480; Stewart v. Petree, 55 N. Y. 621, 14 Am. Rep. 352; Perkins v. Coleman, 51 Miss. 298; Townsend v. Riley, 46 N. H. 300; Porter v. Price, 26 C. C. A. 70, 80 Fed. Rep. 655; Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99; Fitzhugh v. McPherson, 3 Gill, 408; Gunn v. Head, 21 Mo. 432; Grimes v. Blake, 16 Ind. 160; Niles v. Board of Com'rs, 8 Blackf. 158; Forman v. Forman, 17 How. Pr. 255; Van Benschooten v. Lawson, 6 Johns. Ch. 313, 10 Am. Dec. 333; State v. Jackson, 1 Johns. Ch. 13, 7 Am. Dec. 471; Toll v. Hiller, 11 Paige, 228; Barrow v. Rhineland, 1 Johns. Ch. 550; Leonard v. Villars, 23 Ill. 377; Henderson v. Hamilton, 1 Hall, 314; Baker v. Scott, 62 Ill. 86; Doe v. Warren, 7 Me. 48; Cox v. Smith, 1 Nev. 161, 90 Am. Dec. 476; Lewis v. Bacon, 3 Hen. & Munf. 89; Stone v. Locke, 46 Me. 445; Thayer v. Star Mining Co., 105 Ill. 540; Denver B. & M. Co. v. McAllister, 6 Colo. 261; Case v. Fish, 58 Wis. 56, 15 N. W. Rep. 808; Leonard v. Patton, 106 Ill. 99.

² There are but two exceptions to the rule that the law will not allow the recovery of compound interest: First, in respect to interest-bearing coupons; these, when payable to bearer, have, by commercial usage, the legal effect of promissory notes. They are contracts for the payment of a definite sum of money on a day named, and pass as negotiable paper.

after interest is due, no matter at how short intervals it is payable, the creditor may sue for it; or the parties, by a new agreement, [679] may put it upon interest. It has, however, been decided that there is a moral obligation to pay interest on interest for the time it has been in arrears; and that a subsequent promise to pay it for the time already elapsed is binding.¹ Accounts may be judicially stated by computing interest according to the practice of the parties, both as to charging it on the items on each side from their dates, and also as to periodical rests.² Where the parties to a transaction amongst themselves treat accrued interest as an addition to the original principal sum, and charge up interest thereon, they are bound by their course of dealing, if subsequent lienors without notice are not affected.³

§ 374. **Instances of interest on interest.** When a demand consisting of principal and interest passes into a judgment or decree, as a general rule it bears interest because the original claim is merged therein. It is thenceforth a demand of a different nature. The principal and interest are blended together and adjudged to the creditor for immediate payment, or to be at once collected.⁴ Where strict foreclosure was stipulated for in the mortgage, and six months given to pay the debt, with interest at the rate of ten per cent., the legal rate being six, it was held that inasmuch as the complainant was entitled to

The interest on the bonds to which such coupons were attached is not compounded indefinitely, but once only. The second exception is in cases where, the interest having become due and unpaid, the debtor then agrees to have the accrued interest added to the principal and become interest-bearing. *Bowman v. Neely*, 151 Ill. 37, 37 N. E. Rep. 840.

¹ *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Tillotson v. Nye*, 88 Hun, 101, 34 N. Y. Supp. 606; *Hathaway v. Meads*, 11 Ore. 66, 50 Am. Rep. 456, 4 Pac. Rep. 519; *Bogges v. Golf*, 47 W. Va. 139, 34 S. E. Rep. 741; *Rose v. Bridgeport*, 17 Conn. 247; *Camp v. Bates*, 11 Conn. 497.

² *Goodhart v. Rastert*, 10 Ohio Dec.

40; *Emerson v. Atwater*, 12 Mich. 314; *Carpenter v. Welch*, 40 Vt. 251; *Schieffelin v. Stewart*, 1 Johns. Ch. 620, 7 Am. Dec. 507; *Backus v. Minor*, 3 Cal. 231.

If payments are to be made within a stipulated time after quarterly statements are rendered, though such are not rendered, rests may be allowed at every quarter and interest computed on the amounts then due. *Miller v. Billington*, 194 Pa. 452, 45 Atl. Rep. 372.

³ *Hooper v. Hooper*, 81 Md. 155, 177, 31 Atl. Rep. 508, 48 Am. St. 496.

⁴ See *Stevens v. Coffeen*, 39 Ill. 148; *State v. Jackson*, 1 Johns. Ch. 13, 7 Am. Dec. 471.

strict foreclosure it was not error to require a higher rate than is provided for by the statute upon the extension of the time of payment.¹

In a suit for specific performance by the vendee after he has made default in the payment of purchase-money, on which interest was payable annually, the purchase-money to be paid on a decree in his favor should include interest on the instalments of interest from the time they became due.² In such a case the court said: "We express no opinion whether interest upon such instalments of interest could have been recovered by the vendor in a suit for damages, or on a bill for specific performance brought by him. But the complainant comes into court acknowledging his default in making the payments when due, and asks specific performance on making the payments now. As he asks equity he must do equity, and put the [680] vendor in the same condition as if the payments had been made when agreed. Had this money been paid when due it would have earned interest from that time." It was held that interest should be computed on the several instalments of interest from the time they respectively became due.³

§ 375. **Interest on instalments of interest.** The question on which the court in the preceding case refrained from expressing an opinion is one upon which the American courts are divided. Where the principal is payable on long time, and interest is payable annually, or at shorter periods, and the latter is not paid when due, according to the older cases, and as the law seems to be settled in a majority of the states, no interest can be collected upon such arrears of interest,⁴ though

¹ Bissell v. Marine Co., 55 Ill. 165.

² Morris v. Hoyt, 11 Mich. 1.

³ Id.; Pujol v. McKinlay, 42 Cal. 559. See 3 Pomeroy on Equity, § 1407.

⁴ Leonard v. Villars, 23 Ill. 377; Smith v. Luse, 30 Ill. App. 37; Broughton v. Mitchell, 64 Ala. 210; Young v. Hill, 67 N. Y. 162 (except in mercantile transactions upon a contract implied from the course of dealing or from custom); Dyar v. Slingerland, 24 Minn. 267; Mason v. Callender, 2 id. 502; Stokely v. Thompson, 34 Pa. 210; Ferry v. Ferry,

2 Cush. 92; Doe v. Vallejo, 29 Cal. 285; Ackerman v. Emmott, 4 Barb. 626. See note to § 373.

"Interest upon interest which has accrued upon contracts upon which interest is by their terms payable at stated periods before the principal becomes due is never allowed in making up judgments in suits thereon. This has often been determined, and must now be considered as the settled law in this commonwealth." Shaw v. Norfolk County F. Co., 14 Gray, 407, 416, citing Hastings v.

demand has been made for it.¹ In several states, however, the rule is otherwise; interest on such arrears is allowed from the time the same became due without rest to the time of computation for payment or judgment. Thus in North Carolina and Arkansas it is held that where a promissory note is given with a stipulation that the interest is to be paid annually or semi-annually, the maker is chargeable with interest at the [681] like rate upon such deferred payments of interest as if he had given a promissory note for the amount thereof.² By this mode of computation the court say compound interest is not given, but a middle course is taken between simple and compound interest.³ So in Tennessee⁴ and Kentucky.⁵ *Ew-*

Wiswall, 8 Mass. 455; *Wilcox v. Howland*, 23 Pick. 167; *Henry v. Flagg*, 13 Met. 64. To the same effect is *Hodgkins v. Price*, 141 Mass. 162, 5 N. E. Rep. 502.

In *Pindall's Ex'r v. Bank of Marietta*, 10 Leigh, 481, a debtor owing a debt consisting of principal and interest, it was agreed between him and his creditor that he should, in the first place, pay off the principal, and that the interest might for a time remain unpaid. The creditor received money from the debtor, and applied it in satisfaction of the principal. Many years elapsed without payment of the interest. It was held that the creditor was only entitled to the interest due at the time the principal was paid, and not to interest on the interest, there having been no agreement to pay it. *Tooke v. Bonds*, 29 Tex. 419, is to the same effect.

Interest cannot be compounded without statutory authority. *Hoyle*

v. Page, 41 Mich. 533, 2 N. W. Rep. 665. It is provided by statute in Michigan (1 Howell's Stats., § 1599) "that when any instalment of interest upon any note, bond, mortgage or other written contract shall have become due, and the same shall remain unpaid, interest may be computed and collected on any such instalment so due and unpaid from the time at which it became due, at the same rate as specified in any such note, bond, mortgage or other written contract, not exceeding ten per cent.; and if no rate of interest be specified in such instrument, then at the rate of seven per cent." This does not apply to new interest accruing by lapse of time after the maturity of the debt. *Voigt v. Beller*, 56 Mich. 140, 22 N. W. Rep. 270; *McVicar v. Denison*, 81 Mich. 348, 45 N. W. Rep. 659; *Wallace v. Glaser*, 82 Mich. 190, 21 Am. St. 556, 46 N. W. Rep. 227.

Where the contract makes inter-

¹ *Whitcomb v. Harris*, 90 Me. 206, 38 Atl. Rep. 138.

² *Bledsoe v. Nixon*, 69 N. C. 89, 12 Am. Rep. 642; *Vaughan v. Kennan*, 38 Ark. 114. See note to § 373.

³ *Kennon v. Dickins*, Cam. & Norw. Conf. R. (by Battle) 357, 2 Am. Dec. 642; *Bledsoe v. Nixon*, *supra*.

⁴ *House v. Tennessee Female College*, 7 Heisk. 128.

⁵ *Talliaferro v. King's Adm'r*, 9 Dana, 331, 35 Am. Dec. 140; *Hall v. Scott's Adm'r*, 90 Ky. 340, 13 S. W. Rep. 249.

ing, J., said in the first Kentucky case cited: "The fact that the amount so promised to be paid is described as interest accruing upon a larger sum which is payable at a future day cannot the less entitle the plaintiff to demand interest upon the amount, in default of payment, as a just remuneration for the detention or non-payment." In Vermont¹ it is allowed by way of damages for delay of payment; but parties cannot stipulate for interest before it becomes due. In South Carolina interest overdue bears interest.² So in Rhode Island, New Hampshire, Iowa, Wisconsin, Ohio, Texas, Georgia, and, it seems, Washington, substantially the same doctrine prevails.³

est payable by instalments at fixed periods and separately from the principal, simple interest will be allowed on each instalment at the contract rate; but where the payment of interest is not stipulated for until the principal becomes due interest is allowable only on the latter. *Rix v. Strauts*, 59 Mich. 364, 26 N. W. Rep. 638.

¹ *Catlin v. Lyman*, 16 Vt. 44.

² *O'Neill v. Bookman*, 9 Rich. 80; *Gibbes v. Chisolm*, 2 N. & McC. 38, 10 Am. Dec. 560; *Singleton v. Lewis*, 2 Hill, 408; *O'Neill v. Sims*, 1 Strob. 115; *De Brubl v. Neuffer*, id. 426; *Doig v. Barclay*, 3 Rich. 125; *Watkins v. Lang*, 17 S. C. 13; *Wright v. Eaves*, 10 Rich. Eq. 582; *Miller v. Hall*, 18 S. C. 141.

³ *Cramer v. Lepper*, 26 Ohio St. 59; *Lewis v. Paschal's Adm'r*, 37 Tex. 315; *Mills v. Jefferson*, 20 Wis. 50; *Pearce v. Hennessy*, 10 R. I. 223; *Lanahan v. Ward*, id. 299; *Mississippi Valley Trust Co. v. Holins*, 20 Wash. 272, 55 Pac. Rep. 54.

In *Wheaton v. Pike*, 9 R. I. 132, 11 Am. Rep. 227, *Durfee, J.*, said: "The reasons assigned for not allowing interest are, first, that interest on interest savors of usury and is liable to bear with oppressive hardship on the debtor; and second, that the creditor from his forbearing to call for the instalments of interest when they

become due may be presumed to have waived his claim to interest on the same. These reasons are not entirely consistent; for if the interest is not to be allowed for the first reason, there can be no waiver of interest to be presumed. It is also urged that interest, if so allowable upon annual or semiannual dues of interest, should, for the same reason, when the debt is payable with interest at a particular time, be allowed from that time upon the interest then due as well as on the principal. *Doe v. Warren*, 7 Me. 48. See *Union Bank v. Williams*, 3 Cold. 579. But, on the other hand, it is urged that interest upon such interest, whatever savor of usury it may have, is not usurious; for after such interest is due the debtor may lawfully agree to pay interest thereon; and if he has paid interest thereon he cannot recover it back; that no rule should be adopted which favors the debtor at the expense of the creditor; and that there is no good reason why money due at a particular time for the use of money should not carry interest from that time in the same manner as money due for anything else. In South Carolina, where the rule accords with this view, it has been held that where a party contracts to pay a sum of money with interest thereon on a given day, when

In Nebraska interest may be computed upon overdue interest if by so doing the total interest is not made to exceed the maximum legal rate.¹

the day arrives the interest becomes principal and bears interest for the future. *Doig v. Barclay*, 3 Rich. 125. There is a reason for not allowing interest upon interest applicable to negotiable securities which we do not find referred to, namely, that it may not be known to the debtor to whom the interest is to be paid; but it may be replied that the same reason would hold in regard to the principal of a negotiable security payable at a particular day, without interest, upon which, nevertheless, interest accrues after its maturity."

Pierce's Ex'r v. Rowe, 1 N. H. 179. *Woodbury, J.*: "If any interest can be allowed on the annual interest, it must be allowed by virtue of some general principles, and not of any express contract for it contained in the note. But those principles on the subject of interest must be gathered from the reasons on which interest is originally founded, and on which it is in any case permitted without an express contract for its payment. Wherever money is due to an individual, without any stipulation as to interest, some compensation for the use of the money while wrongfully detained seems justly to be due; because the use of the money must be presumed to be beneficial to the one party, and the detention of it injurious to the other. Indeed, the increases of net profit of property are an appurtenant to the property itself, and the same broad principle which, without a special contract, would enable the owner to recover the property, would also entitle him to recover its increase. Hence a fair reward for the use of

money while negligently or wrongfully withheld from the creditor ought always to be allowed him in the nature of damages for its detention; and the principles of our civil actions justify such an allowance by permitting the damages recovered to be commensurate with the injury sustained. On this theory interest will not commence, when no express contract exists for it, till a wrong is done by the debtor's failure to pay what has become due. Because till that event no breach of duty has happened on his part for which legal damages can accrue. But after money becomes due, every day's neglect to make payment of it, whether principal or interest, is an injury to the creditor; and our civil remedies would prove defective, and would not, as justice requires, approximate those specific ones provided by equity unless the money detained, and a compensation for its use while so detained, could be recovered by the creditor. Were this not the law a strong temptation, also, would be presented to debtors to violate their duties. They would, in the language of Lord Mansfield, be encouraged 'to make use of all the unjust dilatories of chicanery;' 'and the more the plaintiff is injured the less he will be relieved.'" Approved in *Little v. Riley*, 43 N. H. 113; *Townsend v. Riley*, 46 N. H. 300, 313.

But where partial payments have been made during a year, the note bearing annual interest, there should not be rests made for such intermediate payments. If such payments were made on account of accruing interest not due, they should be de-

¹ *Murtagh v. Thompson*, 28 Neb. 358, 44 N. W. Rep. 451.

§ 376. **Separate agreements for interest.** Contracts [682] for payment of interest, when secured by a separate instrument, will be enforced like all other agreements for the payment of money at a time certain. After maturity interest as damages will be allowed, and proof that the considera- [683]

ducted at the end of the year, but without interest upon them. *Mann v. Cross*, 9 Iowa, 327; *Calhoun v. Marshall*, 61 Ga. 275.

In *Preston v. Walker*, 26 Iowa, 205, 96 Am. Dec. 140, and *Burrows v. Stryker*, 47 Iowa, 477, interest was allowed upon delinquent interest upon notes made in New York and payable there.

If the contract rate of interest is higher than the minimum legal rate interest will not be allowed on unpaid interest unless the contract explicitly provides for it. *Wofford v. Wyly*, 72 Ga. 863.

In *The Ship Packet*, 3 Mason, 255, the mode of computing interest on a bottomry bond was discussed by Judge Story. "The rule laid down by Mr. Marshall, in his treatise on Insurance and Bottomry (b. 2, ch. 4, p. 752), is, that 'if when the risk is ended the borrower delay payment the common interest begins to run, *ipso jure*, without any demand. *Discussio periculo, majus legitima usura non debetur*. But this interest runs only on the principal, not on the marine interest, for this would be interest upon interest. *Accessio accessionis non est*.' For this doctrine he cites no English authority, but relies altogether upon the civil law and Pothier and Emerigon. The doctrine of the civil law, denying compound interest, is not of universal application under the common law. The opinions of Pothier and Emerigon seem certainly opposed to allowance of interest upon the maritime premium (commonly, but somewhat improperly, called interest); but Emerigon admits in explicit terms

that the law and practice in France are in favor of it. Upon examining his reasoning on the subject it is by no means satisfactory, being obviously founded upon mere motives of compassion. My opinion is that by the successful termination of the voyage the maritime premium, as well as the sum lent, becomes due; the whole forms one aggregate debt, and that any delay in discharging it ought to be allowed by the allowance of common interest, exactly as in other cases of debt. In making up the decree the sum lent and the bottomry interest are to be considered as the principal, and common interest upon this amount is to be added from the time the bond becomes due to the time of the decree."

The statute of Oregon allows parties to stipulate that delinquent interest may bear interest, but not to compound it oftener than once a year. In *Murray v. Oliver*, 3 Ore. 539, the action was on a note payable in one year, "with interest at the rate of thirty per cent. per annum until paid, and interest to be paid semi-annually, and if not paid when due to be compounded at the same rate." Boise, J.: "We think this contract divisible. There is an agreement to pay the principal and interest at the end of one year from date; then it is stipulated that the interest shall be paid semi-annually," etc. After referring to the statutes he continues: "It would, therefore, result in rendering void the contract to pay interest semi-annually, and would not vitiate the contract to pay the principal sum with interest at thirty per cent."

tion is interest on a debt secured by another instrument will be of no avail to prevent such recovery.¹ Coupons are a [684] familiar example. When so framed that they cannot be separated from the principal obligation, they are only equivalent to a provision therein for the payment of interest, and the question of interest on the amount so agreed to be paid is simply one of interest on arrears of interest.² According to the courts of New York the same rule governs so long as the coupons remain in the hands of the original holder; until negotiated or used in some way they serve no independent purpose, but continue to be incidents of the bonds and have no greater force or effect than the stipulation for the payment of interest contained in the bonds. So long as they so remain it can make no difference whether the coupons are attached or detached.³ But generally, if the coupon has in itself all the parts of a complete contract, it may be detached, and if negotiable possesses all the qualities of commercial paper. An action may be maintained on it without production of the bond, though the bond may belong to another party, has never been issued, or has been canceled. And interest after maturity will be given as on notes and bills.⁴ Where it

¹Humphreys v. Morton, 100 Ill. 592; Graeme v. Cullen, 23 Gratt. 266; Koshkonong v. Burton, 104 U. S. 668; Genoa v. Woodruff, 92 id. 502; Walnut v. Wade, 103 id. 183; Mills v. Jefferson, 20 Wis. 50; Pruyv. Milwaukee, 18 id. 367; Forstall v. Consolidated Ass'n of Planters, 34 La. Ann. 770; Welsh v. First Division St. Paul & P. R. Co., 25 Minn. 314; North Pennsylvania R. Co. v. Adams, 54 Pa. 94, 93 Am. Dec. 677; Gilbert v. Washington, etc. R. Co., 33 Gratt. 586. *Contra*, Force v. Elizabeth, 28 N. J. Eq. 403.

²Rose v. Bridgeport, 17 Conn. 243. See Camp v. Bates, 11 id. 487; Crosby v. New London, etc. R. Co., 26 id. 121; Clarke v. Janesville, 1 Biss. 98.

³Bailey v. Buchanan County, 115 N. Y. 297, 22 N. E. Rep. 155, 6 L. R. A. 562; Williamsburgh Savings Bank v. Solon, 136 N. Y. 465, 481, 32 N. E.

Rep. 1058; Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & E. L. Co., 12 App. Div. 199, 42 N. Y. Supp. 781.

⁴Trustees Internal Improvement Fund v. Lewis, 34 Fla. 424, 43 Am. St. 209, 16 So. Rep. 325; Cook v. Illinois Trust & Savings Bank, 68 Ill. App. 478; Lexington v. Union Nat. Bank, 75 Miss. 1, 22 So. Rep. 291; Love v. Philadelphia & Reading R. Co., 19 Phila. 304; Nash v. Meggett, 89 Wis. 493, 61 N. W. Rep. 283; Drury v. Wolfe, 134 Ill. 294, 25 N. E. Rep. 626; Cairo v. Zane, 149 Ill. 122, 143; Rich v. Seneca Falls, 19 Blatch. 558; Philadelphia & Reading R. Co. v. Smith, 105 Pa. 195; Same v. Knight, 124 id. 58, 16 Atl. Rep. 492; Whitaker v. Hartford, etc. R. Co., 8 R. I. 47, 86 Am. Dec. 614; Thomson v. Lee County, 3 Wall. 327; Aurora v. West, 7 id. 82; Humphreys v. Morton, 100 Ill. 592; Genoa v. Woodruff, 92 U. S.

is provided by statute that, in the computation of interest upon any note, interest shall not be compounded, nor shall the interest therein be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith, interest will not be allowed on coupons maturing after the option given the holder of a note to declare the whole sum therein promised to be due and payable has been exercised, in the absence of such agreement.¹

§ 377. Periodical interest after maturity of debt. In Rhode Island, where interest is allowed on instalments of interest payable at stated times after they become due, the question arose whether, after the whole principal matures and remains unpaid, interest will become due thereon periodically in instalments as was stipulated before the principal fell due. It

502; Connecticut Mut. Ins. Co. v. Cleveland, etc. R. Co., 41 Barb. 9, 26 How. Pr. 225; City v. Lamson, 9 Wall. 477; Clark v. Iowa City, 20 id. 583; Durant v. Iowa County, Wool. C. C. 69; Mercer County v. Hackett, 1 Wall. 83; Gelpcke v. Dubuque, id. 175; Murray v. Lardner, 2 id. 110; North Pennsylvania R. Co. v. Adams, 54 Pa. 44; Pollard v. Pleasant Hill, 3 Dill. 195; Rogers v. Lee County, 1 id. 529; Mathias v. Superior Iron Co., 70 Pa. 160; Norris v. Philadelphia, id. 332; Hollingsworth v. Detroit, 3 McLean, 472; Jefferson County v. Hawkins, 23 Fla. 223, 2 So. Rep. 362 (if no rate of interest is specified in the coupon it bears that fixed by statute, though the bonds bear a higher rate); Scotland County v. Hill, 132 U.S. 107, 10 Sup. Ct. Rep. 26.

If there is a discrepancy as to the rate of interest between a coupon and the bond to which it was originally attached the latter will control when the former is held by one who acquired it after maturity. Goodwin v. Bath, 77 Me. 462, 1 Atl. Rep. 244.

If bonds and coupons are issued by

a municipality pursuant to a special statute which does not make provision for the payment of interest upon either after maturity, they do not bear interest. Bates v. Gerber, 82 Cal. 550, 22 Pac. Rep. 1115; Soher v. Calveras County, 39 Cal. 134. See Davis v. Yuba County, 75 id. 452, 13 Pac. Rep. 874, 17 id. 533.

Coupons given by a guardian for instalments of interest on a mortgage on the ward's lands, if not so worded as to bind either of them personally, do not draw interest after maturity as commercial paper, nor as "written instruments" within the statute of Illinois. United States Mortgage Co. v. Sperry, 26 Fed. Rep. 727.

If coupons which do not bear interest by their terms are not presented for payment at the place designated, the money being there to pay them, interest will not be allowed on them if the residue of the fund subsequently passes to the purchaser of the property at a foreclosure sale. Grand Trunk R. Co. v. Central Vermont R. Co., 105 Fed. Rep. 411.

¹ Stubbings v. O'Connor, 102 Wis. 352, 363, 78 N. W. Rep. 577.

was decided in the negative, for the reason that after maturity of the principal sum both the accruing interest and the principal are not due on any particular day, but every day until they are paid. In that case the interest by the contract was payable semi-annually. The court gave judgment for the principal with simple interest to the time of rendering judgment, together with interest on the semi-annual dues of interest, including that which accrued when the note became due.¹ In [685] South Carolina interest after maturity may be regulated by agreement; and it has been held that, if agreed to be paid periodically, the instalments of interest accruing after maturity will bear interest. The bond was given in February, payable on the first of the following January, and provided for interest annually.² But if the promise is to pay at a time fixed

¹ *Wheaton v. Pike*, 9 R. L. 132, 11 Am. Rep. 227.

² *O'Neill v. Bookman*, 9 Rich. 80. Withers, J.: "Within the period of the stipulated credit, when the interest is to be paid annually, no one questions that interest should be computed on the interest from the respective periods fixed for the payment. *Gibbes v. Chisolm*, 2 N. & McC. 38, 10 Am. Dec. 560; *Singleton v. Lewis*, 2 Hill (S. C.), 408; *O'Neill v. Sims*, 1 Strob. 115; *De Bruhl v. Neuffer*, id. 426. Thus much we must regard as settled upon an immovable foundation of authority in the books of reports, reinforced by innumerable instances of conformity in circuit decisions and transactions of daily occurrence. The cases cited, especially *Gibbes v. Chisolm*, will show that the doctrine stated has been fully discussed upon considerations, moral and legal, with a consideration of cases English and American in law and equity, and with dissent in the court at first (see *Gibbes v. Chisolm*) reconciled subsequently. See *Singleton v. Lewis*. But the question now before us presents a variation from some of our cases, but not from all of them. It is a case

where the special credit has expired; and shall the terms, 'with interest payable annually,' be applied to the interest annually accruing at the period of each year following the time set for the payment of the principal? Why should they not so apply when they were so intended by the parties? Undoubtedly they must if the law do not forbid. There can be no law to forbid unless it can be found in the legislation upon usury. That forbids one 'to take, directly or indirectly, for loan of any moneys, etc., above value of seven pounds for the forbearance of one hundred pounds for one year, and so after that rate for a greater or lesser sum, or for a longer or shorter time.' We have already seen that it is not unlawful — that it is not usurious — to compute interest upon the interest promised to be paid at the expiration of each year within the period of credit expressly stipulated. But this decides the whole question; for it only remains in each case to ascertain what the debtor has promised; whether he intended to promise to pay interest annually beyond the time fixed for the payment of the principal, if forbearance should ex-

beyond twelve months from date, with interest annually, the interest is not payable annually after maturity.¹ In New Brunswick an obligation to pay the specified rate of interest until the whole sum for which it was given is paid, and speci-

tend beyond that time; for if he did, there is no more usury in applying the same rule of computation to the year next following than to the next preceding that time. The matter is thus solved: A party promises to pay at a given time \$100, with interest from a given time. At the day of payment, what is due? The principal and interest. From that time, what is forborne? Not the principal only, but all as to which default is made, to wit: the principal and interest; both are equally payable at the time. So it is not the forbearance of \$100 merely, but of more; and where the contract—whether expressly or by legal implication—extends to another succeeding period of time, when the interest is again payable, there is another sum, at such time, in addition to the principal, again forborne. It is at least but seven per cent. per annum, or at that rate, for the forbearance of \$100, or for a greater or less sum. *Singleton v. Lewis* presents a direct authority for the application of this rule of computing interest upon the interest accrued for years succeeding the time fixed for payment of the principal. In that case the credit of the latter expired one year from date, according to the terms used. Yet the promise was: 'with lawful interest, payable annually.' The necessary implication was that the debtor promised to pay interest annually for a period beyond the first year, else the words to that purport would avail nothing whatever, inasmuch as the interest due a year after date would have drawn interest without

them. It was said in *O'Neill v. Sims* 'that in all cases in which the compounding of interest, whilst the collection of principal during the whole time is at the discretion of the creditor, seems to savor of usury or may, by abuse, be perverted to the purposes of the usurer.'

"That which touches the question of mutuality in a contract need not affect the question of usury. There can be no illegality for any reason in a promise to pay \$100 with interest at the end of a year, and if not then paid and so long as the same may remain unpaid the interest thereon shall be paid annually; and if this can be gathered from the contract to be the agreement, it is not obvious how the mere fact that the creditor is at liberty to sue for his money in any case will make that usury which is not so for some other reason. In the case of *Eaton v. Bell*, 7 Eng. C. L. 13, 5 B. & Ald. 34, bankers who advanced money made half-yearly rests and carried the interest to the principal, and computed interest on the aggregate, indulging for a considerable space of time, and this mode of computation being acquiesced in was ratified by the king's bench and held free from the taint of usury. That court referred to and recognized the doctrine of Lord Eldon, in *Ex parte Bevan*, 9 Ves. 223, that a prior contract for a loan for twelve months, to settle the balance at the end of six months, and convert the interest then accrued into principal, would be bad for usury; yet that the same thing actually done at the end of six months, and

¹ *Westfield v. Westfield*, 19 S. C. 85. See *Wilson v. Kelly*, id. 160.

ying that overdue interest is to bear interest at the same rate, carries interest at the stipulated rate on overdue interest, whether it accrued before or after the maturity of the principal.¹

§ 378. **Computation ; application and effect of partial payments.** The established mode in the court of chancery [686] of computing interest is that whenever a sum in excess of the interest at that time due is to be credited, a balance is to be struck.² And the same rule applies at law. Where partial payments are made on a money demand after maturity, the payment is applied in the first place to discharge the interest then due; if the payment exceeds the interest the surplus goes towards discharging the principal; and the subsequent interest is to be computed on the balance of the principal unpaid. If the payment be less than the interest the surplus interest must not be taken to augment the principal; but interest continues on the principal until sufficient payments are made to extinguish the interest to that date. If there be a surplus of such payment it is applied to the principal. A like application is made of all payments.³ This rule applies to

a stipulation to forbear such aggregate, would be legal. Kelly on Usury, p. 48, supposes such *dicta* must be understood as applying to mortgages of real property only. It is finally to be remarked that if at the end of each year a party may give an interest-bearing note for the interest, which notes would be unquestionably valid, there can be no reason why at the inception of the contract he may not provide terms that shall produce the self-same result. Of course an inference that the parties agreed for compound interest may be drawn from their dealings in a like manner as the inference may be drawn from the same source as to simple interest. We adjudge that the plaintiff in the present case was entitled to compute interest upon the interest falling due each year as was allowed in Singleton v. Lewis, the terms im-

porting and the agreement being at least as clear in the present case as in that."

¹ King v. Keith, 1 N. B. Eq. 538, 555.

² Chapline v. Scott, 4 Har. & McHen. 91.

³ Boggess v. Goff, 47 W. Va. 139, 34 S. E. Rep. 741; Russell v. Lucas, Hemp. C. C. 91; Anonymous, Martin & Hayw. 169; Baker v. Baker, 28 N. J. L. 13, 75 Am. Dec. 243; De Ende v. Wilkison, 2 Pat. & H. 663; Baum v. Moon, 1 Hayw. 323; Van Benschooten v. Lawson, 6 Johns. Ch. 313, 19 Am. Dec. 333; Stoughton v. Lynch, 2 Johns. Ch. 209; Bettes v. Farewell, 15 Up. Can. C. P. 450; Scanland v. Houston, 5 Yerg. 310; Dean v. Williams, 17 Mass. 417; Story v. Livingston, 13 Pet. 359; State v. Jackson, 1 Johns. Ch. 13, 7 Am. Dec. 471; Tracy v. Wikoff, 1 Dall. 124; Penrose v. Hart, id. 378; Lewis v. Bacon's Legatee, 3

payments upon judgments,¹ demands upon which interest is allowed only in the discretion of the jury, if it is given,² and accounts where credits are payments.³ Rests in an [688] account bearing interest and consisting of numerous items

Hen. & Munf. 89; *Edes v. Goodridge*, 4 Mass. 103; *Meredith v. Banks*, 6 N. J. L. 408; *Houston v. Crutcher*, 31 Miss. 51; *Den's Estate*, 35 Cal. 692; *Backus v. Minor*, 3 id. 231; *Gwinn v. Whitaker*, 1 Har. & J. 754; *Lightfoot v. Price*, 4 Hen. & Munf. 431; *Wallace v. Glaser*, 82 Mich. 190. 46 N. W. Rep. 227; *Betcher v. Hodgman*, 63 Minn. 30, 65 N. W. Rep. 96, 56 Am. St. 447; *Peyser v. Myers*, 135 N. Y. 599, 32 N. E. Rep. 699; *Clift v. Moses*, 75 Hun, 517, 27 N. Y. Supp. 728; *Wilson's Estate*, 18 Phila. 56.

In Kentucky if interest at a higher rate than six per cent. is contracted for and one of the obligors dies before the maturity of the note, and payments are made by the surviving obligors, the application thereof to the interest due by the survivors and the remainder to the principal is correct as to them, but erroneous as to the estate of the decedent, which is liable for only six per cent. after the maturity of the obligation. As to his estate, the payments should be credited without reference to the amount of interest the living obligors were bound to pay. *Snelling's Adm'r v. Atchison*, 7 Ky. L. Rep. 752.

¹ *Hodgdon v. Hodgdon*, 2 N. H. 169.

² *Peebles v. Gee*, 1 Dev. 341.

³ *Ross v. Russell*, 31 N. H. 376, was an action on an account stated. During seven years after statement of the account nine payments were made upon it, aggregating more than the principal. *Woods, C. J.*, said: "The mode of computing interest upon promissory notes seems to have been perfectly settled by the usages of business and by judicial decisions in many jurisdictions, and we are not aware of any defections from

the rule by any extended usage or any respectable authorities. The authorities in the plaintiff's argument are uniform in support of it, and the unvarying practice of this court is likewise believed to have been in harmony with it. We do not understand the argument of the defendants as drawing the rule into question; but as insisting upon a distinction between the present contract and a promissory note, as well as upon the nature of the contract itself; as, for the reason that the frequency with which the payments were made renders the application of such a rule unreasonably onerous to the party; and therefore not within the general maxim of allowing such interest as shall be just and reasonable. In other words, they claim to have paid the money due on the contract; that the several payments from time to time made in discharge of it should be treated like items of a mutual account, in which the relation of debtor and creditor is not recognized between the parties, except upon final settlement or upon the recurrence of such periodical rests as are allowed by courts sometimes, when the justice of the case seems to require it. If this were a correct view of the case, the question for the court would be as to what interest ought to be allowed, and what rests established for computing it. . . . It was from the beginning a debt for goods sold to the defendants, and by the admission of the party drawing interest; and the sums of money from time to time received by the plaintiff of the defendants were not of the nature of items of mutual account, but as the

are a proper substitute for computation of interest on each item.¹

[689] Where payment is made on a debt before it is due and begins to bear interest, the party who so pays is not, without some stipulation to that effect, entitled to interest up to the time the debt begins to bear it.² If, however, the debt bears interest, and a payment is made and accepted before the money is due, it should be immediately applied to the principal and accrued interest which would next become due.³

auditor finds, and as clearly appears, payments made toward the extinguishment of the debt, and applicable as payments ordinarily are, or should by law be, towards interest or principal, according to the direction that the law gives to such payments in the silence of the parties in respect to them. We find no ground upon which we can exempt this contract to pay money with interest from the general rule shown to govern promissory notes in the particulars in controversy. The principal was payable on demand, and the interest, of course, also. The plaintiffs had a right to insist upon the payment of interest as often as interest accrued, and could have encountered any attempt of the defendants to apply a payment towards the principal by demand of fresh payment on account of interest. The legal presumption, then, was that the payment was made first in reduction of the claim which did not carry interest; that is, the interest itself." *McGregor v. Ganlin*, 4 Up. Can. Q. B. 378.

The court held in *Gwinn v. Whitaker*, 1 Har. & J. 754, that a payment by a debtor *must* be first applied to extinguish the interest of his debt, and then to the principal; and that a different application is not in the discretion of the debtor. But in *Pindall's Ex'r v. Bank of Marietta*, 10 Leigh, 484, it was held that a debtor owing a debt consisting of

principal and interest, and making a partial payment, has a right to direct its application to so much of the principal in exclusion of the interest, and the creditor, if he receives it, is bound to apply it accordingly. And this was approved in *Miller v. Trevilian*, 2 Rob. (Va.) 1, which decided also that a case is not taken out of the influence of that principle by the circumstance that the party receiving the payment is a fiduciary.

¹ *Harding v. Howdy*, 11 Wheat. 103; *Schieffelin v. Stewart*, 1 Johns. Ch. 620, 7 Am. Dec. 507.

² *Killilan v. Herndon*, 4 Rich. 609.

³ *French v. Kennedy*, 7 Barb. 452; *Miami Exporting Co. v. Bank of United States*, 5 Ohio, 260; *Williams v. Houghtaling*, 3 Cow. 86; *Tracy v. Wikoff*, 1 Dall. 133.

In *Miami Co. v. Bank*, *supra*, eight notes were made October 21, 1820. They were severally payable *on or before* the first day of December, 1823, and succeeding years to 1830, and all were on interest from December 1, 1818. Large payments were made on these notes in 1821 and 1822. *Hitchcock, J.*, said: "On the part of the defendants, it is insisted that inasmuch as these notes are payable on or before a particular day, and payments were made before that day, they have a right to compute interest upon the principal sum up to the time of payment, and so on from time to time as payments were

§ 379. **Same subject.** In the computation, for the [690] purpose of applying a partial payment made after the principal sum is due, no notice is taken of the time when such sum fell due. The rests are to be made when the payments are actually made; unless the latter fall short of the interest, in which case, as before stated, the rest is deferred until the amount paid equals or exceeds the interest due; then the money paid is applied first to discharge the interest, and if there is a surplus it is applied to reduce the principal.¹ But in Rhode

made. Had the interest been due when the payments were made, this rule would not have been so objectionable, although we are not prepared to say it would be correct. In support of the principle contended for, the defendants' counsel cite 8 S. & R. 378; 4 Wash. C. C. 92; 17 Mass. 417; 1 Johns. Ch. 13, 7 Am. Dec. 471; 2 Johns. Ch. 209, and a number of other cases. In all these cases, I apprehend, it will be found that none of the payments were made until after the debt was due: at least the contrary does not appear to have been the fact. The cases in Sargent & Rawle, and the one in Washington, are upon judgments. In the case before the court no interest was demandable until the notes themselves became due. To adopt this rule, then, would be doing injustice to the plaintiffs. It would be charging them interest before they could be called upon for either principal or interest. To adopt what is called the commercial rule would be equally unjust to the defendants. There would not be the same injustice in this case, it is true, that there would be where the payments had been long delayed and the debt had been even due for a great length of time. In such case it might so happen that the payment of interest alone would discharge both principal and interest. The case cited from 1 Dallas seems to recognize this prin-

ciple. But it must be remembered that the notes here were payable on or before a certain day. Although the defendants could not compel payment before the day, yet the plaintiffs might pay before that time, and the defendants might be compelled to receive it. They could only be compelled to receive it upon the hypothesis that full payment was made; not only principal, but interest. If, then, partial payment only is made, it would seem to be but just that this partial payment should apply as well to interest as principal. We have found but one case reported similar to the one now before the court. This case is reported in 3 Cow. 86. The court say: 'Payment made on an instalment not due and payable should be applied to the extinguishment of principal, and such proportion of interest as has accrued on the principal thus extinguished. For instance, a note or bond is given for the payment of \$100 on or before the termination of one year. At the end of six months a payment of \$51.50 is made. This is not applied to sink the principal to \$48.50; but the \$1.50 is applied to the interest of \$50 for six months, and \$50 to sink so much of the principal. At the end of the year there will be due \$50 of principal and the interest on that \$50 for one year.'"

¹ French v. Kennedy, 7 Barb. 452.

Island, where, as before remarked, instalments of interest bear interest while in arrear, a rest is to be made at the time the principal should have been paid, though no payment is then made. In a recent case a rule was laid down for computing the amount due at any given time on a bond to pay \$7,500 on or before May 7, 1859, with interest from date at the rate of seven per cent. per annum, payable on the 7th of May, 1859; and, after that time, semi-annually, until the principal sum be paid. It was held that the seven per cent. instalments should be reckoned with interest on them up to the time when the principal was due; and seven per cent. simple interest on the amount then found due; and thence until the time to which the amount is to be computed; inasmuch as by force of the words, "until the principal sum be paid," the contract rate must be held to govern to the time of actual payment although after maturity.¹

The rule which has been stated as applicable where partial payments have been made is intended to, and does, prevent interest being computed upon interest; and of course must be [691] modified where interest payable at particular times and remaining unpaid is allowed to bear interest. In North Carolina the rule for computing interest on a bond on which it is payable annually is to calculate the interest on the bond for the first year, setting the interest aside, and then for the second, third, and so on until the time for the first payment; then calculate the interest on each year's interest to the same time, and apply the payment first to the extinguishment of this interest, and the surplus, if any, to the reduction of the principal. If the payment is not sufficient to pay this interest, it is applied first to extinguish the interest calculated on each year's interest, and the surplus to the principal interest as far as it will go. If the payment is not enough to satisfy the interest on the interest, it is set aside, and neither stops nor bears interest.² Where only the interest on the principal and the deferred interest is a separate demand payments are applied to the delayed annual interest and the secondary interest accrued thereon, and the balance, if any, to the interest accrued on the principal since the last annual period, and then to the principal

¹ Lanahan v. Ward, 10 R. I. 299.

² Bratton v. Allison, 70 N. C. 498.

itself.¹ If an erroneous rule of computing interest is adopted with the knowledge and consent of the parties, although ignorantly, it is a mistake of law; but if there is a mistake in the calculation it is one of fact.²

SECTION 9.

SUSPENSION OF INTEREST.

§ 380. **Miscellaneous cases.** Interest given as damages results from the debtor's default. When he owes money and knows the amount, he is chargeable with interest from the time when he ought to pay it; but if he is prevented from paying by the act or neglect of the creditor,³ or by law, he is not in default, and no interest is allowable during the period he is so prevented. The fact that when an instalment of interest became due the mortgagor was unable to find the mortgagee until after the period for the payment of interest, in order to prevent the principal from coming due, is not, in the absence of any fraud on the part of the mortgagee, a defense to a foreclosure of the mortgage for the non-payment of the principal.⁴ Nor is interest suspended on a bond or note which is lost or mislaid unless a tender is made.⁵ The interest on a note payable by an administrator to the estate he represents is not suspended by his appointment as such.⁶ Neither is that result produced by the death of the payee of a note, although no administration is granted upon his estate and no guardian appointed for the minor heirs, and it is uncertain whether there are any claims against it, if the maker of the obligation can cause letters of administration to be issued.⁷ But where

¹ *Vaughan v. Kennan*, 38 Ark. 114.

² *Baker v. Baker*, 28 N. J. L. 13, 75 Am. Dec. 243.

³ *Cheney v. Bilby*, 20 C. C. A. 291, 74 Fed. Rep. 52; *Hart v. Brand*, 1 A. K. Marsh. 159, 10 Am. Dec. 715; *Thompson v. Fullenwider*, 5 Ill. App. 551.

The maker of a note is bound to know the amount due upon it, and cannot claim a reduction of the interest because the payee refused to

inform him on that point. *Lamprey v. Mason*, 148 Mass. 231, 19 N. E. Rep. 350.

⁴ *Dwight v. Webster*, 10 Abb. Pr. 128. See *Cheney v. Libby*, 131 U. S. 68, 10 Sup. Ct. Rep. 498; *Cheney v. Bilby*, 20 C. C. A. 291, 74 Fed. Rep. 52.

⁵ *Payne v. Clark*, 23 Mo. 259. See *Heywood v. Hartshorn*, 55 N. H. 476.

⁶ *Rodenbach's Appeal*, 102 Pa. 572.

⁷ *Gale v. Corey*, 112 Ind. 39, 13 N. E. Rep. 108, 14 id. 362.

[692] a person entitled to an annuity removed to parts unknown, and made no demand of the administrator for many years till suit was instituted, the court refused to allow interest except from the commencement of suit, on the ground that its allowance in such case is not matter of positive law, but dependent on the circumstances.¹ If negotiable municipal bonds are past due, the maker may pay them at any time upon reasonable notice to their holders; but a notice published three times within six days prior to the time fixed for their payment does not stop the interest at that date unless the holders had actual notice of the call, though the money was on deposit at the place designated in the notice for the payment of the bonds.²

§ 381. Where payments prevented by legal process. In case of garnishment, trustee process, or restraint by other judicial proceeding, where the indebtedness is of such a character that interest can only be recovered for wrongful detention of the principal sum, the question whether the debtor who is subjected to such process shall pay interest during the pendency of the suit has been much discussed and variously decided. In the New England states, and some others, the trustee is not generally held chargeable with interest during the time he is under such restraint,³ unless the funds have been retained under such circumstances that the court can infer that they have earned interest⁴ or the trustee practices unreasonable delay

¹ *Laura Jane v. Hagan*, 10 Humph. 332. See *Daniels v. Benton*, 180 Mass. 559, 62 N. E. Rep. 960; § 314.

² *Williamson County v. Farson*, 199 Ill. 71, 64 N. E. Rep. 1086, 101 Ill. App. 328; *Read v. Buffalo*, 74 N. Y. 463. See § 214, note.

³ *Rennell v. Kimball*, 5 Allen, 356; *Prescott v. Parker*, 4 Mass. 170; *Adams v. Cordis*, 8 Pick. 260; *Smith v. Flanders*, 129 Mass. 322; *Huntress v. Burbank*, 111 Mass. 213; *Greenish v. Standard Sugar Refinery*, 2 Low. 553; *Barnes v. Bamberger*, 196 Pa. 123, 46 Atl. Rep. 303.

⁴ *Norris v. Massachusetts Mut. L. Ins. Co.*, 131 Mass. 294; *Brown v.*

Silsby, 10 N. H. 521; *Swanscot Machine Co. v. Partridge*, 25 id. 369; *Pierce v. Rowe*, 1 id. 179; *Abbott v. Stinchfield*, 71 Me. 214; *Woodruff v. Bacon*, 35 Conn. 98. See *Condee v. Skinner*, 40 id. 463.

The intervention of trustee process will not relieve the defendant from interest, where judgment was entered on the debt after a defense on the merits, during the continuance of the attachment, no application having been made to continue the action for judgment until such process was disposed of. *Albion Lead Works v. Citizens' Ins. Co.*, 3 Fed. Rep. 197.

in making his answer for the purpose of obtaining a longer use of the money.¹

Where a corporation whose object was not to employ its funds in trade and business was the trustee, the court held that it had done its duty if it had the money ready upon the determination of the case to pay such judgment as should be rendered.² So it has been held that if money be enjoined in the hands of a party, who is thereby prevented from making any use of it, interest is not allowed.³ In an action in New York upon a note, it was said that a person who is prohibited by injunction from paying the principal will not be compelled to pay interest; and one who causes such injunction is not entitled [693] to it. The debtor in that case supposed he was enjoined, but was not; and not being compelled to retain the money was held liable to pay interest.⁴ As a general rule, after the property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay of distribution is the act of the law; it is a necessary incident to the settlement of the estate.⁵ Where all the money due when an order of interpleader is made is paid into court the plaintiff is not liable for interest which would have been earned by that money between the time of its payment and the rendition of judgment.⁶

¹ *Oriental Bank v. Fremont Ins. Co.*, 4 Met. 1; *Rushton v. Rowe*, 64 Pa. 63.

The exemption of a garnishee from liability for interest only applies where he stands in all respects *rectus in curia* as a mere stakeholder. It never applies when he assumes the attitude of a litigant. *Ray v. Lewis*, 67 Minn. 365, 69 N. W. Rep. 1100.

² *Swansea Machine Co. v. Partidge*, 25 N. H. 391. See *Norris v. Hall*, 18 Me. 332; *Chase v. Manhardt*, 1 Bland, 333.

³ *Osborn v. Bank of United States*, 9 Wheat. 738; *Wade v. Wade's Adm'r*, 1 Wash. C. C. 477; *Bowman v. Wilson*, 2 McCrary, 394; *Laurel Springs Land Co. v. Fongeray*, 57 N. J. Eq. 318, 41 Atl. Rep. 694.

⁴ *Stevens v. Barringer*, 13 Wend. 639.

⁵ *Thomas v. Western Car Co.*, 149 U. S. 95, 116, 13 Sup. Ct. Rep. 824; *Williams v. American Bank*, 4 Met. 317, 333; *Thomas v. Minot*, 10 Gray, 263; *Grand Trunk R. Co. v. Vermont Central R. Co.*, 91 Fed. Rep. 569; *New York Security & Trust Co. v. Lombard Investment Co.*, 73 Fed. Rep. 537; *Guignon v. First Nat. Bank*, 22 Mont. 140, 56 Pac. Rep. 1051, 1057.

As to the right of an assignee to pay the creditors of the assignor interest on their claims, see *Matter of Fay*, 6 N. Y. Misc. 462, 27 N. Y. Supp. 910; *Bryant v. Russell*, 23 Pick. 308, 533; *Scott v. Morris*, 9 S. & R. 123.

⁶ *Clinton Bridge & Iron Works v. First Nat. Bank*, 103 Wis. 117, 79 N. W. Rep. 47.

In New Jersey the obligee of a bond, for the purpose of having it collected, made an unconditional assignment. Afterwards, fearing that the assignee would appropriate the money to his own use, the assignor filed a bill in equity to restrain the obligor from paying the money to the assignee, and the latter from receiving it. It was held that during the continuance of the injunction the obligor was not chargeable with interest.¹

In Pennsylvania where the debt is the subject of a foreign attachment the interest ceases on the service of the writ if the debtor is ready and willing to pay the debt and interest; but he is not entitled to the benefit of this rule where the delay is caused by his litigiousness and unreasonable conduct. The court suggest that a sure way for the garnishee to avoid liability for interest is to pay the money into court.²

In an Ohio case the court said the exemption, by reason of an injunction or garnishment, seems to rest entirely upon the idea of the party having the money actually in readiness to be disposed of as directed by the court; and so being in the custody of the law it is to be regarded as a *quasi*-payment, as if placed on deposit subject to the order of the court; and referring to the case in hand said: "Nothing short of such a state of facts, we think, should have exempted the defendant in this case from the payment of interest during the pendency of the attachment proceedings. The record shows no proof of such a state of facts in this case. It is not pretended that the defendant, either before or during the attachment proceedings, expressed a wish or even a willingness to pay his indebtedness. Nor does it appear that he was ready to pay. If, then, he is in law exempt from the payment of interest during the time of his garnishment, for the reason that he was actually holding [694] the money, ready and willing to pay, but was prevented by the attachment proceedings, such state of facts must be presumed. But a presumption is the supposition of a truth

¹ *Branthwait v. Halsey*, 9 N. J. L. 3. *R. Co.*, 43 id. 488; *Mackey v. Hodg-*

² *Jones v. Manufacturers' Nat. Bank*, 99 Pa. 317; *Rushton v. Rowe*, 64 id. 63. See *Fitzgerald v. Caldwell*, 2 Dall. 213; *Jackson v. Lloyd*, 44 Pa. 82; *Irwin v. Pittsburgh, etc.* *son*, 9 id. 468; *Updegraff v. Spring*, 11 S. & R. 188; also *Stevens v. Gwathmey*, 19 Mo. 628; *Goodwin v. McGehee*, 19 Ala. 468.

grounded on circumstantial or *probable* evidence. It should always be a natural and reasonable deduction from pertinent circumstances and relative existing facts to constitute a legal presumption."¹

In Alabama where a bill was filed for the purpose of subjecting a sum of money in the hands of a third person to the payment of a debt due the complainant, it was held that if such person is enjoined from using it, and does not offer to bring it into court, but insists upon his right to retain it both against the complainant and his debtor, he should be charged with interest.² In a later case a debtor was enjoined from paying money over to his creditor, but was not restrained from using it in any other manner; it was held that he could only discharge himself from liability for interest by paying the money into court.³

In Kentucky a debtor is not excused from paying interest because the fund is attached in his hands by a bill in chancery, unless he brings the money into court, or shows that he was prevented from using it.⁴

In Maryland in a suit upon an injunction bond given upon the granting of an injunction to restrain the payment of a sum of money, interest on this sum is recoverable as a matter of right up to the time it was paid into court upon the dissolution of the injunction. This right of action and recovery proceeded on the assumption that the debtor enjoined was exempt from paying interest during the continuance of the injunction.⁵

In Virginia it is held that, although a debtor is restrained from paying money by attachment, he ought nevertheless to pay interest during the time he was so restrained if he continued to hold the funds.⁶

¹ Candee v. Webster, 9 Ohio St. 452.

² Kirkman v. Vanlier, 7 Ala. 217.

³ Bullock v. Ferguson, 30 Ala. 227.

⁴ Shackelford v. Helm, 1 Dana, 338.

⁵ Wallis v. Dilley, 7 Md. 237.

⁶ Templeman v. Fountleroy, 3 Rand. 434. Carr, J., said: "The last objection to the decree is that it gives interest while the money was stayed in the party's hands, and it would have been a contempt to have

paid it out. I have examined the case of Tazewell v. Barrett, 4 Hen. & Munf. 159, and think the principle decided there directly applicable to the present question. Tazewell owed money to Bland by bond. He was served with a *subpoena* on behalf of Bland's executors, attaching the money in his hands. After this service he received notice that the bond had been assigned. An order —

This is contrary to the rule in Maine. There a stockholder in a bank was denied interest either on ordinary dividends declared on his shares, or on money due him by reason of the reduction of the bank's capital stock for a period during which the bank was prevented from paying him the same by attachments of his stocks in suits pending between him and other parties, notwithstanding the money was mingled with that of the bank, which was ready and willing to pay it to him but for the attachments, and there being no promise on the part of the bank to pay interest.¹

In Mississippi a garnishee who admits his indebtedness is liable for interest thereon *pendente lite* unless he deposits the money in court.² There is practical good sense in this rule as applied to debtors generally in all judicial proceedings. [695] A debtor who is in default, and therefore liable to interest when the restraining process is served, has no cause to complain that that liability continues; for the process, in restraining him for the time being, operates in harmony with his own choice. When the course of the proceedings admonishes him that the money may be required so soon that he can make no further beneficial use of it the option to pay it into court is equivalent to the option to pay it to his creditor; and having this election from the first it cannot be said that the

court was subsequently served on him to restrain him from paying the money until further order. It was five or six years before this order was discharged: and in a suit by the assignees of the bond the question was whether during this time Tazewell should pay interest. The court decided that he should. Judge Roane considered the principle as settled by *Hunter v. Spotswood*, 1 Wash. 145, where a sheriff sold attached effects under an order of court directing him to pay the money to Hunter on his giving security, which he failed to do; the money remained; and it was said died in the sheriff's hands by depreciation. Yet he was decreed to pay interest. In all such cases I think the safe and

sound doctrine is that if the party, though restrained from paying, holds and uses the money (and we must presume he uses if he continues to hold it) he ought to pay interest; and if the holder does not think so he has always the privilege of bringing the money into court; and because if the debtor could under the restraining process hold the debt for years without interest it would offer a strong temptation to him to stir up claims of this kind, and to throw all possible obstacles in the way of a decision of the question raised." See *Ross v. Austin*, 4 Hen. & Munf. 502.

¹ *Mustard v. Union Nat. Bank*, 86 Me. 177, 29 Atl. Rep. 977.

² *Work v. Glaskins*, 33 Miss. 539; *Smith v. German Bank*, 60 id. 69.

law compels him to keep the money at all; he is not prevented for any time whatever from making payment.¹

§ 382. *Where war prevents payment.* War suspends all commercial intercourse between belligerent nations, and the citizens or subjects of each are enemies of the citizens or subjects of the other. Their contracts are prevented by law from being performed while this hostile relation subsists. Interest cannot be allowed on money becoming due during a [696] war between enemies, the payment of which could not be made by reason of such suspension of commercial intercourse, because the debtor is not in fault for the delay.² On a bond given in one of the American states to a British creditor before the war of the revolution, and confiscated, it was held that the creditor was not entitled to interest except from the time the debt was demanded after the treaty of peace; but that it ought to be disclosed by plea that the creditor was beyond sea, and that the debtor had always been ready since the treaty to pay, and is now ready; in verification of which he should pay the money into court.³ Courts are powerless to abate interest on a judgment for any time on the ground that the creditor was within the lines of the enemy.⁴

Interest on loans made previous to, and maturing after, the commencement of a war ceases to run during the subsequent continuance of it, although it was stipulated for in the contract.⁵ But interest which accrued during the war of the revolution on a bond to a citizen of Maryland by a principal and surety, the former a British subject and the latter a citizen of that state, was held to be recoverable in an action against the surety.⁶ The rule that interest is not recoverable between alien enemies during a war between their respective countries was held to be applicable to debts between citizens of states

¹ See *Greenish v. Standard Sugar Refinery*, 2 Low. 553; *McKnight v. Chauncey*, *Selden's Notes* (N. Y.), 97.

² *Bean v. Chapman*, 62 Ala. 58; *Brewer v. Hartie*, 3 Call, 21; *Duniston v. Imbrie*, 3 Wash. C. C. 396; *Birdley v. Eden*, 3 Har. & McHen. 167. See *Dulany v. Wells*, *id.* 20; *Court v. Vanbibber*, *id.* 140.

³ *Anonymous*, *Martin & Hayw.* 363. See *Sheppard v. Taylor*, 5 Pet. 675; *Selden v. Preston*, 11 Bush, 191.

⁴ *Rowe v. Hardy*, 97 Va. 674, 34 S. E. Rep. 635.

⁵ *Brown v. Hiatts*, 15 Wall. 177; *Lush v. Lambert*, 15 Minn. 410, 2 Am. Rep. 142.

⁶ *Paul v. Christie*, 4 Har. & McIl. 161; *Bean v. Chapman*, 62 Ala. 58.

in rebellion and citizens of states adhering to the national government in the late civil war; but it only applied when the money was to be paid to the belligerent directly.¹ It cannot apply when there is a known agent, resident within the same jurisdiction with the debtor, appointed to receive the money; in such a case the debt will draw interest.²

§ 383. *Tender stops interest.* Tender has been considered in a broader sense in another connection.³ It is only needful [697] here to explain when admissible, in what it consists, and its effect to stop interest. The theory of charging interest after a debt is due and ought to be paid is that the debtor is in default; that he might voluntarily pay, and should be charged with interest because he does not, but withholds the money without the creditor's consent; hence a tender, being an offer of payment, has the effect of preventing all the consequences of the default; it stops interest and protects the party against costs; for, if the tender is refused, it is not his, but the creditor's, fault that the debt remains unpaid.⁴ The tender and refusal only cause a suspension of interest and exempt the debtor from costs. Where the maker of a promissory note paid money into the hands of an agent to secure it, and the latter tendered the money to the holder of the note on condition of having it delivered up, the note being mislaid, this condition was not complied with, and the agent afterwards became bankrupt with the money in his hands, the

¹ *Pillow v. Brown*, 26 Ark. 240; *Ward v. Smith*, 7 Wall. 447; *Lush v. Lambert*, *supra*; *Bigler v. Waller*, Chase's Dec. 316; *Brown v. Hiatts*, 15 Wall. 177.

² *Ward v. Smith*, 7 Wall. 447; *Williams v. State*, 37 Ark. 463; *Roberts v. Cocke*, 28 Gratt. 207.

For circumstances under which trustees were relieved from paying interest during the civil war, though residing in the southern states, where their creditors or *cestuis que trust* also resided, see *Lacy v. Stemper*, 27 Gratt. 42; *Brent's Adm'r v. Clevinger*, 78 Va. 12.

³ §§ 260-278.

⁴ *Patterson v. Sharp*, 41 Cal. 133;

Raymond v. Bearnard, 12 Johns. 274, 7 Am. Dec. 317; *Jackson v. Law*, 5 Cow. 248; *Woodruff v. Trapnall*, 12 Ark. 640; *Wheeler v. Woodward*, 66 Pa. 158; *Dixon v. Clark*, 5 C. B. 365; *Waistell v. Atkinson*, 3 Bing. 289; *Carley v. Vance*, 17 Mass. 389; *Cornell v. Green*, 10 S. & R. 14; *Johnson v. Triggs*, 4 G. Greene, 97; *Freeman v. Fleming*, 5 Iowa, 460; *Shant v. Southern*, 10 id. 415; *Mohn v. Stoner*, 11 id. 30; *Hayward v. Munger*, 14 id. 516; *Dooley v. Smith*, 13 Wall. 604; *Wilcox v. Richmond & D. R. Co.*, 3 C. C. A. 73, 52 Fed. Rep. 264, 17 L. R. A. 804.

A tender of the amount due does not suspend interest if the debtor

maker was still responsible on the note, but interest was not recoverable after the time of the tender.¹

§ 384. **Tender not allowed for unliquidated damages.** A tender can only be made of a debt which is certain in amount; it is not available at common law where the demand consists of unliquidated damages.² The debt must also be certain to justify interest by reason of the debtor's default. The theory of the law is that the debtor is able by his own voluntary act to prevent such interest. His act can never be more than a tender, without the concurring act of the creditor in accepting the money. A tender, however, being all the debtor can do towards performance of the promise to pay, has the [698] effect of preventing damages for non-performance. On principle, a party should have a right by tender to prevent default wherever in the absence of such tender interest would be chargeable on the ground of default.³ In New Hampshire the plaintiff in a tort action will not generally be allowed interest if he recovers less on the trial than the defendant offered him, although the offer was not strictly a tender.⁴ The interest is allowed in such a case as damages following the delay in obtaining redress, and if the wrong-doer is not responsible for the delay he certainly ought not to be called upon to compensate the other party for a loss he has brought upon himself.

§ 385. **When tender may be made.** A tender is the offer of performance by a party who is under a contract obligation to pay money. It should, to prevent interest altogether, be made on the day the money becomes due; the offer is then of the very thing promised, and, if accepted, there is a specific performance of the contract. In Massachusetts a tender afterwards could not be pleaded, and was unavailing as a defense,

subsequently assails the validity of the demand and seeks to have it canceled. *Tishomingo Savings Bank v. Buchanan*, 60 Miss. 496.

¹ *Dent v. Dunn*, 3 Camp. 290.

² *Cilley v. Hawkins*, 48 Ill. 303; *Gregory v. Wells*, 62 id. 232; *Dearle v. Barrett*, 2 Ad. & E. 82; *Green v. Shurtleff*, 19 Vt. 592; *Dunning v. Humphrey*, 24 Wend. 31. See *Mo-*

Dowell v. Keller, 4 Cold. 258; *Hopson v. Fountain*, 5 Humph. 140.

³ In *Dearle v. Barrett*, 2 Ad. & E. 82, it is assumed, or referred to as true, that a tender is pleadable to a *quantum meruit*. See note *b* to this case.

⁴ *Thompson v. Boston & M. R. Co.*, 58 N. H. 524.

until the rule was changed by statute.¹ And this is the doctrine of the English courts. There it is said a plea of tender is in truth a plea of performance of the contract as far as the party contracting can perform; and where money is to be paid, the debtor cannot pay it unless the creditor will receive it. A tender, therefore, at the time it is due is sufficient because it is payment so far as the debtor can pay, but a tender afterwards is too late.² Nothing can discharge a covenant to pay on a certain day but actual payment; acceptance afterwards may have the effect of discharge as accord and satisfaction.³ But neither in England nor Massachusetts is a tender of the debt after it is due without effect. The denial of the right to [699] plead such a tender is technical, and the benefit of it is afforded in another way. The tender, or even an offer to pay without going far enough to constitute a tender, may so negative default as to take away the right to damages, or any penalty for detention of the money. A bank was by statute subjected to additional damages at the rate of twenty-four per cent. per annum for the time it should refuse or delay payment; and demand for payment of a large sum of its bills was made, which was partially complied with; but the amount required, exceeding the specie in the vaults of the bank, there was a deficiency in the payment which was tendered after suit brought, on the day after the demand, and an additional sum for interest and costs. This tender was refused; after which the money was deposited in another bank subject to the order of the creditor, and notice thereof given to such creditor.

¹ *City Bank v. Cutter*, 3 Pick. 414; *Suffolk Bank v. Worcester Bank*, 5 id. 106; *Dewey v. Humphrey*, id. 187; *Maynard v. Hunt*, id. 240; *Frazier v. Cushman*, 12 Mass. 277.

² *Dobie v. Larkan*, 10 Ex. 776.

³ *Poole v. Tumbridge*, 2 M. & W. 223. In this case *Johnson v. Clay*, 7 Taunt. 486, is doubted.

In *Hume v. Peploe*, 8 East, 168, Lord Ellenborough, C. J., said: "In strictness, a plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract; and we

cannot now suffer a new form of pleading to be introduced different from that which has always prevailed in this case. The damages, indeed, have sometimes varied, as the rate of interest has been changed. And though the courts have adopted the practice of referring it to their officers to compute principal and interest on bills of exchange, instead of sending it to a jury to make the same computation, yet it is a matter always in the discretion of the court, and not to be obtained without motion."

Under a rule of the trial court the money was brought into court and taken by the plaintiffs. The court, by Parker, C. J., said:¹ "The tender, though not technically good as a defense, is a legal and equitable shield against the just but severe pen-

¹ *Suffolk Bank v. Worcester Bank*, 5 Pick. 106. The chief justice cites the practice in England in support of the exemption of the debtor from liability to pay interest in such cases. Referring to *Dent v. Dunn*, 3 Camp. 296, he says: "The action was brought by Dent against the executrix of Dunn on two promissory notes given by the testator in his life-time. It appeared that after his death his executrix had given her agent a sum sufficient to take up the notes. The agent offered to pay the principal and interest on having the notes delivered up to him, but they were mislaid, and so the money was not paid. The agent failed with the money in his hands. Afterwards the notes were found and the action brought. These facts were relied upon in defense of the action, but not admitted as such. A question then arose, to what time the interest should be made up. Lord Ellenborough said he thought interest ought to be stopped from the time of the offer to pay. Interest, he said, is a compensation agreed to be paid for the use of money forborne by the lender at the borrower's request. It is more frequently recovered in the shape of damages for money improperly retained by the debtor contrary to the request of the creditor. But in neither of these ways can interest run after an offer to pay the principal upon a reasonable condition, which the party to receive refuses, or is not in a situation to fulfill. And a verdict was taken for the principal and interest down to the tender. Here, it will be observed, was no legal tender. The offer to pay was after the notes

had become due, and a condition was insisted on, which, however reasonable, would have rendered the offer nugatory as a tender; but yet it had its effect, because the money was not unlawfully detained, but it was the negligence of the plaintiff in regard to the notes which prevented the payment.

"So in the case before us there was no legal tender but an offer to pay the money on the same day that the action was commenced, together with a surplus sufficient to cover the interest or penalty which had accrued, and upon the refusal to receive, the money was deposited in a bank for their use, with a notice that they might at any time draw it out. The case is more favorable for the defendants than the one cited, and it differs also in this, that there was no contract for interest, so that it could be recovered only as damages for improper detention; whereas in the case cited the promissory notes themselves were without doubt upon interest, it being stated that the offer by the agent was to pay the principal and interest. There, too, the money was lost so that the payment of the principal itself was disputed. Here the principal and interest due at the time of the offer and the costs which had accrued were at all times after the offer at the disposal of the plaintiffs. The court of common pleas in England have adopted the same just principle, and applied it more extensively as appears by the case of *Zeevin v. Cowell*, 2 Taunt. 203. The case was that after the action was commenced, and before the declaration was made out, the defendant offered to pay the debt and

alty for neglecting and refusing to redeem their bills from the time when they would have redeemed them but for the refusal of the other party to receive. We think, too, that the plaintiffs ought not to recover even simple interest after they might have received their money and refused, under the circumstances of this case. The bank bills or notes sued were promises to pay money on demand, without any engagement to pay interest. Interest was no part of the contract; but after demand and non-payment interest would be recovered in the form of damages for detention. This claim of damages might be answered before a jury by proving that it was the fault of the plaintiffs themselves that they had not received their debt, and that the money had been placed subject to their order so that the debtor could not put it to profitable use. If there were any question about the amount due the case might be

costs which the plaintiff refused to take, and proceeded to make out his declaration. The motion was that the defendant should be permitted to pay into court the debt and costs up to the time of the offer to pay; which was allowed and the plaintiff was made to pay the costs of the application and all subsequent costs. And in the case of *Roberts v. Lambert*, 2 Taunt. 283, the same order was made. This rule is exceedingly just, as it goes to repress the spirit of litigation, and punishes the party for his vexatious proceedings. These cases fully justify us in the conclusion we have come to in the present case, that the money brought in under the rule was sufficient; which having been taken out by the plaintiffs, judgment must be for the defendants for costs after that time." *Goff v. Rehoboth*, 2 Cush. 475. See *Jeter v. Littlejohn*, 3 Murph. 186; *Cornell v. Green*, 10 S. & R. 14; *Heywood v. Hartshorn*, 55 N. H. 476.

In *Donohue v. Chase*, 139 Mass. 407, 2 N. E. Rep. 84. the rates of interest stipulated for in mortgage notes varied from seven to twelve per cent. The mortgageor made an offer to pay

the sum due, which was refused unless compliance was made with an illegal demand of the mortgagee. The court observe that the debtor did all that was necessary to be done before receiving the creditor's account. He was in fault, and it would be inequitable to allow him to avail himself of his own wrongful act to secure the payment of an excessive rate of interest. The offer to pay did not amount to a legal tender, but the court reduced the subsequent interest to the legal rate.

The statute of 3 and 4 Wm. 4, c. 42, § 21, enacts: "That it shall be lawful for the defendant in all personal actions (with certain exceptions) by leave of any of the said superior courts where such action is pending, or a judge of any of said superior courts, to pay into court a sum of money by way of compensation or amends, in such action and under such regulations as to the payment of costs and the form of pleading as the said judges or such eight or more of them as aforesaid shall, by any rule or orders by them to be from time to time made, order and direct."

different; but where the sum is certain, and the creditor refuses to receive the debt, which is not by the terms of the contract on interest, and the debtor deprives himself of the use of the money, putting it under the control of the creditor without any condition, we can see no principle of law or [700] justice which will oblige the debtor to pay interest subsequently." It has also been held in Kentucky that a [701] tender after the day fixed for payment is not good.¹

¹ *Huston v. Noble*, 4 J. J. Marsh. 130. See *Gould v. Banks*, 8 Wend. 562, 24 Am. Dec. 90; *Day v. Lafferty*, 4 Ark. 450.

In *Dixon v. Clark*, 5 C. B. 365, Wilde, C. J., said: "In actions of debt and *assumpsit*, the principle of the plea of tender, in our apprehension, is that the defendant has been always ready (*toujours prêt*) to perform entirely the contract on which the action is founded; and that he did perform it as far as he was able by tendering the requisite money; the plaintiff himself precluding a complete performance by refusing to receive it. And as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prêt*), but must be accompanied by a *proferit in curiam* of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt (for that would be inconsistent with the *uncore prêt* and *proferit in curiam*), yet he will answer the action, in the sense that he will recover judgment for his costs of defense against the plaintiff,—in which respect the plea of tender is essentially different from that of payment of money into court. And, as the plea is thus to constitute an answer to the action, it must, we conceive, be deficient in none of the requisite qualities of a good plea in bar. With respect to the averment of *toujours prêt*, if the plaintiff can

falsify it he avoids the plea altogether. Therefore, if he can show that an entire performance of the contract was demanded and refused at any time when, by the terms of it, he had a right to make such a demand, he will avoid the plea. Hence if a demand of the whole sum originally due is made and refused a subsequent tender of part of it is bad, notwithstanding that, by part payment, or other means, the debt may have been reduced, in the *interim*, to the sum tendered. And this is the principle of the decision of *Cotton v. Godwin*, 7 M. & W. 147. If, however, the demand were of a larger sum than that originally due under the contract, a refusal to pay it would not falsify the *toujours prêt*, even though the amount demanded were made up of the sum due under the contract, and some other debt due from the defendant to the plaintiff. And this is the principle of the decisions of *Brandon v. Newington*, 3 Q. B. 915, and *Hesketh v. Fawcett*, 11 M. & W. 356, which appear to overrule *Tyler v. Bland*, 9 M. & W. 338.

"This principle, however, we think, is only applicable where the larger sum is demanded *generally*, and can hardly be enforced where it is explained to the defendant at the time how the amount demanded is made up; for, in such case, the transaction appears to be nothing less than a simultaneous demand of the several debts so as to falsify the averment of *toujours prêt* as to each

[702] § 386. Same subject. After a debt has become due an action accrues for the recovery of damages; the whole demand is one for their recovery, the right to which is given by law for failure to perform the contract. A tender then is not an offer of [703] strict performance, but of damages; a tender of the full amount to which the creditor is entitled, if received, is accord and satisfaction; but since the damages are certain in amount, consisting of the debt and interest, the general American doctrine is that a tender may be made after the debt is due, and may be pleaded as such. To be sufficient, however, it must include the interest up to the date it is made.¹ In cases of promises to pay in chattels or in paper money of fluctuating value a tender in kind of the thing stipulated to be paid, to be effect-

But, besides the averment of *readiness* to perform, the plea must aver an actual *performance* of the entire contract on the part of the defendant as far as the plaintiff would allow. And it is plain that where, by the terms of it, the money is to be paid on a future day certain, this branch of the plea can only be satisfied by alleging a tender *on the very day*. And this is the principle of the decisions of *Hume v. Peploe*, 8 East, 168, and *Poole v. Tumbridge*, 2 M. & W. 223. It is also obvious that the defect in the plea in this respect cannot be remedied by resorting to the previous averment of *toujours prist*. Consequently a plea by the acceptor of a bill or the maker of a note of a tender *post diem* is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding that the plea alleges that the defendant was always *ready* to pay, not only from the time of the tender (as the plea was in *Hume v. Peploe*), but also from the time when the bill or note became payable. On the same reasoning it appears to us that this branch of the plea can only

be satisfied by alleging a tender of the whole sum due under the contract, for that a tender of a part of it only is no averment that the defendant performed the whole contract as far as the plaintiff would allow. If it be said that the plea of tender is, in effect, only in preclusion of damages subsequent to the tender, and that it would be unjust to give the plaintiff those damages which have been incurred merely in consequence of his refusal to receive the money tendered, the answer is that the same argument might be applied to the instance of the tender *post diem* of the amount of a bill or note with the interest then due; but that, in each case, the defendant is unable to allege that he has performed the terms of his contract as far as the plaintiff would allow him, and is, therefore, disabled from pleading a tender."

¹ *Tracy v. Strong*, 2 Conn. 659; *Stadwell v. Cooke*, 38 id. 549; *Ashburn v. Poulter*, 35 id. 553; *Patterson v. Sharpe*, 41 Cal. 133; *Haman v. Dimmick*, 14 Ind. 105; *Livingston v. Harrison*, 2 E. D. Smith, 197; *Rudolph v. Wagner*, 36 Ala. 698. See 2 Pars. on Cont. 642, note 2.

ual, can only be made on the day appointed for payment.¹ It is only upon debts due that a tender will stop interest; a tender to pay a debt bearing interest before it is due will not have that effect.² The creditor has a right to keep his money at interest according to the contract.³ In a Wisconsin case the question arose whether a tender can be made before an interest-bearing debt becomes due by tendering interest also to the maturity of the debt. The court remarked that the question was somewhat novel in its character, and upon which authorities are not numerous, owing doubtless to the rarity of the occurrence as matter of fact. It is seldom, at least in modern times, that the debtor offers to pay before the debt is due, including interest up to the time it is due; still more seldom, such offer being made, that the creditor refuses it. The two Massachusetts cases seem to rest the decision upon the right of the creditor to keep his money at interest according to the contract. But where the debtor tenders the whole amount of the interest which could accrue up to the time of payment fixed by the contract, this reason would seem to fail. But can it not be said that the creditor may have an interest in keeping his money invested upon security, rather than to have it in his own hands? Can it not be said that he may insist on it, even arbitrarily or obstinately, and without advantage to himself, so long as the contract provides for? It would [704] seem so, unless the rule of the civil law is to prevail, which was that the day of payment was fixed for the convenience of the debtor only; that he might not be compelled to pay before that time, leaving him at liberty, however, to do so if he chose.⁴ A tender should be made before suit brought, though it may be made after the creditor has directed it to be brought,⁵ and even taken the initiatory steps.⁶ But under a rule of court

¹ *Powe v. Powe*, 42 Ala. 113; *Toulmin v. Sager*, id. 127, 94 Am. Dec. 633.

² *Ellis v. Craig*, 7 Johns. Ch. 7; *Mitchell v. Cook*, 29 Barb. 243.

³ *Id.*; *Saunders v. Frost*, 5 Pick. 259, 266; *Kingman v. Pierce*, 17 Mass. 247.

⁴ *Moore v. Cord*, 14 Wis. 213. See *Mellard v. Whetcroft*, 3 Har. & Mell.

85; 2 Par. on Cont. 642; *Tillon v. Britton*, 9 N. J. L. 120.

⁵ *Hubbard v. Chenango Bank*, 8 Cow. 88; *Fishburne v. Sanders*, 1 N. & McC. 242; *Winningham v. Redding*, 6 Jones, 125.

⁶ *Knight v. Bench*, 7 Abb. Pr. (N. S.) 241; *Retan v. Drew*, 19 Wend. 304; *Bennett v. Bayes*, 5 H. & N. 391.

the defendant may pay into court the amount he acknowledges to be due.¹ A tender made in a bill for the specific performance of a contract to convey land and an offer to bring the money due into court whenever that should be directed is sufficient to stop interest.²

The law of tender has been more or less regulated by statute in nearly all the states, and a tender is generally allowed after suit commenced; but when so made, the costs that have accrued up to that time must also be tendered.³ The tender may be made generally for the debt, interest and costs; and will be sufficient if the amount is large enough; but a tender for the debt, not mentioning costs, will not be good, though the plaintiff recover no more than is paid into court; for tenders are *stricti juris*.⁴ If at the time of the tender the debtor has no knowledge of the commencement of a suit, and the creditor does not inform him thereof, nor make any claim of costs, but refuses to accept the amount tendered solely on account of its insufficiency to pay the *debt*, it may be regarded as a waiver of all claims for costs.⁵ After judgment the only way to make a tender effectual is to bring the money into court, and move for and obtain a rule to enter satisfaction upon the record.⁶ But where a defendant, on being taken on execution under a *ca. sa.*, tendered the debt and costs to the plaintiff's attorney, and required him to sign his discharge, [705] which such attorney refused to do until the debtor paid an independent collateral demand for costs, it was held that the plaintiff and his attorney were liable to an action on the case for such refusal.⁷

SECTION 10.

PLEADING.

§ 387. **How interest claimed in pleading.** It is a rule of pleading that those damages which are implied by law, or necessarily result from the facts stated as the cause of action,

¹ *Murray v. Windley*, 7 Ired. 201, 174; *State Bank v. Holcomb*, 7 id. 47 Am. Dec. 324. 193. See *Gammon v. Stone*, 1 Ves.

² *Cheney v. Bilby*, 20 C. C. A. 201, Sr. 339.
³ 74 Fed. Rep. 52.

⁴ *Freeman v. Fleming*, 5 Iowa, 460; *Emerson v. White*, 10 Gray, 351.

⁵ *Shotwell v. Denman*, 1 N. J. L.

⁶ *Haskell v. Brewer*, 11 Me. 258; *Hull v. Peters*, 7 Barb. 331.

⁷ *Jackson v. Law*, 5 Cow. 248.

⁸ *Crozer v. Pilling*, 6 D. & R. 129.

need not be specially declared for.¹ Under this rule, interest at the legal rate, which may be claimed as damages for non-payment of money when due, may be recovered without being specially claimed in pleading.² Where, in an action for con-

¹ Padley v. Catterlin, 64 Mo. App. 629. See ch. 10.

² Ansley v. Jordan, 61 Ga. 482; Tucker v. Page, 69 Ill. 179; McConnell v. Thomas, 3 Ill. 313; Washington v. Planters' Bank, 1 How. (Miss.) 230, 28 Am. Dec. 333; Grand Lodge A. O. U. W. v. Bagley, 164 Ill. 340, 45 N. E. Rep. 538, allowing interest on insurance money. *Contra*, Farrell v. Farmers' Mut. F. Ins. Co., 66 Mo. App. 153; Petersen v. Mannix, 90 N. W. Rep. 210 (Neb.). But when interest is included in the agreement it is part of the debt agreed to be paid, and the interest promise and its breach must be alleged. In Chinn v. Hamilton, Hemp. C. C. 438, debt was brought on a promissory note for \$3,919.53, to be paid one day after date, with interest at ten per cent. from date until final payment. In the declaration the plaintiff demanded the sum of \$3,919.53, and assigned as a breach the non-payment of that sum, made no averment in relation to the interest, and concluded the breach in these words: "to the damage of the plaintiff, \$2,000." And the court say: "In actions upon obligations, or promissory notes for the payment of money, containing no stipulation in regard to interest, it has not been deemed necessary to demand in the declaration the interest that may be due, nor to negative its payment in the assignment of breaches. The uniform and settled practice is to declare for the debt alone, and interest is recovered as damages for its detention. Upon the failure to pay money at the time it is due the creditor is justly and legally entitled to be remunerated by the debtor for

the damages he has sustained by the fault of the debtor. The law has declared the amount of these damages, and fixed them at the rate of six per cent. per annum, and allowed the parties to the contract to vary this rate, so that in no case shall it exceed the rate of ten per cent. per annum upon the amount loaned or withheld. In lieu of the damages that the creditor would be entitled to recover for the unjust detention of the debt the law has given interest; and although the law denominates it interest, it is in fact the damages which the creditor has sustained. He is therefore always allowed to recover the interest due at the rendition of the judgment as damages for the detention of the debt. But in cases where the parties stipulate in the contract for the payment of interest before the debt falls due, the interest cannot be regarded in the light of damages, but constitutes a part of the contract itself. The interest in this case accrues by the stipulations of the contract, and not as a legal consequence of a breach. It cannot be in the nature of damages, for it arises before any infraction of the contract or failure to perform it. . . . The promise to pay the debt, and the promise to pay interest from the date of the contract, are two separate, distinct promises or undertakings; one may be performed without performing the other. In declaring upon a covenant or a parol contract in writing containing various undertakings, the plaintiff has his election to complain of the breach of one or of all of the covenants or promises. If he complains of the breach or the non-per-

version, the damages asked largely exceeded the recovery, it was proper to allow interest, although it was not specifically demanded. "Since it was immaterial whether the interest was recovered as damages or as interest, it was equally imma-

formance of one only of the covenants or promises, he thereby admits that the others have been performed. The intendment is to be made most strongly against the pleader, and as he complains of the breach of only one of the covenants or obligations, the presumption arises that the others have been performed. It, at all events, waives any right of action upon them; for, having sued upon the contract once, he is forever barred from suing again. It will not be allowed to split up the various covenants or promises contained in one contract and sue upon each of them — he can have but one recovery upon one contract, which then becomes merged in the judgment of the court.

"If the foregoing remarks are well founded the declaration is not defective. Can the plaintiff in this case recover interest after the debt becomes due; and if he can, at what rate? He is entitled to recover interest as damages for the detention of the money after it became due, and where the contract is silent the law fixes the rate at six per cent. per annum; but when the contract fixes the rate of interest at ten per cent., the law declares that to be the rate. In this case the contract is set out in the declaration, and fixes the rate of interest at ten per cent. per annum; consequently the plaintiff is entitled to recover interest at the rate of ten per cent. per annum. The fact that the parties have agreed upon the rate of interest does not change the nature of interest after the debt becomes due; but it is still justly regarded in the nature of damages for the failure to pay at the time stipulated by the parties."

But in *De Groot v. Darby*, 7 Rich. 120, Whitner, J., said: "The plaintiff claims interest in this case. The action was for goods sold and delivered. The declaration contained no count for interest, and although it did contain the usual count for money had and received, the bill of particulars, we are informed in the course of the argument, was for goods alone, and without any item for interest. It cannot be said, in the ordinary transaction of the sale of goods, that interest is an incident of the contract itself. The first inquiry is whether there was a special agreement to pay interest, *eo nomine*, or to do something towards the payment of an admitted sum. That would imply a promise; for in no just sense can it be maintained that the interest constitutes a part of the price of the goods. I do not understand this principle to be drawn into controversy. Cases in our own state are numerous in reference to such contracts as carry interest with them. Harp. 83; 1 Hill, 393; 3 McCord, 505; 2 Bailey, 394. The mere statement of such a proposition, it would seem, discloses the necessity of its appearance in pleading in some form. The very object of all pleading is to advertise the party sought to be charged of the matter or thing claimed. Hence the necessity of a declaration; and when according to our forms and the nature of the demand it might otherwise be too general, hence the propriety of a bill of particulars. The law abhors surprise and undue advantage, and therefore requires all reasonable certainty. In this particular case the party would be wholly at sea if he may be made liable for that which is outside of

terial whether it was demanded in the prayer of the complaint as the one or the other."¹ If the action is brought upon an express promise to pay money, and the con- [706] tract set out includes a promise to pay interest at a given rate which it is lawful to stipulate for until the debt is paid, a general breach with an *ad damnum* large enough to cover the principal and interest will entitle the plaintiff to recover interest to the date of the judgment at the contract rate.² [707] It has been held in Alabama, however, that, in general, a court

the contract set forth, which in no way springs from it as an incident, which, though susceptible of allegation, is neither set out by special count nor notified in the bill of particulars. Such a rule would be obnoxious to the double implication of surprising the defendant and of giving to the plaintiff what he has not asked for. On the contrary, that is but a reasonable rule which requires such an advertisement at least as may enable the parties to prepare to meet proof by proof, that the truth may be known."

This decision is not adverse to that in the preceding case, if interest by agreement was sought to be recovered, before the account was due, or put upon interest by demand or unreasonable delay. But if it is deemed necessary to specifically claim interest on an account after it is due, and after interest would accrue by reason of default in payment, then it would seem to be in conflict with the principle universally recognized that those damages which are implied by law need not be specially claimed.

The true distinction is pointed out in *Adams v. Palmer*, 30 Pa. 346, where it was held that where a usage of trade has fixed a period at which book-accounts bear interest, this becomes a law of the contract, and it is not necessary to demand it in the copy of the claim filed. *Hummel v. Brown*, 24 Pa. 310; *Watt v. Hoch*, 25

id. 411. If a bargain, however, exists for interest at an earlier period than the usage would allow, or if a special contract be relied on as giving it, then it must be set forth in or added to the copy of the claim; otherwise the plaintiff cannot include it in his judgment.

¹ *New Dunderberg Mining Co. v. Old*, 38 C. C. A. 89, 97 Fed. Rep. 150.

² *Camp v. First Nat. Bank*, — Fla. —, 33 So. Rep. 241; *Chinn v. Hamilton*, Hemp. C. C. 438; *McConnell v. Thomas*, 3 Ill. 313.

In the last case suit was upon a note payable in a year, with interest at the rate of thirty per cent. per annum from date until paid. Breach assigned: "yet the debt remains unpaid; wherefore the plaintiff prays judgment for his debt and damages for the detention of the same." A verdict was given for debt and interest, and it was held right. The "debt" in that case included the principal and interest to the time of the action.

In *Nunnelle v. Morton*, Cooke, 21, an action of debt on a judgment in which interest was specifically asked for, it was at first a question whether the claim of interest did not render the demand uncertain. But, with some hesitation, the court held that the amount of the judgment could be claimed as a debt, and the interest from its rendition as damages.

of equity will not decree interest on a balance unless it is specially asked for in the bill; but this rule only applies to interest due at the filing of the bill. When interest accrues subsequently it is the practice of the court, upon further directions, to order that it be computed, although there is no prayer to that effect.¹ In an action for an accounting interest should be asked for,² and so in an action to enforce payment of an account,³ and in condemnation proceedings.⁴

A claim against the estate of a decedent will support an allowance of interest though it was not specifically mentioned upon the principle that interest may be allowed on money illegally withheld, or property converted without proof of special damage. It is the common practice in actions for breach of contract to allow interest without a special averment. Whether the liability was for an unlawful conversion or for breach of contract, the same is true.⁵ But as interest before the maturity of the principal is the creature of contract, no case can be made for the recovery of such interest without alleging the contract and a breach of it.⁶ A demand for principal and interest on a covenant to pay a specific sum with interest is divisible.⁷

Under the code, an office judgment in case of failure to answer is authorized to be taken for the amount specified in the summons; if an answer is filed judgment may be rendered for the principal, and interest added thereto, though the complaint only prays for judgment for the principal.⁸ Interest may be allowed from the time action was begun in a default

¹ Godwin v. McGehee, 19 Ala. 468. See Mills v. Heeney, 35 Ill. 173; Carter v. Lewis, 29 Ill. 500; Prescott v. Maxwell, 48 id. 82; Heiman v. Schroeder, 74 id. 158.

Under a demand for a specified sum with interest and costs, judgment cannot be recovered on the interest due on the judgment sued upon anterior to the time suit was begun. Haven v. Baldwin, 5 Iowa, 403. See David v. Conard, 1 G. Greene, 336.

² Cheney v. Ricks, 187 Ill. 171, 58 N. E. Rep. 234.

³ Van Riper v. Morton, 61 Mo. App. 440.

⁴ Cunningham v. San Saba County, 11 Tex. Civ. App. 557, 563, 32 S. W. Rep. 928.

⁵ Dayton v. Estate of Dakin, 103 Mich. 65, 61 N. W. Rep. 349.

⁶ Chinn v. Hamilton, Hemp. C. C. 438, quoted from *supra*; McConnell v. Thomas, 3 Ill. 313.

⁷ McClure v. Cole, 6 Blackf. 290; Verney v. Iddings, 2 Chitty, 234.

⁸ Cassacia v. Phoenix Ins. Co., 28 Cal. 628; Corcoran v. Doll, 32 Cal. 82.

judgment, although the damages were unliquidated and there was no specific prayer therefor in the complaint.¹ If the right to interest depends upon a demand, the time of making it must be alleged, or interest will be computed only from the commencement of the action.² Under the code of Colorado, which requires only a statement of the cause of action in ordinary language, a count in a complaint based on an account stated, which alleges facts from which the law implies a promise to pay, is good though the promise is not alleged, and will sustain a judgment allowing interest.³

If there are two defendants, only one of whom answers, it is error to allow judgment against both for interest, the relief asked for not including interest.⁴ No greater rate of interest can be recovered than is asked for.⁵ If it is sought to recover interest in excess of the statutory rate as damages by reason of the special contract between the parties, the declaration should apprise the defendant of the claim therefor in order to warrant its recovery.⁶

SECTION 11.

INTEREST DURING PROCEEDINGS TO COLLECT A DEBT.

§ 388. Interest on verdict before judgment. When the cause of action is such as to carry interest, and judgment is delayed after verdict by the act of the defendant, by an unsuccessful motion for new trial or writ of error, in New York the plaintiff was held entitled to interest on the entire amount of the verdict for the time of the delay, to be taxed as [709] part of the general costs in the cause.⁷ Interest is so allowed in cases where the contract sued on carries it,⁸ but only for

¹ *Whereatt v. Ellis*, 68 Wis. 61, 30 N. W. Rep. 520, 31 id. 762.

² *Hall v. Farmers' & Citizens' Bank*, 55 Iowa, 612, 8 N. W. Rep. 448.

³ *Mine & Smelter Supply Co. v. Parke & Lacy Co.*, 47 C. C. A. 34, 107 Fed. Rep. 581.

⁴ *Pickett v. Handy*, 9 Colo. App. 357, 48 Pac. Rep. 870.

⁵ *Merchants' Savings Bank v. Moore*, 5 Kan. App. 362, 48 Pac. Rep. 455; *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. Rep. 711, 16 id. 770.

⁶ *Camp v. First Nat. Bank*, — Fla. —, 33 So. Rep. 241. See *Ashby v. Shaw*, 82 Mo. 70.

⁷ *Lord v. Mayor*, 3 Hill, 426; *People v. Gaines*, 1 Johns. 343; *Vredenberg v. Hallett*, 1 Johns. Cas. 27; *Henning v. Van Tyne*, 19 Wend. 101; *Williams v. Smith*, 2 Cal. 253; *Bull v. Ketchum*, 2 Denio, 188; *Bisell v. Hopkins*, 4 Cow. 53.

⁸ *Vredenberg v. Hallett*, *supra*.

the period during which the plaintiff has been delayed in obtaining judgment by the act of the defendant.¹ In other jurisdictions interest during this interval has been computed and added to the judgment.²

If the demand sued for is of such a nature that it carries interest before verdict the plaintiff's right thereto between verdict and judgment for him, when there is delay by the act of the defendant, rests upon sound principles. The fact that he disputes his liability, or the amount of it, does not suspend interest before verdict; nor should the pendency of a defendant's motion for a new trial, or in arrest of judgment on untenable

¹ Bull v. Ketchum, 2 Denio, 188; Vail v. Nickerson, 6 Mass. 261. See Buckman v. Davis, 28 Pa. 211.

Where the verdict was taken subject to the opinion of the court on a case to be made and the plaintiff rested nearly thirty years before having judgment entered, he was allowed interest only from its entry. Redfield v. Ystalyfera Iron Co., 110 U. S. 174, 3 Sup. Ct. Rep. 570.

Where the court refused to receive the verdict in a tort action until required to do so by the supreme court, the plaintiff's right to interest did not accrue until the mandate of the latter court was acted upon by the trial court. Kansas City, etc. R. Co. v. Berry, 55 Kan. 186, 40 Pac. Rep. 288.

² Kansas City, etc. R. Co. v. Berry, *supra*; Griffith v. Baltimore & O. R. Co., 44 Fed. Rep. 574.

Interest may be computed from the day the verdict was rendered, whether the action be tort or contract. Gibson v. Cincinnati Enquirer, 2 Flap. 88; Sproat's Ex'r v. Cutler, Wright, 157; Winthrop v. Curtis, 4 Me. 297; Johnston v. Atlantic, etc. R. Co., 23 N. H. 410; Weed v. Weed, 25 Conn. 494; Renthner v. State, 3 Ind. 84; Carson v. Germania Ins. Co., 62 Iowa, 433, 17 N. W. Rep. 650. But not from the first day of the term

in which it was rendered. Gibson v. Cincinnati Enquirer, *supra*.

In South Dakota if the recovery is for the breach of an obligation not arising out of contract the allowance of interest is within the discretion of the jury. Hollister v. Donahoe, 92 N. W. Rep. 12.

Interest is not to be added to the verdict on motion. By failing to ask for an instruction awarding it the right is waived. Parsons v. Jameson, 70 N. H. 625, 46 Atl. Rep. 687.

In Irvin v. Hazelton, 37 Pa. 465, a verdict was taken in 1853; no further proceeding was had until 1860, when judgment was entered for the amount of the verdict, with interest from its date. The allowance of interest was held, on error brought, to be proper. Strong, J., said: It "was in substance, an exercise of the ordinary and well recognized power of entering a judgment *nunc pro tunc*; and if they had the power, we must presume, in the absence of reasons to the contrary, that it was rightfully exerted." Referring to Kelsey v. Murphy, 30 Pa. 340, he said the learned judge in that case "denied that interest was a necessary incident to a verdict." The case called for nothing more, and nothing more ought to be considered as decided by it.

grounds, suspend it between verdict and judgment.¹ The same rule has been applied to tort actions.² As interest, regulated by law or the agreement of the parties, is a definite measure [710] of damages not requiring testimony to prove or a jury to de-

¹American Nat. Bank v. National Wall Paper Co., 23 C. C. A. 33, 77 Fed. Rep. 85; Swails v. Cissna, 61 Iowa, 693, 17 N. W. Rep. 39; Dowell v. Griswold, 5 Sawyer, 23.

The reasoning in *Kelsey v. Murphy*, 30 Pa. 240, which seems to be disapproved in the later case of *Irvin v. Hazleton*, 37 Pa. 465, is plausible; but interest, in general, is not refused upon such grounds. Thompson, J., says: "Interest has been defined 'to be a compensation for delay of payment by the debtor,' and is said to be impliedly due 'whenever a liquidated sum of money is unjustly withheld.' 10 Wheat. 440. And again—but rather by way of amplification—it is said 'to be a legal and uniform rate of damages allowed in the absence of any express contract when payment is withheld after it has become the duty of the debtor to discharge the debt.' From these definitions, differing but little in essentials, two things must necessarily pre-exist to raise this duty on the part of the debtor; namely, the ascertainment of the amount to be paid, and its maturity. If these essentials are wanting, the debt, although existing, cannot be said to be due and withheld, and the duty to pay has not become imperative upon the debtor. Unliquidated demands, past due, will, if otherwise entitled, bear interest, upon the maxim of *ad certum*, etc. They can be rendered certain. But while the question of indebtedness, under all the ascertained facts in the case, is

in abeyance, as is the case on a motion for a new trial, the contract of the debtor is suspended. The case is *gremio legis*, and is presumed to be held under consideration by the ministers of the law. The debtor can neither pay nor tender so as to avail anything, even if disposed to abandon the contest. It is emphatically, and in truth, the 'law's delay.' It is an incident, inseparable from the civil machinery that the law puts in operation to ascertain the truth between man and man, and until the process is gone through with it presumes that errors may exist, and hence not only indulges such delays, occasionally, but sometimes brings out of them the finest achievements of its mission." See *Hoopes v. Brinton*, 8 Watts, 73.

In *Johnson v. Atlantic, etc. R.*, 43 N. H. 410, it was held that interest between verdict and judgment upon the amount of the verdict should be added in rendering judgment. Such a motion was made and denied by the trial court. Bellows, J., said: "Upon the facts reported we are of opinion that the allowance of interest upon the amount of the verdict would have accorded with the general course of practice in this state, and is sustained both by principle and authority. Up to the time of the decision of *Robinson v. Bland*, 2 Burr. 1085, the general principle appears to have been the other way in England, and even to allow no interest after the commencement of the action. But the question was much

²*Hilton v. State*, 60 Neb. 421, 83 N. W. Rep. 354; *Missouri Pacific R. Co. v. Fox*, 60 Neb. 531, 555, 83 N. W.

Rep. 744; *Fremont, etc. R. Co. v. Root*, 49 Neb. 914, 69 N. W. Rep. 397.

cide, there is no difficulty in the matter of practice in allowing [711] it to run until judgment. The right and the convenience of practice concur to favor the allowance. Interest during this period, however, is not universally allowed. In Maryland,

discussed in that case by Lord Mansfield, and the allowance of such interest in general put upon very solid ground; holding that 'nothing can be more agreeable to justice than that the interest should be carried down quite to the actual payment; but as that cannot be, it should be carried on as far as the time when the demand is completely liquidated;' and he says he 'don't know of any court in any country which does not carry interest down to the time of the last act by which the sum is liquidated.' The recovery in this case was for money loaned, which was found by a special verdict to be £300. and to that interest was added by the court to the rendition of the judgment; and there are remarks which seem to point to a distinction, in this respect, between actions of *assumpsit* and actions of trespass and the like; but the general course of the reasoning applies to both kinds of actions. The decision accords also with the course of practice of courts of equity, where interest, after the master's report, is usually added in making up the decree. 2 Dan. Ch. Pr. 1442, and notes; *Brown v. Barkham*, 1 P. Wins. 652, and *Perkyns v. Baynton*, 1 Bro. Ch. 574. The general doctrine of these cases is recognized in *Vredenbergh v. Hallett*, 1 Johns. Cas. 27; *People v. Gaine*, 1 Johns. 343; *Williams v. Smith*, 2 Cai. 253; *Lord v. Mayor*, 3 Hill, 426; *Bull v. Ketchum*, 2 Denio, 188; *Vail v. Nickerson*, 6 Mass. 262; *Winthrop v. Curtis*, 4 Me. 297. In many or most of these cases, the allowance of interest upon the amount of the verdict is confined to cases where the delay was caused by the

act of the defendant; and now, by statute in New York, this distinction is disregarded. By our statute interest is now payable on all executions in civil actions from the time judgment is rendered. Comp. St. 296, sec. 6. And it will be perceived that no distinction is made as to the nature of the action in which the judgment is rendered; and it will also be observed that this law carries out the suggestion of Lord Mansfield, that justice requires that interest should be carried down to the time of payment. The verdict of the jury, if judgment is rendered upon it, must be regarded as showing the amount justly due at the time it is rendered, and, in most cases, whether *ex contractu* or *ex delicto* interest, *eo nomine*, is included in the verdict, at least from the commencement of the suit; and in the other cases it may reasonably be supposed that it is in some form taken into account. No solid reason, we think, can be given for withholding the interest between the finding of the jury and the rendering of judgment, as it is quite clear that, under our law and practice, interest should be allowed at all other times from the commencement of the suit at least until payment and satisfaction of the judgment.

"In *Bull v. Ketchum*, 2 Denio, 188, the defendant delayed judgment for a time by proceedings designed to set aside the verdict, but abandoned them; and the plaintiff afterwards took steps attended with delay for a new trial, the motion for which was denied. Interest was allowed on the verdict and taxed with the costs for the time judgment was delayed by

West Virginia, Colorado, Georgia and Louisiana it is denied.¹ Under a statute allowing interest after ascertainment of the balance due, where a judgment for the defendant was reversed and a new trial resulted in a judgment for the plaintiff, his right to interest was limited to the rendition of the second verdict.² If a fund in court is subject to lien claims of different priorities interest is allowable only from the date of decree.³ So far as the federal courts are concerned, the question of interest generally, as well as the matter of allowing it between verdict and judgment, is one of local law.⁴ It has been suggested, however, that if the allowance of interest in the latter case rested solely upon a statute permitting its recovery on judgments, it is difficult to see how it could be computed upon verdicts, "inasmuch as the specific allowance of interest upon judgments would seem to exclude the inference that interest should be allowed upon verdicts before judgment."⁵ Interest on costs runs only from the entry of judgment.⁶ The right to recover interest on the verdict rests upon the law of the state in which the cause of action arose.⁷

§ 389. *On judgments pending review.* On general principles, a judgment or money decree bears interest from the time of being pronounced unless a different time is fixed for payment, because the moneys so adjudged or decreed are liquidated and due. But interest on such debts, being allowed only as damages for detention of money which ought to be paid, can

the defendant, and then ceased; and no interest was given while the plaintiff's motion for new trial was pending."

A verdict of a stated sum "with interest" in an action on a contract which provided for payment in instalments, the amount of principal found due being less than the last instalment, was construed to mean with interest from the maturity of such instalment. *Van Winkle v. Wilkins* 81 Ga. 93, 12 Am. St. 299, 7 S. E. Rep. 614.

¹ *Baltimore City R. Co. v. Sewell*, 37 Md. 443; *Fowler v. B. & O. R. Co.*, 18 W. Va. 579; *Hawley v. Barker*, 5 Colo. 118 (under statute); *Bonner v.*

Copley, 15 La. Ann. 501; *Guernsey v. Plunizy*, 113 Ga. 898, 39 S. E. Rep. 402. See *Equitable L. Assur. Society v. Trimble*, 27 C. C. A. 404, 83 Fed. Rep. 85.

² *Priest v. Eide*, 19 Mont. 53, 47 Pac. Rep. 206, 958.

³ *Jourolmon v. Ewing*, 29 C. C. A. 41, 85 Fed. Rep. 103.

⁴ *Massachusetts Benefit Ass'n v. Miles*, 137 U. S. 689, 11 Sup. Ct. Rep. 234.

⁵ *Id.*

⁶ *Matter of MacFarlane*, 65 App. Div. 93, 72 N. Y. Supp. 723.

⁷ *Fronnfelker v. Delaware, etc. R. Co.*, 73 App. Div. 350, 76 N. Y. Supp. 745.

only be recovered by action or judicially awarded in a pending proceeding. A ministerial officer, with the usual process [712] for carrying into execution the judgment or decree, cannot assess and collect such interest as part of the debt he is authorized and required to levy unless he is empowered to do so by statute or by the execution.¹ A defendant in an execution is not chargeable with interest upon the debt due by him beyond the return day of the writ, although the plaintiff does not receive his money, unless the delay is occasioned by the former.²

In the distribution of a fund raised by a sheriff's sale interest is allowable on a mechanics' lien to the date of sale only, and not to that of distribution.³ In an action upon an interpleader bond conditioned that the property shall be forthcoming on the determination of the issue, the issue is determined when judgment is rendered, not on the return of the verdict.⁴ If the real estate of an insolvent's estate is sold by order of court to pay debts, creditors can claim interest only up to the return-day of the order of sale.⁵ But if the estate is solvent interest may be recovered until payment is made.⁶ Upon sale or confirmation of sale of the debtor's property to satisfy the debt, interest ceases to run.⁷ In case of the sale by an assignee for the benefit of creditors under the Pennsylvania act of 1876, interest upon the liens divested ceases on final confirmation of the sale.⁸ In the case of distribution of the property of a decedent in the ordinary administration of his estate, specialty creditors are entitled to interest until the order of distribution.⁹ The same rule is applicable to the distribution of the assets of an insolvent bank.¹⁰

Unless a new judgment is rendered by the appellate court,

¹ Klock v. Robinson, 22 Wend. 157.

² Strohecker v. Farmers' Bank, 6 Watts, 96.

³ Allen v. Oxnard, 152 Pa. 621, 25 Atl. Rep. 568.

⁴ Lowenstein v. Seff, 6 Pa. Dist. Rep. 533.

⁵ Sollenberger's Estate, 8 Pa. Dist. Rep. 626; Ramsey's Appeal, 4 Watts, 71.

⁶ Yeatman's Appeal, 102 Pa. 297.

⁷ Strohecker v. Farmers' Bank, 6 Watts, 96; McCruden v. Jonas, 6 Pa. Dist. Rep. 146.

⁸ Carver's Appeal, 89 Pa. 276; Tomlinson's Appeal, 90 Pa. 224.

⁹ Shultz's Appeal, 11 S. & R. 182.

¹⁰ Estate of Bank of Pennsylvania, 60 Pa. 471; Bank Commissioners v. Security Trust Co., 70 N. H. 536, 49 Atl. Rep. 113.

or by its direction, all damages pending the review must be awarded in its judgment of affirmance; the adjudication below remains; if affirmed, it is available from the time it was made; and interest is not suspended by appeal, writ of error or *certiorari*. It may be collected by suit or by execution, legally including accruing interest, as though no proceedings had been had in an appellate court.¹ A district court sitting as a court of admiralty which has awarded a decree including interest cannot, after the modification thereof and the receipt of the mandate of the reviewing court directing the entry of a decree for a specified sum, give interest thereon from the time the libellant's cause of action accrued.² If a judgment carrying interest is reversed and judgment directed to be given for a larger sum with interest, the allowance of interest is to be made by the trial court from the same date as its original judgment.³ Where leave was granted a defendant to appeal from a judgment on paying into court the amount thereof with one year's interest, and the appeal was kept pending for two years and a half, when it lapsed for lack of prosecution, the plaintiff was entitled to interest from the expiration of the year for which it had been paid to the receipt of the certificate showing the dismissal of the appeal.⁴

Under a system of practice by which, on appeal or writ of error, a final judgment is entered in the appellate court, the new judgment will of course embrace the former, in case of affirmance, as well as the costs and damages incident to the appeal or writ of error. But where the appeal is from a judgment of a single judge to the general term, as in New York, both judgments being in the same court, the general term does

¹In *Lord v. Mayor*, 3 Hill, 426, a judgment of affirmance was rendered on *certiorari*, and this judgment affirmed on writ of error in the court of last resort. The final judgment of affirmance expressly awarded to the successful party interest from the date of the judgment of affirmance below, and a question arose whether the right to interest from the rendition of the original judgment to the first affirmance was thereby taken away. It was held

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that the adjudication below being affirmed remained available from the time it was made, and such interest was allowed. *McLimans v. Lancaster*, 65 Wis. 240, 26 N. W. Rep. 566.

²*Brown v. Merritt Wrecking Organization*, 28 C. C. A. 38, 83 Fed. Rep. 720.

³*Everett v. Gores*, 92 Wis. 527, 66 N. W. Rep. 616.

⁴*Smart v. O'Callaghan*, 4 Viet. L. R. (law) 148.

not enter a new judgment on affirmance for the original claim; but it declares that it is satisfied to let the former judgment stand, and therefore merely affirms it. The judgment of affirmance is added to the original judgment roll, and in case of appeal to the court of last resort the whole case is carried up; but the former judgment is not thereby vacated.¹ Under this practice the judgment of affirmance should not include interest on the judgment which is affirmed. It has become the established practice in that state to exclude from the judgment of affirmance all sums secured by the judgment in the court below.²

In an equity case the mandate of the supreme court directed the court of chancery to make a decree that the plaintiff should pay the defendant a certain sum as damages for an injunction, but directed nothing in respect to the interest on the same; and the court of chancery made the decree granting interest only from the date thereof. It was held that the decree was, in this respect, in accordance with the mandate, the plaintiff not being in default for not paying the damages until it was made; and therefore not liable for interest prior thereto. The defendants having appealed from the decision refusing interest, the plaintiff was also held not liable to pay interest while the cause was in the supreme court on appeal, but only from the time it was remanded to the court of chancery.³ In Tennessee upon the affirmance of a money decree rendered by the court of chancery appeals the supreme court will enter a new judgment embracing the amount of the decree, with interest thereon from the date of its rendition to the date of its affirmance.⁴ Where the original decree on a creditor's bill was reversed in part, it was proper for the court on a second hearing to compute interest on the judgments from their dates, rather than on the sums found by the first decree.⁵

In Pennsylvania, on affirmance of a judgment in the appellate court on error, interest is to be charged on the judgment below till affirmance, and then the aggregate is to bear inter-

¹ *Eno v. Crooke*, 6 How. Pr. 462.

Vanvalkenbergh v. Fuller, 6 Paige, 10.

² *Beardsley Scythe Co. v. Foster*, 36 N. Y. 561; *Halsey v. Fink*, 15 Abb. Pr. 367. See *Dougherty v. Miller*, 38 Cal. 548.

⁴ *Cowan v. Donaldson*, 95 Tenn. 327, 32 S. W. Rep. 457.

⁵ *Dilworth v. Curts*, 139 Ill. 508, 29

³ *Sturges v. Knapp*, 36 Vt. 439. See N. E. Rep. 861.

est; and this results from the statute giving interest on every judgment. Whenever a judgment is given it is understood that interest on any former judgment in the same action is to be charged.¹

Where the damages for delay during an unsuccessful appeal or other mode of review by an appellate court are subject to the determination of that court, its judgment controls the question of interest between the rendition of the judgment below and its affirmance in the superior court.² If a new trial upon the facts takes place on appeal, interest is to be computed in the appellate court on such trial as though no previous trial had been had, and not on the judgment appealed from.³

If the successful party in the trial court withdraws funds in litigation after an adjudication adverse to intervenors, and such judgment is reversed, and on a second trial they are successful, the party who has the funds will be liable for interest from the time they came to his possession.⁴ Intervenor who secure the payment of money into court to abide the further order thereof are not liable for interest while it is detained there under an erroneous order, though they fail to establish their right to it.⁵ On the reversal of a judgment turning over a fund to claimants, they are chargeable with interest received by them pending the determination of the appeal, less expenses incurred in managing the fund.⁶ The complainant in a bill in the nature of a bill of interpleader is not liable for interest on the fund which he deposits in court at the commencement of suit if he is not responsible for delays occurring in the course of the litigation.⁷

¹ McCausland v. Bell, 9 S. & R. 388. See Brigham v. Van Buskirk, 6 B. Mon. 197; Young v. Pate, 3 J. J. Marsh. 100; Smith's Adm'r v. Todd's Ex'r, id. 306, 20 Am. Dec. 112.

² Butcher v. Norwood, 1 H. & J. 485; Contee v. Findley, id. 331. See Kelsey v. Murphy, 30 Pa. 340.

³ Tindall v. Meeker, 2 Ill. 137. See Eno v. Crooke, 6 How. Pr. 462.

⁴ Heidenheimer v. Johnson, 76 Tex. 200, 13 S. W. Rep. 46.

⁵ Van Gordon v. Ormsby, 60 Iowa, 510, 15 N. W. Rep. 306.

Money paid into court in satisfaction of a decree and for distribution does not bear interest in favor of the party who is entitled thereto pending an appeal, though the order of distribution is changed; but money to which the party was not entitled bore interest against him. Whitall v. Cressman, 18 Neb. 508, 26 N. W. Rep. 245.

⁶ Independent Foresters v. Kellher, 36 Ore. 501, 78 Am. St. 785, 59 Pac. Rep. 324, 60 id. 563.

⁷ Groves v. Sentell, 13 C. C. A. 286.

By section twenty-three of the judiciary act of 1789¹ it was [714] provided that when the supreme or circuit court should affirm a judgment or decree they should adjudge or decree to the respondent in error just damages for his delay, and single or double costs, at their discretion. Under this law there was no distinction made between cases in equity and at law. In either the allowance of damages in addition to the amount found to be due by the judgment or decree of the court below was confided to the official discretion of the appellate court. If, upon affirmance, no allowance of interest or damages was made, it was equivalent to a denial of either, and the court below, in carrying into effect the judgment or decree of affirmance, could not enlarge the amount thereby allowed, but was limited to the mere execution of the mandate in the terms in which it was expressed.² That court, in 1803 and 1807, made

66 Fed. Rep. 179. In *Spring v. Insurance Co.*, 8 Wheat. 270, the complainant was required to pay interest on the fund because he had not paid it into court. In *Richards v. Salter*, 6 Johns. Ch. 445, interest was not required because the complainant had, with all reasonable diligence, paid the money into court.

¹ See § 1010, R. S. of U. S.

² This rule is not applicable when the question is whether interest shall be allowed on a verdict when an erroneous judgment thereon has been reversed, and direction given by the supreme court to enter the proper judgment in favor of the prevailing party. In *Kneeland v. American Loan & Trust Co.*, 138 U. S. 509, 11 Sup. Ct. Rep. 426, a decree was reversed for error in a part of the sum for which it was given, another distinct part being approved. The mandate was to strike out certain allowances and to allow others as fixed, nothing being said as to interest. Upon that order the circuit court gave a second decree, allowing interest from the date of the first decree, which decree, upon a second appeal, was affirmed.

Per Woods, C. J., in *Metcalf v. Wassertown*, 16 C. C. A. 37, 42, 68 Fed. Rep. 859.

In the case last referred to the trial court made a finding of facts from which the sum due the plaintiff for principal and interest, if he was entitled to recover, could be computed, but gave the defendant judgment. This judgment was reversed and the entry of judgment for the plaintiff on the finding was directed by the supreme court. The circuit court of appeals ruled that the plaintiff was entitled, under a local statute, to interest on the finding to the entry of judgment on the mandate of the supreme court upon the whole amount of principal and interest due him when the finding was made. The local statute forbidding the compounding of interest was not applicable; it and the statute allowing interest on verdicts must stand together.

If the right of equitable recovery has been settled by the supreme court and nothing remains for the court of original jurisdiction to consider except the amount for which

rules by which its discretion was guided. By the seventeenth rule, when a case appeared to be brought merely for delay, damages were awarded at the rate of ten per cent. on the amount of the judgment; and by the eighteenth rule, the damages were to be at the rate of six per cent., when it appeared that there was a real controversy.¹ Now, by the twenty-third rule, [715] interest and damages are thus regulated:

"1. In cases where a writ of error is prosecuted to this court,

judgment shall be given, if no intimation to the contrary has been given the latter court will allow interest from the filing of the bill. *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 9 C. C. A. 468, 61 Fed. Rep. 237.

¹ *Perkins v. Fourniquet*, 14 How. 338. In this case Taney, C. J., referring to *Mitchell v. Harmony*, 13 How. 115, said: "The judgment brought up by the writ of error was rendered in the circuit court of New York, and was affirmed by this court. The sum recovered was large, and interest, even for a short time, was therefore important. And counsel for Harmony, the defendant in error, moved the court to allow him the New York interest of seven per cent. upon the amount of the judgment, and that the interest should run until the judgment was paid." But as the rules [mentioned in the text] were still in force, the court held that he was entitled to only six per cent., to be calculated from the date of the judgment in the circuit court to the day of affirmance here. The case now before us was decided in the early part of the last term, before the case of *Mitchell v. Harmony*, and consequently falls within the operation of the same rules, and damages upon the affirmance of the decree must be calculated in a like manner. Indeed, in the New York case, the claim for interest stood on stronger ground than the present one, for that was an action at law. The act of

1842, therefore, applied to the judgment in the circuit court, and it would have carried the state interest until paid, if it had not been brought here by writ of error. But this is a decree in equity, and not embraced in the act of 1842, and, according to the settled chancery practice, no interest or damages could have been levied under process of execution upon the amount ascertained to be due and decreed to be paid if there had been no appeal. 2 Ves. 157, 168, n. 1, Sumn. ed.; 2 Dan. Chan. Pl. & Pr. 1442, 1437, 1438. Nor could any damages or interest have been given on its affirmance here but for the discretionary power vested by the act of 1789." *Boyce v. Grundy*, 9 Pet. 275.

In *Hoyt v. Gelston*, 15 Johns. 221, it was said: "This court cannot pronounce any new judgment in this case. It can only carry into effect the judgment of the supreme court of the United States. In the computation of interest, therefore, the taxing officer must not go beyond the time of the judgment of affirmance, that being the last act of the court above. The practice in this respect in our state courts is regulated by statute, which cannot apply to this case." See same case, 3 Wheat. 246, 236. See, also, *Himely v. Rosa*, 3 Cranch, 313; *Kilbourne v. State Savings Inst.*, 22 How. 503; *Hennessy v. Sheldon*, 12 Wall. 440; *Insurance Co. v. Huchbergers*, id. 160.

and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment is rendered.¹

“2. In all such cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.²

“3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.³

“4. In cases in admiralty, interest shall not be allowed unless specially directed by the court.”⁴

¹ Adopted 1803, 1851.

625, 2 Sup. Ct. Rep. 827; *Whitney v.*

² Adopted 1803, 1871.

Cook, 99 U. S. 607.

³ See *Schell v. Cochran*, 107 U. S.

⁴ Adopted 1884.

CHAPTER IX.

EXEMPLARY DAMAGES.

- § 390. Compensation for wrongs done with bad motive.
 391-393. Exemplary damages; difference of views; **when allowed.**
 394. Malice in law and malice in fact.
 395. Restriction and denial of exemplary damages.
 396. Same subject; New Hampshire rule.
 397. Same subject; Massachusetts rule.
 398. Same subject; Nebraska rule.
 399. Same subject; Michigan rule.
 400. Same subject; the rule in Colorado, West Virginia, Washington and Connecticut.
 401. Exemplary damages as compensation and punishment.
 402. Exemplary damages for penal offenses.
 403. Exemplary damages as matter of right.
 404, 405. Enhancement and mitigation of exemplary damages.
 406. Exemplary damages based on actual damages.
 407. Motive of one wrong-doer not imputable to others.
 408-411. Parties liable; master for servant.
 412. Liability of officers, municipalities and estates.

§ 390. Compensation for wrongs done with bad motive.

A party who breaks his contract is liable for the result- [716]
 ing damage, without regard to the motive by which he was
 actuated. And in theory, the damages recoverable in actions
 upon contract are not affected by the motive which induced
 the breach.¹ Actions for breach of marriage contracts are an

¹Richardson v. Wilmington & W. R. Co., 126 N. C. 100, 35 S. E. Rep. 235; O'Connell v. Rosso, 50 Ark. 603, 20 S. W. Rep. 531; Gordon v. Brewster, 7 Wis. 355; Duche v. Wilson, 37 Hun, 519; Norfolk & W. R. Co. v. Wysor, 82 Va. 250.

There are cases in which exemplary damages have been allowed against sureties on statutory bonds where the principal therein had subjected himself to such damages. In Alabama sureties have been held to that liability on an attachment bond, the writ having been wrongfully

sued out. Floyd v. Hamilton, 33 Ala. 235.

In a later case the signers of a bond of indemnity given to induce a sheriff to levy on goods in the possession of one not a party to the process were held not liable for exemplary damages unless they authorized him to execute the process wantonly, recklessly or with circumstances of aggravation, or his acts were probably consequent on making the levy or were ratified by them. Laenkau v. Morris, 66 Ala. 400.

In Iowa the sureties upon a liquor

exception; and there are some other exceptions to which attention has been called;¹ but such is the general rule. In actions of tort full compensation may be recovered though the injury was the result of mistake, or the acts were done in good faith.² In other words, the right to compensation for tortious injuries does not depend at all upon their being inflicted purposely or with any culpable intention.

There is, however, a marked difference legally, as there is practically, between a tort committed with and without malice; between a wrong done in the assertion of a supposed right, and one wantonly committed; one unattended with any incidents of insult, and one with such concomitants. Such vicious accompaniments increase the injury, and render additional damages necessary to adequate compensation.

§ 391. Exemplary damages; difference of views; when allowed. There is much authority for allowing damages for [717] torts beyond compensation whenever a case shows a wanton invasion of the plaintiff's rights, or any circumstances of outrage or insult;³ whenever there has been oppression or

seller's bond, the terms of which bound them to "pay any damage any person may sustain, or which may result from the drinking of any wine or beer, or any liquor got or procured at his saloon or place of business," have been held for exemplary damages. *Richmond v. Shickler*, 57 Iowa, 486, 10 N. W. Rep. 882. These cases are not in harmony with the weight of authority, nor consistent with the theory upon which such damages are imposed. It is otherwise as to attachment bonds in South Carolina and Illinois (*McClen-don v. Wells*, 20 S. C. 514; *Spants v. Barrett*, 57 Ill. 290, 11 Am. Rep. 10); and as to dram-shop bonds in the latter state (*Cobb v. People*, 84 Ill. 511); and replevin bonds. *Dalby v. Campbell*, 26 Ill. App. 502.

The sureties on a statutory bond are not liable for exemplary damages although the act of the principal which broke the condition of the

bond was a wilful tort. *North v. Johnson*, 58 Minn. 212, 59 N. W. Rep. 1012; *Johnson v. Williams' Adm'r*, 23 Ky. L. Rep. 658, 63 S. W. Rep. 759.

In Texas a suit may be brought for a breach of contract and for a tort when both grow out of the same transaction and can be properly litigated together. But to recover exemplary damages the pleading must show that the manner in which the breach of contract was committed amounted to a tort for which an action would lie for exemplary damages, independently of the right to recover actual damages by reason of the breach of contract alone. *Hooks v. Fitzenrieter*, 76 Tex. 277, 13 S. W. Rep. 230.

¹ §§ 98, 99.

² *Id.*

³ *Amer v. Longstreth*, 10 Pa. 148.

It was said by Moses: "If a man shall dig a pit and not cover it, and an ox or an ass shall fall therein, the

vindictiveness on the part of the wrong-doer;¹ whenever there is a wilful, malicious or reckless tort to person or property.² In a Kentucky case the court say: "In actions of trespass juries are authorized to give what is denominated smart money. If trespassers were bound to pay in damages no more than the exact value of the property forcibly taken and converted by them, there would be no motive created by the operation of the law to induce them to desist and abstain from invading the rights of others. To furnish such a motive smart money is allowed."³ In an Illinois case the court say: "The experience of past ages demonstrates a tendency on the part of many in every community to take the law into their own hands, and to oppress, insult and abuse others, even in pursuing their rights. And inasmuch as such conduct is not indictable, the law has, for the repose of society, authorized the jury to give exemplary damages where a trespass is wanton, wilful or malicious; or where it is accompanied with such

owner of the pit shall make it good. For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing which another challengeth to be his, the cause of both parties shall come before the judges, and whom the judges shall condemn, he shall pay double unto his neighbor. If a man steal an ox or a sheep, and kill it or sell it, he shall restore five oxen for an ox and four sheep for a sheep." Exodus, ch. § 21, 22.

Mr. Justice Gray observed in *Lake Shore, etc. R. Co. v. Prentice*, 147 U. S. 101, 106, 13 Sup. Ct. Rep. 261: The most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American revolution is to be found in the remarks of Chief Justice Pratt (afterwards Lord Camden) in one of the actions against the king's messengers for trespass and imprisonment under general warrants of the secretary of state, in which the plaintiff's counsel having asserted, and the defendant's coun-

sel having denied, the right to recover exemplary damages, the chief justice instructed the jury as follows: "I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Wilkes v. Wood*, Lofft. 1, 18, 19, 19 How. St. Trials, 1153, 1167.

¹ *Nagle v. Mattison*, 34 Pa. 48.

² *Illinois, etc. R. Co. v. Cobb*, 68 Ill. 53; *Cutler v. Smith*, 57 Ill. 252; *Connors v. Walsh*, 131 N. Y. 599, 20 N. E. Rep. 59; *Wagner v. Gibbs*, Miss —, 31 So. Rep. 434; *Turnbow v. Wimberly*, 106 La. 259, 30 So. Rep. 747; *Cosgriff v. Miller*, — Wyo —, 68 Pac. Rep. 206, 216, quoting the text.

³ *Tyson v. Ewing*, 3 J. J. Marsh. 186.

acts of indignity as to show a reckless disregard of the rights of others, as a punishment for the wrong, and to deter others from the perpetration of such acts."¹ A later case states the rule thus: Exemplary damages are given as a punishment where torts are committed with fraud, actual malice, or deliberate violence or oppression, or where the defendant acts wilfully, or with such gross negligence as to indicate a wanton disregard of the rights of others.² In New Hampshire there has been considerable fluctuation of decision; and that state may now be classed with those in which exemplary damages, [718] *ultra* compensation, are denied.³ But in several cases

¹ Cutler v. Smith, 57 Ill. 252.

² Consolidated Coal Co. v. Haenni, 146 Ill. 614, 35 N. E. Rep. 162.

³ In Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270, a very able, elaborate and exhaustive opinion was delivered by Foster, J., in which the court seemed to be unanimous, against exemplary damages, especially where the act complained of is a criminal offense. While admitting there are many cases sanctioning the recovery of such damages, he contends, with great force of reasoning, not easy to resist on principle:

1. That many of the cases cited in support of exemplary damages, and many loose expressions which are to be found in judicial opinions, when closely scrutinized only favor a liberal allowance of compensation in consideration of aggravations.

2. That where there are such facts as have generally been deemed to warrant the recovery of vindictive damages, they should be considered only as they enhance the damages which the injured party is entitled to receive; that nothing should be allowed for punishment as a substantive element or purpose.

3. That to permit a plaintiff to recover for his actual damages, including, as they should, his pecuniary loss, and in cases of personal in-

jury, or other torts aggravated by personal abuse or insult, for pain, bodily and mental; and, in addition, a sum by way of punishment, is to subject the defendant to the injustice of a double recovery; for he is thus compelled to pay more than the plaintiff is entitled to receive.

4. If the defendant is subject to be punished criminally for the same act, then the recovery in a civil action of vindictive or punitive damages exposes the wrong-doer to double punishment, besides making full compensation for every element of injury to the injured party.

5. That such double recovery of damages, and such double punishment, are an infraction of the maxims of the common law against being twice vexed for the same cause or twice punished for the same offense; and an infraction of the guaranties found in nearly all American constitutions on the same subject.

He concluded his opinion by saying: "The true rule, simple and just, is to keep the civil and criminal process and practice distinct and separate. Let the criminal law deal with the criminal, and administer punishment for the legitimate purpose and end of punishment,—namely, the reformation of the offender and the safety of the people. Let the individual whose rights are infringed,

their allowance had been affirmed. The court say in one: "It is extremely well settled that exemplary or vindictive damages may, in certain cases, be recovered; and this is, perhaps, in accordance with the legislative policy which has given pecuniary penalties in numerous instances to private prosecutors of certain offenses. Where the wrong done to the party partakes of a criminal character, though not [719] punishable as an offense against the state, the public may be said to have an interest that the wrong-doer should be prosecuted and brought to justice in a civil suit; and exemplary damages may, in such cases, encourage prosecutions where mere compensation for the private injury would not repay the trouble and expense of the proceeding."¹ In a subsequent case² this doctrine was approved, and the court add that it

and who has suffered injury, go to the civil courts, and there obtain full and ample reparation and compensation; but let him not thus obtain the 'fruits' to which he is not entitled, and which belong to others. Why longer tolerate a false doctrine, which, in its practical exemplification, deprives a defendant of his constitutional right of indictment or complaint on oath before being called into court? deprives him of the right of meeting the witnesses against him face to face? deprives him of the right of not being compelled to testify against himself? deprives him of the right of being acquitted, unless the proof of his offense is established beyond a reasonable doubt? deprives him of the right of not being punished twice for the same offense? Punitive damages destroy every constitutional safeguard within their reach. And what is to be gained by this annihilation and obliteration of fundamental law? The sole object, in its practical results, seems to be to give a plaintiff something which he does not claim in his declaration. If justice to the plaintiff requires the destruction of the constitution, there

would be some pretext for wishing the constitution were destroyed. But why demolish the plainest guaranties of that instrument, and explode the very foundation upon which constitutional guaranties are based, for no other purpose than to perpetuate false theories and develop unwholesome fruits? Undoubtedly this pernicious doctrine 'has become so fixed in the law,' to repeat the language of Mr. Justice Campbell, of Michigan, 'that it may be *difficult* to get rid of it.' But it is the business of courts to deal with difficulties; and this heresy should be taken in hand without favor, firmly and fearlessly. It was once said: 'If thy right eye offend thee, pluck it out; . . . and if thy right hand offend thee, cut it off.' Wherefore, not reluctantly, should we apply the knife to this deformity, concerning which every true member of the sound and healthy body of the law may well exclaim: 'I have no need of thee.'³

¹ *Greeniff. Ev.*, §§ 253, 274; *Boyer v. Barr*, 8 Neb. 68, 30 Am. Rep. 814.

² *Hopkins v. Railroad*, 56 N. H. 2, 72 Am. Dec. 257.

³ *Taylor v. Railway*, 43 N. H. 390.

"furnishes the most efficient, if not the only, means of correcting many very serious social abuses; and among those that of gross negligence, which puts at unnecessary hazard the life and limbs of large numbers of passengers, must take high rank. It is not, therefore, to be regretted that the law has established an exception to the ordinary rule in respect to damages, and armed the sufferer in such cases with the power to administer a corrective which cannot or will not otherwise be efficiently applied at all."

§ 392. *Same subject.* The foregoing views have been sanctioned by the supreme court of the United States. Mr. Justice Grier said:¹ "It is a well established principle of the common law that in actions of trespass, and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not [720] admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.' This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must de-

¹ Day v. Woodworth, 13 How. 371.

pend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction."¹ It was said in a case ruled in the same court in 1892: "In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages."²

In the actions here spoken of the conduct and motives of the defendant are open to inquiry with a view to the amount of damages. If, in committing the wrong complained of, he acted recklessly, oppressively, insultingly or wilfully and maliciously, with a design to oppress and injure, the jury in fixing the damages may disregard the rule of compensation; and beyond that, may, as a punishment of the defendant, and as protection to society against the violation of personal rights and social order, award such additional damages as in their

¹ *Stimpson v. Railroad*, 2 Wall. Jr., 164; *Milwaukee, etc. R. Co. v. Arms*, 91 U. S. 489; *Denver, etc. R. v. Harris*, 122 U. S. 597, 7 Sup. Ct. Rep. 1286; *Minneapolis, etc. R. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. Rep. 207.

It is held in the case last cited and also in *Missouri Pacific R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. Rep. 110, that statutes which authorize the recovery of double the value of stock killed or damage caused thereto by the neglect of railroad companies to

comply with the law concerning the fencing of their roads do not infringe the fourteenth amendment to the federal constitution, either as depriving such companies of property without due process of law or denying them the equal protection of the laws.

² *Lake Shore, etc. R. Co. v. Prentice*, 147 U. S. 101, 107, 13 Sup. Ct. Rep. 201; *Scott v. Donald*, 165 U. S. 58-87, 17 Sup. Ct. Rep. 265; *Cowen v. Winters*, 37 C. C. A. 628, 96 Fed. Rep. 930.

discretion they may deem proper.¹ This rule has been held to [721] apply in all actions for torts—in actions for personal injuries, in cases of a wilful injury to property, in slander, libel, seduction, false imprisonment, malicious prosecution, and in actions for tort founded upon negligence amounting to misconduct and recklessness.² On grounds of public policy

¹ *Canfield v. Chicago, etc. R. Co.*, 59 Mo. App. 354, quoting the text.

² *Union Mill Co. v. Prenzler*, 100 Iowa, 540, 69 N. W. Rep. 876; *O'Connell v. Rosso*, 56 Ark. 603, 20 S. W. Rep. 531; *Watson v. Hastings*, 1 Pennw. 47, 39 Atl. Rep. 587; *Citizens' Street R. Co. v. Willoehy*, 134 Ind. 563, 33 N. E. Rep. 627; *Lake Erie & W. R. Co. v. Bradford*, 15 Ind. App. 655, 57 Am. St. 245, 44 N. E. Rep. 551; *Carson v. Smith*, 133 Mo. 606, 34 S. W. Rep. 855; *White v. Barnes*, 112 N. C. 323, 16 S. E. Rep. 922; *Hamerlynck v. Banfield*, 36 Ore. 36, 59 Pac. Rep. 712; *Matheis v. Mazet*, 164 Pa. 580, 30 Atl. Rep. 434; *Wiley v. McGrath*, 194 Pa. 498, 75 Am. St. 709, 45 Atl. Rep. 331; *Vogel v. McAuliffe*, 18 R. I. 791, 13 Atl. Rep. 1; *Duckett v. Pool*, 34 S. C. 311, 13 S. E. Rep. 542 (reviewing earlier cases in the state); *Samuels v. Richmond, etc. R. Co.*, 35 S. C. 493, 28 Am. St. 883, 14 S. E. Rep. 943; *Glover v. Charleston & S. R. Co.*, 57 S. C. 228, 35 S. E. Rep. 510; *Telephone & Tel. Co. v. Shaw*, 102 Tenn. 313, 52 S. W. Rep. 163; *Thirkfield v. Mountain View Cemetery Ass'n*, 12 Utah, 76, 41 Pac. Rep. 564, citing the text; *Farr v. Swigert*, 13 Utah, 150, 44 Pac. Rep. 711, citing the text; *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. Rep. 58, overruling *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. Rep. 485, and *Beck v. Thompson*, 31 W. Va. 459, 7 S. E. Rep. 447; *Vassau v. Madison Electric R. Co.*, 106 Wis. 301, 82 N. W. Rep. 152; *East Tennessee, etc. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. Rep. 778; *Highland Ave. & Belt R. Co. v. Robinson*, 125 Ala. 483, 28 So. Rep. 28; *Pickens v. South*

Carolina & G. R. Co., 54 S. C. 498, 507, 32 S. E. Rep. 567, correcting a statement in *Quinn v. South Carolina R. Co.*, 29 S. C. 381, 7 S. E. Rep. 614, 1 L. R. A. 682, to the effect that wilfulness is not essential to the recovery of exemplary damages; *Watt v. South Bound R. Co.*, 60 S. C. 67, 74, 38 S. E. Rep. 240, saying that gross negligence is not ground for exemplary damages; *Bingham v. Lipman*, 40 Ore. 363, 67 Pac. Rep. 98; *Cosgriff v. Miller*, — Wyo. —, 68 Pac. Rep. 206, 216 citing the text; *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152; *Eviston v. Cramer*, 57 Wis. 570, 15 N. W. Rep. 760; *Templeton v. Graves*, 59 Wis. 95, 17 N. W. Rep. 672; *Brown v. Evans*, 17 Fed. Rep. 912; *Sowers v. Sowers*, 87 N. C. 303; *Johnson v. Allen*, 100 id. 131, 5 S. E. Rep. 666; *Webb v. Gilman*, 80 Me. 177, 13 Atl. Rep. 688; *Bergmann v. Jones*, 94 N. Y. 51; *Spear v. Hiles*, 67 Wis. 350, 58 Am. Rep. 853, 30 N. W. Rep. 506; *Pittsburg, etc. R. Co. v. Lyon*, 123 Pa. 140, 2 L. R. A. 489, 10 Am. St. 517, 16 Atl. Rep. 607; *Alabama, etc. R. Co. v. Hill*, 90 Ala. 71, 24 Am. St. 764, 8 So. Rep. 9, 9 L. R. A. 442; *Kemmitt v. Adamson*, 44 Minn. 121, 46 N. W. Rep. 327; *Barlow v. Lowder*, 35 Ark. 492; *Holt v. Van Eps*, 1 Dak. 198, 46 N. W. Rep. 689; *Bates v. Callender*, 3 Dak. 256, 16 N. W. Rep. 506; *Smith v. Bagwell*, 19 Fla. 117, 45 Am. Rep. 12; *Harrison v. Ely*, 120 Ill. 83, 11 N. E. Rep. 334; *Wales v. Miner*, 89 Ind. 118; *State v. Stevens*, 103 id. 55, 2 N. E. Rep. 214, 53 Am. Rep. 482; *Farman v. Lauman*, 73 Ind. 568; *Parkhurst v. Mastellar*, 57 Iowa, 474, 10 N. W. Rep. 864; *Root v. Sturdivant*, 70 Iowa, 55,

exemplary damages have been denied for a tortious injury to property which was employed in an unlawful business.¹ It has been ruled that such damages cannot be recovered in an

29 N. W. Rep. 802; *Wilkinson v. Drew*, 57 Me. 360; *Boetcher v. Staples*, 27 Minn. 308, 7 N. W. Rep. 263; *MacGowan v. Duff*, 14 Daly, 315; *Day v. Holland*, 15 Ore. 464, 15 Pac. Rep. 555; *Lakeshore, etc. Ry. Co. v. Rosenzweig*, 113 Pa. 519, 6 Atl. Rep. 545; *Holmes v. Carolina Central R. Co.*, 94 N. C. 318; *Knowles v. Norfolk Southern R. Co.*, 102 id. 59, 9 S. E. Rep. 7; *Louisville & N. R. Co. v. Ballard*, 85 Ky. 387, 3 S. W. Rep. 530, 88 Ky. 159, 10 S. W. Rep. 429, 2 L. R. A. 694; *Sloan v. Edwards*, 61 Md. 89; *Voltz v. Blackmar*, 64 N. Y. 440; *Tift v. Culver*, 3 Hill, 180; *Tillotson v. Cheetham*, 3 Johns. 56, 3 Am. Dec. 459; *Wort v. Jenkins*, 14 Johns. 352; *Taylor v. Railway*, 48 N. H. 320; *Fleet v. Hollenkemp*, 13 B. Mon. 219, 56 Am. Dec. 563; *Jennings v. Maddox*, 8 B. Mon. 432; *Illinois, etc. R. Co. v. Cobb*, 68 Ill. 53; *Becker v. Dupree*, 75 id. 167; *Robinson v. Burton*, 5 Harr. 335 (but see *McCoy v. Philadelphia, etc. R. Co.*, 5 Houst. 599); *Fox v. Stevens*, 13 Minn. 272; *Young v. Mertens*, 27 Md. 114; *Elbin v. Wilson*, 33 id. 135; *Wade v. Thayer*, 40 Cal. 578; *McWilliams v. Bragg*, 3 Wis. 524; *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197; *Gilreath v. Allen*, 10 Ired. 67; *Bradley v. Morris*, *Busbee*, 395; *Stevenson v. Belknap*, 6 Iowa, 97, 71 Am. Dec. 392; *Reeder v. Purdy*, 48 Ill. 261; *Chicago, etc. R. Co. v. Williams*, 55 id. 185, 8 Am. Rep. 641; *McNamara v. King*, 7 Ill. 43; *Kalb v. O'Brien*, 86 id. 210; *Stillwell v. Barnett*, 69 id. 210; *Bauer v. Gottmanhauser*, 65 id. 499; *Lawrence v. Hagerman*, 56 id. 68, 8 Am. Rep. 674; *Clevenger v. Dunaway*, 84 Ill. 367; *Sherman v. Dutch*, 16 id. 281; *Drohn v. Brewer*, 77 id. 280; *Miller v. Kirby*, 74 id. 242; *Scott v. Bryson*, id. 420; *Farwell v. Warren*, 70 id. 28; *Grable v. Margrave*, 4 id. 373, 38 Am. Dec. 88; *Johnson v. Weedman*, 5 Ill. 495; *Smalley v. Smalley*, 81 id. 70; *McBride v. McLaughlin*, 5 Watts, 375; *Allabaek v. Utt*, 51 N. Y. 651; *Von Fragstein v. Windler*, 2 Mo. App. 598; *Newman v. St. Louis, etc. R. Co.*, id. 402; *Kennedy v. North Mo. R. Co.*, 36 Mo. 351; *Green v. Craig*, 47 id. 90; *Molecek v. Tower Grove R. Co.*, 57 id. 17; *Klingman v. Holmes*, 54 id. 301; *Graham v. Pacific R. Co.*, 66 id. 536; *Kansas, etc. R. Co. v. Little*, 19 Kan. 267; *Edelman v. St. Louis Transfer Co.*, 3 Mo. App. 503; *Vicksburg, etc. R. Co. v. Patton*, 31 Miss. 155; *Storm v. Green*, 51 id. 103; *Memphis, etc. R. Co. v. Whittfield*, 44 id. 466; *Burrage v. Milson*, 18 id. 237; *Kalb v. Bankhead*, 18 Tex. 228; *Smith v. Sherwood*, 2 Tex. 460; *Bowler v. Lane*, 3 Met. (Ky.) 311; *Cochran v. Miller*, 13 Iowa, 128; *Champion v. Vincent*, 20 Tex. 811; *Greenville, etc. R. Co. v. Partlow*, 14 Rich. 237; *McGee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341; *Mobile, etc. R. Co. v. Ashcroft*, 48 Ala. 15; *Hesley v. Baker*, 19 Kan. 9; *Sawyer v. Iauer*, 10 id. 466; *Emblen v. Myers*, 6 H. & N. 54; *Baltimore & Y. Turnpike Road v. Boone*, 45 Md. 344; *McWilliams v. Holan*, 42 id. 56; *Philadelphia, etc. R. Co. v. Larkin*, 47 id. 155, 28 Am. Rep. 442; *Bradshaw v. Buchanan*, 50 Tex. 492; *Titus v. Corking*, 21 Kan. 722; *Mendel v. Anthus*, 71 Ill. 241; *Parker v. Shackelford*, 61 Mo. 68; *Shaw v. Brown*, 41 Tex. 446; *Welch v. Durand*, 36 Vt. 182; *Ellsworth v. Potter*, 41 id. 686; *Slater v. Sherman*, 5 Bush, 206; *Huckle v. Money*, 2 Wils. 203; *Tullidge v. Wade*, 3 id. 18; *Merest v.*

¹ *Knauffman v. Babcock*, 67 Tex. 241, 2 S. W. Rep. 878.

action on the case for fraud in the sale of personal property;¹ but it may be doubted whether all the elements which enter into the right to exemplary damages are not present when a fraud is perpetrated.² An attorney who is employed to secure a divorce is liable for such damages if he, in order to secure the payment of the balance of the fee agreed upon, falsely represents to his client that the divorce has been granted, thereby leading her to remarry.³ A corporation has the same right to recover punitive damages as an individual for a malicious and oppressive trespass committed upon its property.⁴ Under a statute which provided that injuries to the person, whether the same do or do not result in death, shall survive to the executor or administrator, such damages have been allowed where there was an interval between the act which caused the death and that event;⁵ and also where the death was instantaneuous.⁶ Statutes of this character usually confine the damages to the pecuniary injury sustained by the next of kin or the persons who may recover, and are construed to ex-

Harvey, 5 Taunt. 442; *Brewer v. Dew*, 11 M. & W. 625; *Sears v. Lyons*, 2 Stark. 317; *Williams v. Currie*, 1 Man., G. & S. 841; *Bell v. Midland R. Co.*, 10 C. B. (N. S.) 287; *Clissold v. Machell*, 26 Up. Can. Q. B. 422; *Silver v. Dominion Tel. Co.*, 2 Russ. & G. (Nova Scotia), 17; *Gildersleeve v. Overstoltz*, 90 Mo. App. 518; *Coffin v. Spencer*, 2 Hawaiiia. 23.

The malice necessary to authorize the infliction of exemplary damages need not be proved beyond a reasonable doubt. *St. Ores v. McGlashen*, 74 Cal. 148, 15 Pac. Rep. 452.

¹ *Singleton's Adm'r v. Kennedy*, 9 B. Mon. 222.

² *State v. Stevens*, 103 Ind. 55, 53 Am. Rep. 482, 2 N. E. Rep. 214; *Holmes v. Carolina Central R. Co.*, 94 N. C. 318; *Wiley v. McGrath*, 194 Pa. 498, 45 Atl. Rep. 331, 75 Am. St. 709. See § 1178.

³ *Hill v. Montgomery*, 84 Ill. App. 300. See § 1178.

⁴ *International, etc. R. Co. v. Tele-*

phone & Tel. Co., 69 Tex. 277, 5 Am. St. 45, 5 S. W. Rep. 517.

⁵ *Murphy v. New York, etc. R. Co.*, 29 Conn. 496.

The constitution of Kentucky provides that whenever the death of a person shall result from an injury inflicted by negligence or wrongful acts damages may be recovered for such death from the corporations and persons so causing the same. This extends the right of action to recover both compensatory and exemplary damages for injury not resulting in death to cases in which death ensues. *Louisville & N. R. Co. v. Kelly's Adm'r*, 100 Ky. 421, 38 S. W. Rep. 852.

⁶ *Couch v. Chesapeake & O. R. Co.*, 45 W. Va. 51, 30 S. E. Rep. 147; *Turner v. Norfolk & W. R. Co.*, 40 W. Va. 675, 22 S. E. Rep. 83; *Texarkana Gas & Electric Light Co. v. Orr*, 59 Ark. 215, 27 S. W. Rep. 66, 43 Am. St. 30; *Halsey v. Mobile & O. R. Co.*, 7 Baxter, 239; *Railway Co. v. Doughtry*, 88 Tenn. 751, 13 S. W. Rep. 698.

clude punitive damages.¹ But where the action was brought by the person injured, who died during its pendency, another question is presented. Because exemplary damages are not compensatory and, therefore, are not property, it has been contended that the right to recover them does not survive the death of the plaintiff in the action, although the cause of action survives. In answer it was said: "It must be borne in mind that, where the action is brought by the representative of one deceased, it is to repair the injury done to the estate, and the damages are assessed with reference to the injury done thereto. Consequently, pain and suffering are not taken into account. Neither can exemplary damages be awarded, as a general rule, for they are peculiar to the person, and do not relate to pecuniary or property rights. And, notwithstanding all causes of action now survive, in assessing damages we must look to the wrong to be remedied, and the injury to be repaired. When the action is brought by the representative of one deceased it is to right the wrong done to his estate. But when the action, as in this case, is brought by the person injured, who dies during its pendency, the law attempts to remedy the wrong done to him, and not necessarily to his estate; and the damages in such case are not only compensatory, but may include exemplary as well. The statute governing the survival of actions has reference to the causes of actions, and not to the rule of damages.² A court of equity will not award such damages,³ but courts of admiralty will,⁴ though not in a suit *in rem* against a vessel for a maritime tort.⁵ They cannot be recovered in an action for a statutory penalty.⁶

¹ Garrick v. Florida Central & P. R., 53 S. C. 448, 31 S. E. Rep. 334, 69 Am. St. 874; Atrops v. Costello, 8 Wash. 149, 35 Pac. Rep. 620. See ch. 37.

² Union Mill Co. v. Prenzler, 100 Iowa, 540, 69 N. W. Rep. 876.

Under a statute authorizing the personal representative of a decedent to commence and prosecute any action which the latter could have done, and another section to the effect that where a trespasser has died, punitive damages may not be recovered from his estate, the death

of a party assaulted does not affect the right to recover such damages. Wagner v. Gibbs, — Miss —, 31 So. Rep. 434.

³ Bird v. Wilmington & M. R. Co., 8 Rich. Eq. 46, 57, 64 Am. Dec. 739.

⁴ Boston Manuf. Co. v. Fiske, 2 Masson, 119, 121. See The Amiable Nancy, 3 Wheat. 546.

⁵ The William H. Bailey, 103 Fed. Rep. 799.

⁶ Stovall v. Smith, 4 R. Mon. 378; Giffen v. Barr, 60 Vt. 599, 15 Atl. Rep. 190.

The doctrine that exemplary damages may be allowed for [722] the purpose of example and punishment, in addition to compensation in certain cases, is held in a large majority of the states of the Union,¹ in Canada and in England. In some states it is followed with reluctance and deprecating acquiescence; in others, with emphatic indorsement; while in a few it is not, or but partially, accepted.² There is a substantial and practical difference, and not a mere verbal conflict, on two aspects of the subject. First, as to what is intrinsically meant by exemplary, vindictive, punitive or punitory damages; those words in general being used indifferently as importing the same thing.³ Second, in respect to the consequence [723] to the civil remedy of the tortious act complained of being an offense punishable under the criminal law.

¹ Indiana has been considered by some courts and writers to be one of the states in which exemplary damages are not recoverable. This misapprehension has probably arisen from *obiter* remarks by individual judges and from the rule long established and consistently adhered to that they cannot be allowed where the act which gives rise to the claim is punishable criminally. It was observed in *State v. Stevens*, 103 Ind. 55, 2 N. E. Rep. 214, 53 Am. Rep. 482, that in all that class of torts not rising to the degree of criminality the injured party might, where the elements of fraud, malice, gross negligence or oppression mingled in the controversy, in addition to full compensation for all other damages, recover exemplary or punitive damages as a punishment, or by way of example, to deter others from the like offenses. *Lytton v. Baird*, 95 Ind. 349; *Citizens' Street R. Co. v. Willoby*, 134 Ind. 563, 33 N. E. Rep. 627.

The code of Georgia permits the recovery of exemplary damages "either to deter the wrong-doer from repeating the trespass or as compensation for the wounded feel-

ings of the plaintiff." The public good and the desire to deter others cannot justify their imposition. *Ratree v. Chapman*, 79 Ga. 574.

² In Colorado, the right to recover exemplary damages has been established by the legislature after its existence had been denied by the court. But the statute has been refused retroactive effect on the ground that it does no more than change the form of the remedy, being penal in its nature, and the constitution forbidding the passage of any *ex post facto* law, or law impairing the obligation of contracts, or retrospective in its operation. *French v. Deane*, 19 Colo. 504, 36 Pac. Rep. 609, 24 L. R. A. 387.

³ *Chiles v. Drake*, 2 Met. (Ky.) 146, 74 Am. Dec. 406; *Louisville, etc. R. Co. v. Smith*, 2 Duvall, 556; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351.

In *Meidel v. Anthis*, 71 Ill. 241, the court gave a construction to the remedy of a wife for damages under the liquor law of that state. That act subjects the seller of intoxicating liquors sold contrary to its provisions to punishment by indictment; it also gives a civil remedy in damages to a wife, among others, who is injured in person, property or means

§ 393. Same subject. Formerly the imposition of damages as punishment and for example was exclusively in the discretion of the jury, subject to review as to the amount allowed. There is a tendency in some courts to consider such damages

of support by the intoxication of her husband, caused by such unauthorized and prohibited sales. Breese, C. J., referred to *Freese v. Tripp*, 70 Ill. 496, and said: "It was held in that case that the statute, being highly penal in its character, and introducing remedies unknown to the common law in which the person prosecuting had decided advantages over the party defending, should receive a strict construction. It was held that anguish or mental pain of the wife was not an element of damage to be considered. The statute contemplates only injury in person or property or means of support. It was also held the jury could not give exemplary damages unless actual damages were proved and found. In support of this *Schneider v. Hosier*, 21 Ohio St. 98, was cited. It was also held that exemplary damages could not be awarded as punishment for the reason the statute itself provides the public shall avail of its preventive provisions by indictment (§§ 6, 8); that putting money in the pocket of the plaintiff would be no satisfaction to the public for violation of a penal statute. Appellee in this case insists such damages can be awarded; that the statute allows exemplary damages. This is true, but not damages by way of punishment, but exemplary damages, such as will operate as an example, or a warning to deter the party or others from similar transactions, and aggravating circumstances must be shown. Appellee says such damages are allowed in actions of *tort* at common law. Granted; but this is not an action of *tort* at common law; and the idea of the statute does not seem to

be, as it has provided a punishment for the public wrong, that a complaining party in a civil suit should pocket money by way of punishment for the offender. We concede this court is committed to the doctrine that in certain actions of *tort* at the common law the jury can go beyond the question of mere compensation for the injury, and give damages by way of punishment, though eminent law writers protest, and insist that this was not a principle of the ancient and genuine common law. It is insisted, by that law, the civil remedy for a wrong done should not be punitive to the wrong-doer, as well as compensative to the sufferer. 3 Parsons on Cont. 170. Greenleaf, in his treatise on Evidence, in most emphatic language affirms that the position that damages may be given by way of punishment has not the countenance of any express decision upon the point, though it has the support of several *obiter dicta*; and inquires, if this be a rule of law, how is the party to be protected from double punishment. 2 Greenleaf on Evidence, § 242, in an elaborate note. Although this court is committed to the other doctrine, still the question remains under this statute, can the jury give exemplary damages by way of punishment of the offender? They may give exemplary damages. We understand by this they may, in a proper case, give besides actual damages to the party injured such damages as may operate as a warning to others—they may make an example of the doer by the *quantum* of damages they shall award against him. We cannot believe that it was the design of the legis-

more in the nature of a right, or following as a legal consequence from the doing of an unlawful act with reprehensible motives. Whether the allowance is discretionary with the jury or may be directed by the court, in making it the idea of compensation to the injured party for any immediate or remote loss or injury to him is put out of view. In determining the amount which the defendant shall pay on this account the turpitude of his conduct and his financial ability are only considered; and such consideration is not in view of the injury or distress of the plaintiff, but in behalf of the public; the wrongful act is regarded as an indication of the actor's vicious mind — as an overt deed of vindictive or wanton wrong, offensive and dangerous to the public good. This is the view of those damages [724] ages which generally prevails. They are allowed when a wrongful act is done with a bad motive; or so recklessly as to imply a disregard of social obligations; or where there is negligence so gross as to amount to misconduct and recklessness.¹ In answer to the contention that punitive damages can-

lature to give to the jury in such an action the power to punish the violator of the law in the shape of damages which go to the party injured, the more especially as, by the very act authorizing exemplary damages, the seller, as punishment for his wrong-doing, is subject to fine and imprisonment in the county jail. Exemplary damages must not be given as punishment—not as vindictive but as exemplary damages. This is a penal statute, and to the words used in it the proper significance must be given. It was enough to comply with the statute for the court to tell the jury that, in addition to actual damages, they might find exemplary damages."

¹ *Voltz v. Blackmar*, 64 N. Y. 440; *Milwaukee, etc. R. Co. v. Arms*, 91 U. S. 489; *Prickett v. Crook*, 20 Wis. 358; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197; *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6; *Baltimore & Y. Turnpike*

Road v. Boone, 45 Md. 344; *Sherman v. Dutch*, 16 Ill. 283; *Clevenger v. Dunaway*, 84 Ill. 367; *Philadelphia, etc. R. Co. v. Hoeflich*, 62 Md. 300, 50 Am. Rep. 223; *Hoffman v. Northern Pacific R. Co.*, 45 Minn. 53, 47 N. W. Rep. 312; *Trauerman v. Lippincott*, 39 Mo. App. 478; *Powers v. Manhattan R. Co.*, 120 N. Y. 178, 24 N. E. Rep. 295; *Brooks v. New York, etc. R. Co.*, 30 Hun, 47; *Day v. Holland*, 15 Ore. 464, 15 Pac. Rep. 855; *Boyle v. Case*, 18 Fed. Rep. 880; *Berry v. Fletcher*, 1 Dill. 67; *United States v. Taylor*, 35 Fed. Rep. 484; *Alabama, etc. R. Co. v. Sellers*, 93 Ala. 9, 20 Am. St. 17, 9 So. Rep. 375. The text has been approved in *Louisville, etc. R. Co. v. Guinan*, 11 Lea, 98, 103, 47 Am. Rep. 279; *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 389, 53 S. W. Rep. 557, 46 L. R. A. 549; *Railway Co. v. Lee*, 90 Tenn. 570, 573, 18 S. W. Rep. 268; *American Lead Pencil Co. v. Davis*, 103 Tenn. 251, 256, 67 S. W. Rep. 864.

not be awarded in an action for negligence, Appleton, C. J., said: The law seems well settled that punitive damages may be given in case equally as in trespass. Whatever reasons exist for punitive damages in trespass are equally applicable in case. The objection is that this is merely negligence and not the wilful act of the defendant. But the omission of duty, negligence, may be as injurious and criminal in its consequences as the direct and wrongful application of force. The omission to act, when action is obligatory, is equally criminal with wrongful action when action is forbidden. Action and inaction alike imply volition. Care and want of care are evidentiary of mental conditions.¹ It is no objection to the allowance of such damages that the declaration does not allege that the negligence was wilful and wanton,² or malicious.³

If a wrong is done wilfully, that is, if a tort is committed deliberately, recklessly,⁴ or by wilful negligence,⁵ with a pres-

¹ *Wilkinson v. Drew*, 75 Me. 360; *Hopkins v. Atlantic, etc. R. Co.*, 36 N. H. 9, 72 Am. Dec. 287.

² *Wilkinson v. Drew*, 75 Me. 360; *Pierce v. Carpenter*, 65 Mo. App. 191, citing the text.

³ *Lyddon v. Dose*, 81 Mo. App. 64; *Goetz v. Ambs*, 27 Mo. 28.

⁴ *Texarkana Gas & Electric Light Co. v. Orr*, 59 Ark. 215, 27 S. W. Rep. 66, 43 Am. St. 30.

The negligence must be gross, within the strictest signification of the phrase, which means such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness, and is indifferent, or worse, to the danger of injury to the persons or property of others. *Lienkauf v. Morris*, 66 Ala. 406; *Wilkinson v. Searcy*, 76 id. 176.

It is said in *Brooke v. Clarke*, 57 Tex. 105, 114: "If the conduct of the defendant in the discharge of his duty as accoucher was so grossly negligent as to raise the presumption of his criminal indifference to results, we very greatly doubt whether

⁴ In Kentucky the right to exemplary damages is not conditioned upon wilful neglect — the greatest degree of negligence — but it exists if the negligence was gross. *Louisville & N. R. Co. v. Earl's Adm'x*, 94 Ky. 368, 22 S. W. Rep. 607; *Maysville & Lexington R. Co. v. Herrick*, 13

it should avail to exempt him from exemplary damages for him to show that he had no bad motive, and that he acted otherwise in a manner tending to show that he was not, at heart, indifferent. Where the act is so grossly negligent as to raise the presumption of indifference, evidence that in other matters connected therewith he had shown due care, and that actual indifference would have been in fact indifference to his own interest, should, we think, not be allowed for any other purpose than to be considered by the jury in fixing the amount of exemplary damages."

Gross carelessness is not ground for such damages under the code of California, in the absence of oppression, fraud or malice. *Yerian v. Linkletter*, 80 Cal. 135, 22 Pac. Rep. 70.

ent consciousness of invading another's right, or of exposing him to injury, an undoubted case is presented for exemplary damages.¹ To enable a jury to exercise their discretion wisely for the purposes for which such damages are allowable, all the

Bush, 127; Louisville & N. R. Co. v. Greer, 16 Ky. L. Rep. 667, 29 S. W. Rep. 337; Louisville & N. R. Co. v. McClain, 23 Ky. L. Rep. 1878, 66 S. W. Rep. 391; Smith's Adm'x v. Middleton, 23 Ky. L. Rep. 2010, 66 S. W. Rep. 388. But every case of such negligence will not justify punitive damages. Where the injury was sustained through the act of an employee, the negligence complained of being that of the defendant's superintendent, and there being no evidence of motive or recklessness on his part, such damages were not recoverable. McHenry Coal Co. v. Sneddon, 98 Ky. 684, 34 S. W. Rep. 228.

In Tennessee the gross negligence which will support punitive damages must consist of such entire want of care or of such recklessness of conduct as is the equivalent of positive misconduct, or shows a conscious indifference to consequences. Railway Co. v. Lee, 90 Tenn. 570, 18 S. W. Rep. 268; as where the plaintiff was injured by a street car which left the track while being run at a high rate of speed over a switch which was unusually dangerous. Nashville Street R. v. O'Bryan, 104 Tenn. 28, 55 S. W. Rep. 300.

In Florida the gross negligence which will justify an award of exemplary damages must be such as evinces reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or evidences that entire want of care which raises the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard

of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. Florida R. & N. Co. v. Webster, 25 Fla. 394, 419, 5 So. Rep. 714; Florida Southern R. Co. v. Hirst, 30 Fla. 1, 38, 11 So. Rep. 506, 16 L. R. A. 631.

An award of exemplary damages has been sustained where a railroad company fenced its right of way through the inclosure of the plaintiff without making, after notice to do so, an opening in the fence for him, in accordance with the requirement of the statute, the proper openings having been made for his neighbors. San Antonio, etc. R. Co. v. Grier, 20 Tex. Civ. App. 138, 49 S. W. Rep. 148.

A justice of the peace acts ministerially in making up his record and in issuing a *mittimus*, and if he is actuated by malice in doing so is liable to punitive damages. Baister v. Wakeman, 64 Vt. 203, 23 Atl. Rep. 585, 15 L. R. A. 201; Gildersleeve v. Overstolz, 90 Mo. App. 518; Watts v. South Bound R. Co., 60 S. C. 67, 38 S. E. Rep. 240.

In Lake Shore, etc. R. Co. v. Rosenzweig, 113 Pa. 519, 543, 6 Atl. Rep. 545, a passenger was wrongfully put off a train. The court said: "In determining whether the conductor acted in reckless disregard of the plaintiff's rights, the jury ought to have kept in view the fact that he violated an express rule calculated to promote the safety of passengers and those having contractual relation with the defendant. This con-

¹ Cosgriff v. Miller, — Wyo. —, 68 Pac. Rep. 206, 216, quoting the text.

facts and circumstances which belong to the principal transaction and tend to develop its character should be submitted to them.¹ There need not be positive proof of malice or oppression if the transactions or the facts shown in connection therewith fairly imply its existence, and it is left to the jury to look at all the circumstances in order to see whether there was anything in the conduct of the defendant to aggravate the damages.² When the plaintiff is entitled to damages arising from the defendant's intentional wrong the jury may take into consideration those causes even remotely contributing to the injury, not for the purpose of giving damages for the injury thus caused, but that they may have in view all the facts and circumstances of the case in considering the question of exemplary damages.³

These damages are allowable only when there is misconduct and malice, or what is equivalent thereto. A tort committed by mistake, in the assertion of a supposed right, or without any actual wrong intention, and without such recklessness or negligence as evinces malice or conscious disregard of the rights of others, will not warrant the giving of damages for punishment, where the doctrine of such damages

ductor committed no battery; he made no threats; he acted quickly. A glance at the ticket, a pull at the bell rope, the stopping of the train, a deaf ear to the plaintiff's entreaties to be carried to a place of safety, a few significant words, and the plaintiff followed him to the ground, there to be pointed to a light toward the depot; but not to a bridge or any safe way out of his peril. If there was no wilful misconduct by the conductor, how can it be said that he was not recklessly indifferent to the consequences likely to befall the plaintiff? If the suit were against him, there could be little question that the jury would be permitted to give exemplary damages." Compare *Philad. Traction Co. v. Orban*, 119 Pa. 37, 12 Atl. Rep. 816; *Philadelphia, etc. R. Co. v. Hoefflich*, 62 Md. 90, 50 Am. Rep. 223.

¹ *Woodward v. Ragland*, 5 D. C. App. Cas. 220; *Alabama, etc. R. Co. v. Frazier*, 93 Ala. 45, 9 So. Rep. 303. The cases cited in the five last preceding notes recognize the rule.

² *Johnson v. Perry*, 2 Humph. 569; *Bryan v. McGuire*, 3 Head, 530; *Telephone & Tel. Co. v. Shaw*, 102 Tenn. 313, 25 S. W. Rep. 163.

In the last case the defendant cut a tree of the plaintiff's after being warned not to do so, the cutting being done in the absence of the plaintiff and against his wife's protest. *Memphis Telephone Co. v. Hunt*, 16 Lea, 456, 1 S. W. Rep. 159, 57 Am. Rep. 327, and *Cumberland Tel. & Telephone Co. v. Poston*, 34 Tenn. 696, 30 S. W. Rep. 1040, are similar cases.

³ *Pickens v. South Carolina & G. R. Co.*, 54 S. C. 498, 32 S. E. Rep. 567.

prevails.¹ An excessive battery is an answer to a plea of *son assault demesne*, and if wantonly or maliciously inflicted subjects the party making it to the same liability to exemplary damages as if he had been the original wrong-doer.² So the [725] fact that a person who has acted oppressively and

¹ *White v. Naerup*, 57 Ill. App. 44; *Louisville, etc. R. Co. v. Wurl*, 62 id. 381; *Biloxi City R. Co. v. Maloney*, 74 Miss. 738, 21 So. Rep. 561; *Bullock v. Delaware, etc. R. Co.*, 61 N. J. L. 550, 40 Atl. Rep. 650; *Cone v. Central R. Co.*, 62 N. J. L. 99, 40 Atl. Rep. 780; *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. C. 648, 20 S. E. Rep. 718; *Atchison, etc. R. Co. v. Chamberlain*, 4 Okl. 542, 46 Pac. Rep. 499; *Talbot v. West Virginia, etc. R. Co.*, 42 W. Va. 560, 26 S. E. Rep. 311; *Vassau v. Madison Electric R. Co.*, 106 Wis. 301, 82 N. W. Rep. 152; *Lyles v. Perrin*, 119 Cal. 264, 51 Pac. Rep. 332; *Gibney v. Lewis*, 68 Conn. 392, 36 Atl. Rep. 799; *Florida Southern R. Co. v. Hirst*, 30 Fla. 1, 11 So. Rep. 506, 16 L. R. A. 631; *Atchison, etc. R. Co. v. Stewart*, 55 Kan. 667, 41 Pac. Rep. 961; *Burruss v. Hines*, 94 Va. 413, 26 S. E. Rep. 875, citing the text; *Richardson v. Huston*, 10 S. D. 484, 74 N. W. Rep. 234; *Farwell v. Warren*, 70 Ill. 28; *Mansur-Tebbetts Implement Co. v. Smith*, 65 Ill. App. 319; *Hamilton v. Morgan's Louisiana & Texas R. & S. Co.*, 42 La. Ann. 824, 8 So. Rep. 586; *Norfolk, etc. R. Co. v. Neely*, 91 Va. 539, 545, 22 S. E. Rep. 367, quoting the text; *Smith v. Philadelphia, etc. R. Co.*, 87 Md. 48, 38 Atl. Rep. 1072; *Norfolk & W. R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. Rep. 809, 20 L. R. A. 817; *State v. Jungling*, 116 Mo. 162, 22 S. W. Rep. 688; *Wamsanz v. Wolff*, 86 Mo. App. 205; *Alabama, etc. R. Co. v. Arnold*, 84 Ala. 159, 5 Am. St. 354, 4 So. Rep. 359; *Patterson v. South & North A. R. Co.*, 89 Ala. 318, 7 So. Rep. 437; *Sullivan v. Dee*, 8 Ill. App. 263; *Holmes v. Carolina Central R. Co.*, 94 N. C. 318; *Jackson v. Crum*, 62 Tex. 401; *Nordhaus v. Peterson*, 54 Iowa, 68, 6 N. W. Rep. 77; *Inman v. Ball*, 65 Iowa, 513, 22 N. W. Rep. 666 (it is not enough to authorize the imposition of exemplary damages that the defendant acted with good reason to believe that he was doing wrong); *Powers v. Manhattan R. Co.*, 120 N. Y. 178, 24 N. E. Rep. 295 (a delay of two years to initiate condemnation proceedings will not subject a railroad company to punitive damages if it has legislative and judicial authority to support its acts); *O'Brien v. Loomis*, 43 Mo. App. 29; *Richmond & D. R. Co. v. Vance*, 93 Ala. 144, 30 Am. St. 41, 9 So. Rep. 574 (see *Alabama, etc. R. Co. v. Hill*, 93 Ala. 514, 525, 9 So. Rep. 722, 30 Am. St. 65); *Kolb v. O'Brien*, 86 Ill. 210; *Floyd v. Hamilton*, 33 Ala. 235; *Devaughn v. Heath*, 37 id. 595; *Hamilton v. Third Avenue R. Co.*, 53 N. Y. 25; *Wallace v. Mayor*, 9 Abb. Pr. 40; *Moody v. McDonald*, 4 Cal. 297; *St. Peter's Church v. Beach*, 26 Conn. 355; *Phelps v. Owen*, 11 Cal. 22; *Goetz v. Ambs*, 27 Mo. 28; *Biggs v. D'Aquin*, 13 La. Ann. 21; *Jones v. Rahilly*, 16 Minn. 321; *Beveridge v. Welch*, 7 Wis. 465; *Blodgett v. Brattleboro*, 30 Vt. 579; *Smith v. Wunderlich*, 70 Ill. 426; *Stillwell v. Barnett*, 60 id. 210; *Tripp v. Grouner*, id. 474; *Elliot v. Herz*, 29 Mich. 202; *Walker v. Fuller*, 29 Ark. 448; *Brown v. Allen*, 35 Iowa, 306; *Scripps v. Reilly*, 38 Mich. 10; *Hyatt v. Adams*, 16 id. 180; *Allison v. Chandler*, 11 id. 542.

² *Philadelphia, etc. R. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442.

cruelly in dispossessing another in inclement weather believed he had a right to eject him will not be a protection from exemplary damages, if it be found that he had not such legal right.¹ One who sues out an attachment under circum-

¹ Raynor v. Nims, 37 Mich. 34, 26 Am. Rep. 493.

There is a very instructive and reasonable *resumé* of the discussions on the general subject in Hendrickson v. Kingsbury, 21 Iowa, 379, an action for assault and battery. In the instructions to the jury the trial court thus defined and stated the law of exemplary damages: "Exemplary damages are given whenever elements of oppression or fraud or malice enter into the commission of the offense; and in such cases the jury are not limited to actual compensation, nor are they required to scrutinize very closely the amount of their verdict; but blending together the rights of the injured party and interests of the community, they may give such a verdict as will compensate for the injury, and at the same time inflict some punishment upon the defendant for his wrongful act, protect society and manifest the detestation in which the act is held by them." On appeal Mr. Justice Cole said: "As to the right of the jury to increase the amount of the verdict so as 'to manifest the detestation in which the act is held by them,' we think that such language, or its equivalent, cannot be found in any authoritative report of any adjudicated case in England or this country. Mr. Sedgwick, in his article in reply to Professor Greenleaf's review of his text, both of which may be found in the appendix to Sedgwick on the Measure of Damages (2d and 3d ed.), quotes that language, and cites Lives of the Lord Chancellors, vol. 5, p. 249. We have the second American from the third London edition of that

most excellent work, and on pages 213 and 214 the learned author and justly distinguished jurist, Lord Campbell, after stating the circumstances of the discharge under *habeas corpus* of Mr. Wilkes from arrest for libel under a 'general warrant,' issued by Lord Halifax, says: 'The immense popularity which Lord Chief Justice Pratt (afterward Lord Camden) now acquired *led him into some intemperance of language*, although his decisions might be sound. Many actions were brought in his court and tried before him for arrests under general warrants; and, the juries giving enormous damages, applications were made to set aside the verdicts and to grant new trials. It might be right to refuse to interfere, but not in terms such as these: . . . The defendants claim a right, under a general warrant and bad precedents, to force houses, break open escritaires, seize papers, where no inventory is made of things taken, and no persons' names specified in the warrant, so that messengers are to be vested with a discretionary power to search wherever their suspicions or their malice may lead them. As to the damages, I continue of the opinion that the jury are not limited to the injury received. Damages are designed, not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, and as proof of the detestation in which the wrongful act is held by the jury.' Lord Campbell himself *italicizes* the last lines in his quotation, and thereby points to that as the 'intemperate language' into which Lord Camden

stances which make him liable for such damages is not relieved from liability therefor because he made a fair statement of his case to his attorney before acting; his exemption from that liability must rest on his *bona fide* belief that he had good

had been led by the 'immense popularity' acquired by the discharge of Mr. Wilkes, a member of parliament, from his arrest under a general warrant for publishing a seditious libel. The discharge was based upon his privilege as a member of parliament to be free from arrest in all cases except treason, felony and actual breach of the peace. Upon the reassembling of parliament after Mr. Wilkes' discharge, both houses declared (as if in condemnation of Lord Camden's decision) 'that privilege of parliament does not extend to the case of writing or publishing seditious libels.' It was after this resolution of parliament, and in Mr. Wilkes' own action for that particular arrest, that Lord Chief Justice Pratt is said, by Lord Campbell, to have used the language quoted; but in a note to page 14 of the *Lives of the Lord Chancellors*, the case of *Boardman v. Carrington*, 2 Wils. 233, is cited. Now, if Lord Campbell, who writes of Lord Camden as 'one of the brightest ornaments of my profession, and of my party,' can so unequivocally condemn this particular language as intemperate and unsound; and when the circumstances under which it was uttered are so clearly indicative of a controversy between the king and parliament on the one hand, and the court and people on the other, as would naturally (if not properly) stimulate to the use of strong and partisan language, is it reasonable to hold upon this authority alone that such language is the law of the land, and ought to be given as such by way of instruction to the jury? It should also be borne in mind that even

Lord Camden himself did not give this language in instructions to the jury, but only used it in argument to sustain his judgment and refusal to set aside the verdict on the ground of excessive damages. Without passing just here upon the correctness of other portions of the instruction, we think that after telling the jury that they may compensate the plaintiff, punish the defendant and protect society, and not scrutinize these amounts very closely, that they may also add such further sum as will manifest the detestation in which the act is held by them, is, to speak mythologically, 'piling Pelion and Ossa on Olympus,' and is without good foundation as we think in principle or precedent."

As to the right of the jury to give damages by way of punishment he continued: "He would be a bold jurist who, in view of these authorities [over one hundred different cases which the learned judge said he had carefully examined, and a majority of which decide that vindictive or punitive damages may be given in cases where the element of fraud or oppression is shown], should hold that the doctrine of exemplary, vindictive or punitive damages had no foundation in law. Since the time of the controversy between Professor Greenleaf and Mr. Sedgwick (1847) on this subject, a large majority of the appellate courts in this country have followed the doctrine advocated by Mr. Sedgwick in that controversy; and our own supreme court has expressly denied, on the authorities, the correctness of Professor Greenleaf's views (*Funk & Co. v. Coe*, 4 G. Greene, 555, 61 Am.

ground for suing out the writ.¹ It is not cause for denying such damages that the actual damage is small. It was regarded as a sufficient reply to such suggestion to say that it is the boast of the common law that the lowest shall have its

Dec. 141); and in the same case expressed the opinion that, under certain circumstances, exemplary damages should be entertained. . . . Cochrane v. Miller, 13 Iowa, 128; Thomas v. Isett, 1 G. Greene, 470; Denslow v. Van Horn, 16 Iowa, 476; King v. Palmer, 18 Iowa, 377; R. S. 1860, §§ 2112, 3113, 3183. It seems that the terms *exemplary*, *vindictive*, *punitive*, *imaginary*, *presumptive*, *speculative*, and *smart money* are used in the law as synonymous; and the first three were expressly held in Chiles v. Drake, 2 Met. (Ky.) 146, 74 Am. Dec. 406, to be synonymous terms. While these words certainly have a literal or technical difference of signification as defined by lexicographers, yet they have been too long used as synonymous by legal writers to now justify the making of any distinction of meaning in construing the decisions or opinions of judges, or other law writings in which they are used. The controversy on this subject between Professor Greenleaf and Mr. Sedgwick may, perhaps, after all the attention and discussion it has excited, be found to be a controversy as to the terminology of the law, rather than as to the extent of the right of recovery or real measure of damages. Professor Greenleaf holds that, while the plaintiff can only recover compensation, he is not confined to the proof of actual pecuniary loss, but that the jury may take into consideration every circumstance of the act which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind,

his quiet and sense of security, in the enjoyment of his rights; in short, his happiness. But it must affect his happiness, not his neighbors'; and, therefore, to this question alone the jury should be restricted. Sedg. on Meas. of Dam. 609. While Mr. Sedgwick holds that whenever the elements of fraud, malice, gross negligence or oppression mingle in the controversy, the law, instead of adhering to the system, or even the language, of compensation, adopts a wholly different rule. It permits the jury to give what it terms *punitory*, *vindictive* or *exemplary* damages: in other words, it blends together the interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer but to punish the offender. Sedg. on Meas. of Dam. 623.

"The difference arises, not in the statement of the respective propositions, but in the restatement or construction which each puts upon the rule stated; 'in short,' says Professor Greenleaf, '*his* happiness;' while Mr. Sedgwick says, 'in other words, blends together the interest of society and the aggrieved individual,' etc. But some of the courts, which follow the rule as stated by Mr. Sedgwick, place a construction upon it not at all in antagonism to the rule as stated by Mr. Greenleaf. In Chiles v. Drake, 2 Met. (Ky.) 146, 74 Am. Dec. 406, the court say, 'every recovery for personal injury, with or without vindictive damages, operates in some degree as a punishment, but it is the punishment which results from the redress of a private

¹Union Mill Co. v. Trenzler, 100 Iowa, 540, 69 N. W. Rep. 876.

benefits as well as the highest feel its power, and that consistency must characterize the administration of the law lest error creep into the state.¹

wrong, and does not, therefore, violate the meaning or spirit of the constitution,' prohibiting more than one punishment for the same offense. . . . The damages are allowed as compensation for the loss sustained, but the jury are permitted to give exemplary damages on account of the nature of the injury. It is, therefore, the increase of the damages resulting from the character of the defendant's conduct that is denominated punitive or vindictive. Under the rule as stated by Mr. Greenleaf this increase of damages resulting from the nature of the defendant's conduct showing fraud, malice or oppression is given to the plaintiff as a compensation for the invasions of his 'peace of mind, his quiet and sense of security in the enjoyment of his rights;' while under the rule as stated by Mr. Sedgwick, this increase is given as 'punitive, vindictive or exemplary damages.' In either case, and under either rule, the amount given by the jury is 'imaginary,' 'presumptive' or 'speculative' with them; that is, the jury have not, and, in the nature of things, cannot have, in either case, any pecuniary standard by which to measure the amount of compensation or damages to which the plaintiff is entitled.

"It is, perhaps, true that the broad and general language of the rule, as stated by Mr. Sedgwick, tends more to convey to a jury the idea of their unlimited and unrestrained power, jurisdiction or control over the amount of their verdict than the rule as stated by Mr. Greenleaf; and that under that rule jurors would

more frequently return verdicts based more or less upon their passions and prejudices than under the other rule. For instance, the instruction as given in this case, omitting the objectionable clause heretofore considered, would tend very strongly to convey to the jury the idea of complete control over the amount of their verdict, unrestrained by any legal rule whatever. But suppose they had been instructed that in estimating the amount of plaintiff's damages they would ascertain and give: First, the actual pecuniary loss directly sustained, as the value of the clothing destroyed. Second, the consequential pecuniary loss, as the value of the time lost by the plaintiff, the expenses, if any, incurred for medicine, physician's bills, compensation to the attendant, and board while sick, or the like. Third, the physical suffering consequent upon the injury, including any temporary, protracted or permanent deformity, disability or disfiguring, as by scars, or the like. Fourth, the mental anguish, loss of honor and sense of shame, caused by the act of the defendant, as by the exposure of his naked person to the public, the sense of wrong inflicted, insult effected, the degradation felt, and the like. Fifth, the injury to the business, reputation, social standing, and the like. Is it not unreasonable to suppose that such an instruction would more certainly exclude passion and prejudice, and that a jury would feel themselves more constrained to limit their verdict to compensation to the plaintiff for the injuries inflicted by the defendant,

¹Telephone & Tel. Co. v. Shaw, 102 Tenn. 313, 52 S. W. Rep. 163.

§ 394. **Malice in law and malice in fact.** As has been shown, the liability to exemplary damages does not rest solely on the fact that the defendant has done wrong by infringing on the legal rights of the plaintiff. The wrong must be aggravated by the manner in, or the purpose for, which it was done. The spirit which actuated the wrong-doer may doubtless be inferred from the circumstances surrounding the parties and the transaction. If it appears that he is a lunatic, he is not liable for anything beyond compensatory damages because he is incapable of exercising the volition upon which depends his liability therefor.¹ There is some difference of opinion concerning the effect to be given an act which is done without other malice than is implied from the doing of an unlawful act. It is said that every act done wilfully or purposely, to the injury of another, without or upon slight provocation, is as against such person malicious, and the law so presumes; and whenever a grievous or wanton assault is committed, actual malice need not be shown to entitle the aggrieved party to exemplary damages.² Malice in law is not personal hate or ill-will of one person towards another; it refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct toward that citizen.³ It is implied

and, at the same time, would render a verdict which would amply compensate for the injury in every phase and manner wherein it could operate? And, indeed, it seems to us that under such an instruction the verdict would be more likely to approximate to justice and to exclude passion and prejudice than under the loose and general instruction as given by the court in this case, and justified by the rule laid down by Mr. Sedgwick, and sustained by the general current of the authorities. And yet it is doubtless true that such an instruction might mislead and confound a jury: and they would not, in any event, have any pecuniary standard by which to measure the damages under the third, fourth and fifth subdivisions of the instructions as specified."

¹ McIntire v. Sholty, 121 Ill. 660, 2 Am. St. 140, 13 N. E. Rep. 239.

If the wrong lies in the intent, and the intent is an impossibility, there can be no recovery. Jewell v. Colby, 66 N. H. 399, 24 Atl. Rep. 902; Krom v. Schoonmaker, 3 Barb. 617; Williams v. Hays, 143 N. Y. 442, 38 N. E. Rep. 449, 26 L. R. A. 153.

² Borland v. Barrett, 76 Va. 128, 44 Am. Rep. 152.

Such damages are not recoverable for an assault if, in making due allowance for the infirmities of human temper, the defendant has a reasonable excuse, arising from the provocation or fault of the plaintiff, though they were not sufficient to justify the act done. Ward v. Blackwood, 41 Ark. 295, 48 Am. Rep. 41. See § 151, 1255.

³ Willis v. Miller, 29 Fed. Rep. 238;

from the doing of an unlawful and injurious act with a wrong motive.¹ "The term 'malice' is variously used, according to the nature of the litigation in which it is sought to be established. In legal parlance malice may be actual or implied, and in general it may be implied whenever there is a deliberate intention to do a grievous wrong without legal justification or excuse. In civil controversies the very essence of malice is a disposition or willingness to do a wrongful act greatly injurious to another."² The right of the jury to assess punitive damages in cases of false imprisonment, says Thayer, J., does not necessarily depend upon the existence of malice, using that term in its ordinary sense. They may be awarded when a wrongful act is done wilfully, in a wanton or oppressive manner, or even when it is done recklessly, in open disregard of the rights of others. The cases on the subject show that in the matter of assessing damages for a false imprisonment, or for an assault or trespass, it is the duty of the jury to consider not only all the circumstances of aggravation attending the wrongful act, but in some measure, at least, the nature of the right that has been invaded, and the effect upon social order of permitting a wrong-doer to escape without substantial punishment, in case of a flagrant violation of the law and the rights of others.³ A statute which imposes liability to exemplary damages for wilful neglect contemplates an intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured, either in preventing or avoiding the injury.⁴ It has generally been held that civil damage laws which authorize the recovery of such damages do

Cincinnati, etc. R. Co. v. Cooper, 120 Ind. 469, 22 N. E. Rep. 340, 16 Am. St. 334, 6 L. R. A. 241; Palmer v. Chicago, etc. R. Co., 112 Ind. 250, 14 N. E. Rep. 70; Lake Erie & W. R. Co. v. Bradford, 15 Ind. App. 655, 44 N. E. Rep. 551.

¹ Baldwin v. Fries, 46 Mo. App. 288; Winters v. Cowen, 90 Fed. Rep. 99; Bromage v. Prosser, 4 B. & C. 247, 255; White v. Spangler, 68 Iowa, 222, 26 N. W. Rep. 85.

² Williams v. Williams, 20 Colo. 51, 63, 37 Pac. Rep. 614.

Malice implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations. Philadelphia, etc. R. Co. Quigley, 21 How. 202, 214; Smith v. Philadelphia, etc. R. Co., 87 Md. 48, 52, 38 Atl. Rep. 1072; Boyer v. Coxen, 92 Md. 366, 370, 48 Atl. Rep. 161.

³ Fotheringham v. Adams Exp. Co., 36 Fed. Rep. 252, 1 L. R. A. 474.

⁴ Kentucky Central R. Co. v. Gastineau's Adm'r, 83 Ky. 119.

not go so far as to allow them to be imposed unless the violation of the law was wilful, wanton or reckless, or otherwise merited punishment beyond that which followed the recovery of compensatory damages.¹ In Iowa, however, the wilful violation of the statute supports the recovery of punitive damages.² In Maine, where the seller of liquors and the owner of the building in which they were sold in violation of law were joined as defendants, and a wilful and wanton violation of law, in utter disregard of the consequences, was shown on the part of both, an award of exemplary damages was sustained.³ These cases and the adjudications generally do not proceed on the theory that the wrong-doer must act with a spirit of ill-will toward the individual who is injured by his act or omission. Indeed, so far as punitive damages are based on the principle that the public good requires, or is subserved by, their allowance, the consequences of the wrong-doer's conduct are more important than the motive which prompted it; or are the sure *indicia* of the motive, so far at least as to throw upon him the duty of establishing the facts which exempt him from punitive liability for doing an act in itself wrongful to another. In suits for libel the general rule is that if the publication is libelous *per se* exemplary damages may be awarded without proof of

¹ Kreiter v. Nichols, 28 Mich. 496; Rosecrantz v. Shoemaker, 60 id. 4, 26 N. W. Rep. 794; Kadym v. Miller, 13 Ill. App. 474; Jockers v. Borgman, 29 Kan. 109, 44 Am. Rep. 625; Neu v. Kechnie, 95 N. Y. 632, 47 Am. Rep. 89; Franklin v. Schermerhorn, 8 Hun, 112; Reid v. Terwilliger, 116 N. Y. 530, 22 N. E. Rep. 1091; Meidel v. Anthus, 71 Ill. 241; Wilber v. Dwyer, 69 Hun, 507, 23 N. Y. Supp. 395. *Contra*, Bean v. Green, 33 Ohio St. 444; Miller v. Gleason, 18 Ohio Ct. Ct. 374.

It is held in McMahon v. Sankey, 133 Ill. 636, 24 N. E. Rep. 1027, which is approved in Wolfe v. Johnson, 152 Ill. 280, 38 N. E. Rep. 866, that if a dramshop keeper continues to sell liquors to a man in the habit of drinking to excess, in wanton disre-

gard of the request and warning of the latter's wife, to her damage, the jury may award her exemplary damages. A later case holds that a sale is wilful, so as to subject the seller to such damages, if made after warning by the wife of the purchaser. Siegle v. Rush, 173 Ill. 559, 72 Ill. App. 485, 50 N. E. Rep. 1008. It is also wilful if made to an intoxicated person with knowledge that he is an habitual drunkard or that he is already intoxicated. England v. Cox, 89 Ill. App. 551; Laffler v. Fisher, 121 Mich. 60, 79 N. W. Rep. 934.

² Fox v. Wunderlich, 64 Iowa, 187, 20 N. W. Rep. 7.

³ Campbell v. Harmon, 96 Me. 87, 51 Atl. Rep. 801.

express malice;¹ if it is not so libelous the falsity of it is sufficient proof of malice to sustain such damages if the jury award them.² If the words published were qualifiedly privileged actual malice must be shown in order to authorize the imposition of damages beyond those which are compensatory.³ In Wisconsin exemplary damages cannot be recovered for a libel unless it was published with special ill-will or bad intent, which may be inferred from all the circumstances, but not alone from the falsity of the charge and its evil consequences.⁴

It is said in a recent case that the adjudications tend to the conclusion that the presence or absence of a malicious intent in the mind of the defendant is a question of fact to be determined by the jury from the evidence; that they may allow punitive damages if they believe that such intent existed, but that if the battery was the consequence of a sudden heat resulting from provocation first offered by the plaintiff, and not of a design for his injury deliberately formed by the defendant, and that the force used was not so disproportionate to the provocation as to repel the inference that it was induced thereby, exemplary damages should not be given.⁵ The code of Georgia expresses that in every tort there may be aggravating circumstances, either in the act or the intention, and in

¹Wood v. Hilbish, 23 Mo. App. 389; Regensperger v. Kiefer, 7 Atl. Rep. 724. 20 W. N. C. 97 (Pa.); Times Pub. Co. v. Carlisle, 36 C. C. A. 475, 94 Fed. Rep. 762, and cases cited. See § 1216.

²Malloy v. Bennett, 15 Fed. Rep. 371; Buckley v. Knapp, 48 Mo. 152; Bergmann v. Jones, 94 N. Y. 51; Samuels v. Evening Mail Ass'n, 75 id. 604; Holmes v. Jones, 121 id. 461, 24 N. E. Rep. 701.

³Fresh v. Cutter, 73 Md. 87, 10 L. R. A. 67, 25 Am. St. 575. 20 Atl. Rep. 774.

⁴Eviston v. Cramer, 57 Wis. 570, 15 N. W. Rep. 760; Templeton v. Graves, 59 Wis. 95, 17 N. W. Rep. 672. See Neeb v. Hope, 111 Pa. 145, 2 Atl. Rep. 568; Hamilton v. Eno, 81 N. Y. 116.

⁵Badostain v. Grazide, 115 Cal. 425, 47 Pac. Rep. 118, citing Lee v. Woolsey, 19 Johns. 319, 10 Am. Dec. 230; Robinson v. Rupert, 23 Pa. 523; Ward v. Blackwood, 41 Ark. 295, 300, 48 Am. Rep. 41; Crosby v. Humphreys, 59 Minn. 92, 96. 60 N. W. Rep. 843; Kiff v. Youmans, 86 N. Y. 324, 48 Am. Rep. 543; Childers v. San Jose Pub. Co., 105 Cal. 284, 291, 45 Am. St. 40, 38 Pac. Rep. 903. "Suppose two persons fight by mutual consent; each is punishable criminally, but neither may recover exemplary damages in a suit against the other; so, even though they fought 'with great spirit and brutality.'" Shay v. Thompson, 59 Wis. 540, 48 Am. Rep. 538, 18 N. W. Rep. 473.

that event the jury may give additional damages, either to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff. Under this provision exemplary damages have been awarded for wrongfully disinterring a dead body, that having been done wantonly or maliciously, or as the result of gross negligence or in reckless disregard of the rights of others, equivalent to an intentional violation of them;¹ and so where the plaintiff, after traveling with the dead body of a relative, and reaching the gate of a cemetery, in which he had a right to inter the remains, and in which the defendant had, under a contract with the plaintiff, prepared the grave, was denied access to the grounds for the purpose of burial.²

§ 395. Restriction and denial of exemplary damages.

In some jurisdictions the term "exemplary damages" is [726] in use, but signifies only a liberal extension of compensation to the injured party in view of the bad motive which induced or characterized the wrong, the mental distress resulting therefrom and the remoter pecuniary consequences. The courts here accept, in the main, the views of Prof. [727] Greenleaf. He says: "Damages are given as a compensation, recompense or satisfaction to the plaintiff for an injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more nor less; and this, whether it be to his person or estate. All damages must be the result of the injury complained of. It is [728] frequently said that in actions *ex delicto* evidence is admissible in aggravation or in mitigation of damages. But this, it is conceived, means nothing more than that evidence is admissible of facts and circumstances which go in aggravation or in

¹ *Jacobus v. Children of Israel*, 107 Ga. 522, 33 S. E. Rep. 853, 73 Am. St. 141.

² *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884, 38 S. E. Rep. 94, 52 L. R. A. 621.

Exemplary damages may be recovered from the owner of a dog which has frightened a horse by attacking it on the highway, causing the horse to run, and thereby injur-

ing the driver, if the dog was harbored and kept wilfully and maliciously, with knowledge of his vicious habits and practices, no effort being made to restrain him or protect the public from him. *Cameron v. Bryan*, 89 Iowa, 214, 56 N. W. Rep. 431; *Koestel v. Cunningham*, 97 Ky. 421, 30 S. W. Rep. 970; *Dillehay v. Hickey*, 24 Ky. L. Rep. 760, 65 S. W. Rep. 1095.

mitigation of the injury itself. The circumstances thus proved [729] ought to be those only which belong to the act complained of. The plaintiff is not justly entitled to receive compensation beyond the extent of his injury, nor ought the defendant to pay to the plaintiff more than the plaintiff is entitled to receive. Injuries to the person or to the reputation consist in the pain inflicted, whether bodily or mental, and in the expenses and loss of property which they occasion. The jury, therefore, in the estimation of damages, are to consider not only the direct expenses incurred by the plaintiff, but the loss of his time, his bodily sufferings, and, if the injury was wilful, his mental agony also; the injury to his reputation, the circumstances of indignity and contumely under which the wrong was done, and the consequent public disgrace to the plaintiff, together with any other circumstances belonging to the wrongful act and tending to the plaintiff's discomfort."¹

§ 396. **Same subject; New Hampshire rule.** In the late New Hampshire case already referred to, Foster, J., said his review of the cases compelled the conclusion that the modern erroneous idea of exemplary damages "originated in, and is in fact the same thing as, damages for wounded feelings, as [730] distinguished from damages for an injury to the person, or property. Damages for lacerated sensibilities, insulted honor, tyrannical oppression, and so forth, being much emphasized, and often being the principal damage suffered by the plaintiff, and language being loosely used, and not preserving the true distinction carefully, . . . it finally came to be understood that damages might be given in a civil suit as a punishment for an offense against the public; an idea that is certainly not plainly declared in the early cases. . . . I venture to say that no case will be found in which a judge explicitly told a jury that they might in an action for assault and battery give the plaintiff four damages, viz: 1. For loss of property, or for injury to his apparel, loss of labor and time, expenses of surgical assistance, nursing, etc. 2. For bodily pain. 3. For mental suffering; and 4. For punishment of the defendant's crime. But a critical examination of the cases will show, as I believe, that this fourth is, in fact,

¹ 2 Greenlf. Ev., § 267.

comprehended in the third, but has grown into and become a separate and additional item by inconsiderate, if not intemperate and angry, instructions given to juries when the court was too much incensed by the exhibition of wanton malice, revenge, insult and oppression to weigh with coolness and deliberation the meaning of language previously used by other judges; and instructions prompted by impulses of righteous indignation, swift to administer supposed justice to a guilty defendant, but expressed with too little caution and without pausing to reflect that the court was thus encouraging the jury to give the plaintiff more than he was entitled to; to give him, in fact, as damages, the avails of a fine imposed for the vindication of the criminal law and for the sake of public example.”¹

In a subsequent case in the same state² the court approve the foregoing, and say, by Cushing, J.: “Ordinarily, in actions for torts, the rule of damages is compensation in money for the damage sustained by reason of the natural and obvious consequence of the wrongful act. . . . When, however, the element of malice enters into the wrong the rule of damages is different and more liberal. It is equally well settled that in such cases there enters into the question of damages considerations which cannot be made the subject of [731] exact pecuniary compensation,—such as were described in the charge of the court as mental distress and vexation, what in common language might be spoken of as offenses to the feelings, insult, degradation, offenses against honest pride, and all matters which cannot arise except in those wrongs which are attended with malice. . . . In the endeavor to bring such considerations within the grasp of the law, and as far as possible to compensate such wrongs by damages, courts have used the terms punitive, vindictive, exemplary. I do not think the cases show, in so far as I have examined them, that this has ever been considered as punishing an offense against the criminal law of the state, but simply as a mode of stating the matter so as to bring this almost intangible subject within the grasp of the law. Whenever the law is so held that the jury are instructed that they may leave the domains of act-

¹ *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270. ² *Buxby v. Dunlap*, 56 N. H. 456.

ual pecuniary value, and go into speculations in regard to compensation for the wounded feelings, the offended pride, the outraged sense of decency and delicacy, they have come into the domain of what the law has been accustomed to call punitive, vindictive, or exemplary damages. It is of little consequence under what name it goes. The substance of the thing must be retained, unless a very large class of cases are to be stricken from the list of actionable wrongs. . . . According to these views, it is incorrect to separate what is called actual damage from what is called exemplary damage. The rule is not, as I understand it, to instruct the jury in the first place to determine the actual money damage which the plaintiff has sustained, and then further instruct the jury that, if they find that the defendant has been malicious, they may give another separate sum in damages by way of example, or for the sake of punishment. The true rule, as I understand it, is to instruct the jury that if they find the defendant has been malicious the rule of damages will be more liberal; that instead of awarding damages only for those matters which are capable of exact pecuniary valuation, they may take into consideration all the circumstances of aggravation,—the insults, offended feelings, degradation, and so on,—and endeavor, according to their best judgment, to award such damages by way of compensation or indemnity as the plaintiff, on the whole, ought to receive, and the defendant ought to pay.”

§ 397. **Same subject; Massachusetts rule.** In Massachusetts the same doctrine appears to be held; compensation is allowed to be fixed by considering all those circumstances which are generally the basis of exemplary damages; but there seems to be no countenance given to the infliction of additional damages for the punishment of the offender.¹ In an action by a father for harboring and secreting his minor daughter, and persuading her to remain absent from his family and service without his consent, it was held that he was entitled to recover for mental suffering caused by the injury, though it was erroneous to admit evidence thereof distinct from and in addition to that which showed the nature and extent of the injury.² If

¹ *Smith v. Holcomb*, 99 Mass. 552;
Austin v. Wilson, 4 Cush. 273.

² *Stowe v. Heywood*, 7 Allen. 18;
Phillips v. Hoyle, 4 Gray, 568.

there is a wantonness or mischief, causing additional bodily or mental damage, in the injurious act of a servant within the scope of his employment, that wantonness or mischief will enhance the damages against the master.¹ When the gist of the action is the breaking and entering the plaintiff's close, the circumstances which accompany and give character to the trespass may always be shown either in aggravation or mitigation.² He who is guilty of a wilful trespass, or one characterized by gross carelessness and want of ordinary attention to the rights of another, is bound to make full compensation. Under such circumstances the natural injury to the feelings of the plaintiff may be taken into consideration in trespasses to real estate as well as in other actions of tort. Acts of gross carelessness, as well as those of wilful mischief, often inflict a serious wound upon the feelings when the injury done to property is comparatively trifling. No rule of law requires the mental suffering of the plaintiff or the misconduct of the defendant to be disregarded. The damages in such cases are enhanced, not because vindictive or exemplary damages are allowable, but because the actual injury is made greater by its wantonness.³ In one case Chief Justice Shaw said: "It is immaterial," speaking of the particular case, "whether [733] the proof establishes gross negligence, or only a want of ordinary care on the part of the defendant. In either case the plaintiff would be entitled to recover in damages the actual amount of loss sustained, and no more, in the form of vindictive damages or otherwise."⁴

§ 398. **Same subject; Nebraska rule.** In Nebraska the court say:⁵ "To this court the question of punitive, vindictive or exemplary damages is *tabula rasa*, it now being presented for the first time. And being thus called upon to lay the foundation for future adjudications on this subject in this state,

¹ Hawes v. Knowles, 114 Mass. 518, 19 Am. Rep. 393.

⁴ Barnard v. Poor, 21 Pick. 380.

² Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Bracegirdle v. Orford, 2 M. & S. 77; Merest v. Harvey, 5 Taunt. 442; Brewer v. Dew, 11 M. & W. 625.

⁵ Boyer v. Barr, 8 Neb. 68, 30 Am. Rep. 814. The later cases are in harmony with the early one. Boldt v. Budwig, 19 Neb. 739, 28 N. W. Rep. 280; Winkler v. Roeder, 23 Neb. 706, 37 N. W. Rep. 607.

³ Meagher v. Driscoll, *supra*; Fillebrown v. Hoar, 124 Mass. 580.

we are warned to avoid a line of construction which seems to have been the fruitful source of so much difficulty elsewhere, and to follow those precedents and authorities which are most satisfactory to our judgment, and which do not seem to have led to any embarrassing complications in their administration.” And the court disapproved an instruction to a jury that, in addition to compensating the plaintiff for injury actually committed, they might assess other damages of a punitive or exemplary character.¹ In an action for libel evidence of express malice is improper if received for the purpose of influencing the jury in fixing the damages.²

[734] § 399. **Same subject; Michigan rule.** In Michigan, also, the element of punishment is rejected. Mr. Justice Campbell stated the question and defined the accepted doctrine with great clearness and force in a libel case. He said: “It is in connection with the various degrees of blameworthiness chargeable on wrong-doers that the discussions have arisen upon the subject of vindictive damages, which, inasmuch as they rest upon actual fault, are by some authorities said to be designed to punish the wrong intent; while, according to others, the damages usually so called are only meant to recompense the sense of injury which is, in human experience, always aggravated or lessened in proportion to the degree of perversity exhibited by the offender. While the term exemplary or vindictive damages has become so fixed in the law that it may be difficult to get rid of it, yet it should not be allowed to be used so as to mislead; and we think the only proper application of damages, beyond those to the person, property or reputation, is to make reparation for the injury to the feelings of the person injured. This is often the greatest wrong which can be inflicted; and injured pride or affection may, under some circumstances, justify very heavy damages. . . . The injury to the feelings is only allowed to be considered in those torts which consist of some voluntary act or very gross neglect, and practically depends very closely on the degree of fault evinced by all the circumstances. It has been very wisely left to the jury to determine each case upon its own surroundings, because

¹ See *Quigley v. Central Pacific R. Co.*, 11 Nev. 350, 376, 21 Am. Rep. 757. ² See *Pub. Co. v. World Pub. Co.*, 59 Neb. 713, 82 N. W. Rep. 28.

the only safe rule of damages in matters of feeling is to give what, to the ordinary apprehension of impartial men, [735] would seem proportionate to an injury which must be measured by the instincts of our common humanity."¹ A recent

¹*Detroit Daily Post Co. v. McArthur*, 16 Mich. 447.

Some years later the same judge again discussed this subject. In *Welch v. Ware*, 32 Mich. 84, he said: "The common sense of mankind has never failed to see that the injury done by a wilful wrong to person or reputation, and in some cases to property, cannot be measured by the consequent loss in money. A person assaulted may not be disabled, or even disturbed in his business, and may not be put to any outlay in repairs or medical services. He may not be made poorer in money, directly or consequentially. He may incur no pecuniary damage whatever. And it is very clear that the shame and mental anxiety and suffering or indignation consequent on such a wrong are not capable of a money measurement. No one would avow in advance that he would be willing for a given sum to meet that experience; and no one who should seek it as a means of putting money into his pocket would be likely to receive compensation at the hands of a jury. So a person who is struck down by a blow from the arms of a wind-mill may be much more seriously hurt than by a blow from a fist or a whip. But no one would dream of comparing these injuries by their physical effect. When the law gives an action for wilful wrongs it does it on the ground that the injured person ought to receive pecuniary amends from the wrong-doer. It assumes that every such wrong brings damages upon the sufferer, and that the principal damage is mental and not physical. And it assumes further, that this is actual

and not metaphysical damage, and deserves compensation. When this is once recognized, it is just as clear that the wilfulness and wickedness of the act must constitute an important element in the computation, for the plain reason that we all feel our indignation excited in direct proportion with the malice of the offender, and that the wrong is aggravated by it.

"If actual damage is not confined to pecuniary consequences and cannot be measured by a money standard, all redress in damages must partake of a punitive character to some extent; and the line between actual and what are called exemplary damages cannot be drawn with much nicety. In every such case the jury are compelled to determine from their own sense of justice and their knowledge of human nature what the amount of damages should be. When the amount to be recovered must in all cases rest in their fair and deliberate discretion, the law can give them no precise instructions. It aims to do justice by directing them to distinguish between provoked grievances and those which are unprovoked, or for which the provocation is in great disproportion to the wrong, making adequate compensation in all cases, but giving heavier damages in all cases where the wrong is aggravated by bad motives or malice. It would be of very little use to present the law to a jury upon any theoretical basis. The rule is intelligible and has not been found to work badly in practice. But whether this rule involves merely compensation or whether it is based on a theory of punishment is not very impor-

case adheres to the rule announced in the earlier cases, viz.: "that where the damages are capable of pecuniary estimation, vindictive damages can never be allowed; that for any wrongful injuries where the grievance created is purely pecuniary in

tant in practice and does not come within the domain of law so long as the jury are obliged to estimate by their own good judgment. It is not an open question in this state that damages are to be given not only for grievances beyond pecuniary losses, but also in accordance with the malice of the offender." Previous cases in that state illustrating the general doctrine concerning aggravation of damages by wilful and wanton misconduct, and the powers and duties of jurors in actions of tort, are cited. *Tefft v. Windsor*, 17 Mich. 486; *Warren v. Cole*, 15 Mich. 265; *Brushaber v. Stegemann*, 22 Mich. 266; *Swift v. Applebone*, 23 Mich. 252; *Leonard v. Pope*, 27 Mich. 145; *Sheahan v. Barry*, 27 Mich. 217.

In *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668, Judge Campbell had to deal with this subject again in an action by a female for assault and battery aggravated by an alleged attempt to ravish. He said: "This is nothing more than trespass for an assault and battery. There is no such thing as a private action for a crime as such. The civil grievance here charged was an assault described as was proper with its attendant circumstances of enormity including an attempt to ravish. This, however, does not make it differ from an action for a lighter grievance except as showing a heavier ground of complaint, for which if made out the damages would be likely to be larger." Further on he says: "There was no dispute but that the plaintiff below received some blow or blows, or, what was equivalent, was pushed with more or less force by the defendant. If this

was done by him as the first assailant, he was unquestionably guilty of an assault. And as an assault cannot very well be purely accidental, and is not pretended to have been anything but intentional, if committed at all, it was such an act as must be regarded as wilful, whether serious or trivial. Being so, it authorized the jury to give such damages as would, in their sound judgment, be required by the character and extent of its atrocity. If the jury believed that there was any assault at all they could not help believing it was an indecent one, if not felonious, because there was no proof of any other. We need not, therefore, consider anything except the instructions given concerning what are called exemplary damages, as the case was fit for them if they were allowed at all. The question of the propriety of their allowance is not an open one in this state. The argument that a person is thereby punished twice within the constitutional and common-law rule is, in our opinion, entirely fallacious. The maxim at common law that no one shall be twice vexed for the same cause, where it applied at all, prevented a second prosecution as well as a second punishment; and if it applied to civil damages would cover the whole and not merely what is assumed to be part of them. But there is no analogy between the civil and criminal remedies. The punishment by criminal prosecution is to redress the grievance of the public, while the civil remedy is for private redress. In the eye of the law, where both actions lie, there is a double injury, and one has never,

its nature, and is susceptible of a full and definite money compensation, it is not permissible to abandon a certain rule, which will do complete justice, for an uncertain one that can hardly fail to do injustice.¹ And in *Wilson v. Bowen*² it is said that it is not the province of the jury, after full damages have been found for the plaintiff, so that he is fully compensated for the wrong committed by the defendant, to mulct the defendant in an additional sum to be handed over to the plaintiff as a punishment for the wrong he has done to such plaintiff."³ The disinclination to allow exemplary damages is so strong that a civil damage act expressly permitting their recovery is con-

therefore, been allowed to be pleaded in abatement or bar of the other, simply because they are contentions between different parties. But when we look at the rules which have been provided for enforcing the redress of either the public or the private complainant, we are not so much concerned with any supposable theories on which such rules may be based as with the rules themselves. Civil actions never lie, except for the vindication of broken laws, any more than criminal. It is a matter of arbitrary regulation, and not of principle, whether a given violation of law shall be redressed by a civil or criminal prosecution, or by both; and where new crimes are created out of what were before civil wrongs, the civil remedy has seldom been lessened or narrowed by reason of the new criminal prosecution. Whether we call the process punitive or exemplary or remedial, we get no nearer a conclusion if the law has given the rule of procedure." *Scripps v. Reilly*, 38 Mich. 10; *Stilson v. Gibbs*, 53 id. 283, 18 N. W. Rep. 815; *Wilson v. Bowen*, 64 Mich. 133, 31 N. W. Rep. 81. See *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. 698, 28 N. W. Rep. 695; *Durfee v. Newkirk*, 83 Mich. 522, 47 N. W. Rep. 351,

¹ *Warren v. Cole*, 15 Mich. 273.

² 64 Mich. 133, 31 N. W. Rep. 81; *Stuyvesant v. Wilcox*, 92 Mich. 233, 52 N. W. Rep. 465; *Haviland v. Chase*, 116 Mich. 214, 74 N. W. Rep. 477, 72 Am. St. 519.

³ *Durfee v. Newkirk*, 83 Mich. 522, 47 N. W. Rep. 351. The opinion continues: "There is a class of cases, such as seduction (see *Watson v. Watson*, 53 Mich. 168, 51 Am. Rep. 111, 18 N. W. Rep. 605), where the damages are not capable of accurate measurement by a money standard, and where they must necessarily be left to the proper discretion of the jury. In such cases increased damages are permitted for circumstances of aggravation in the wrongdoing, but they are not given by the law, as interpreted by this court, in punishment of the wrong-doer, but as extra compensation to the person wronged, for the reason that the injury is considered greater because of such circumstances of aggravation, and therefore the compensation ought to be greater. Wilful trespasses, assaults and batteries, libels and slanders, false imprisonment and, perhaps, other actions, where the injury is in part to the feelings of the plaintiff, to his shame and humiliation, are cases where 'increased' damages may be given."

strued not to justify an award by way of punishment, but rather to empower the jury to award a sum in addition to the actual proven damages as compensation for injured feelings.¹

§ 400. Same subject; the rule in Colorado, West Virginia, Washington and Connecticut.—The early cases in Colorado supported, at least by strong inference, the doctrine of exemplary damages. In 1884 they were reviewed and the conclusion was reached that the question was not *res judicata*. It was then held that such damages are not recoverable for an act which is punishable under the criminal laws.² Four years later it was ruled that nothing beyond liberal compensation is recoverable.³ In the following year the legislature provided for the recovery of exemplary damages.⁴

In West Virginia the right to recover punitive damages was denied, after apparently full discussion,⁵ in 1888, by a unanimous court. In 1895, a complete change in the *personnel* of the court having taken place in the meantime, there was a change of position, and the rule generally recognized was approved.⁶

In Washington exemplary damages are not recoverable,⁷ except where allowed by statute, and then they are not to be punitive in extent. The code allows such damages in an action on an attachment bond if the attachment was maliciously sued out. This is construed not to permit damages by way of punishment, but to authorize them as compensation for injury to reputation, feelings, and other damage of an intangible nature. Exemplary damages are not recoverable if the attach-

¹ Ford v. Cheever, 105 Mich. 679, 63 N. W. Rep. 975; Haviland v. Chase, 116 Mich. 214, 217, 74 N. W. Rep. 477, 72 Am. St. 519; McChesney v. Wilson, — Mich. —, 93 N. W. Rep. 627.

² Murphy v. Hobbs, 7 Colo. 541, 49 Am. Rep. 366, 5 Pac. Rep. 119.

³ Greeley, etc. R. Co. v. Yeager, 11 Colo. 345, 18 Pac. Rep. 211; Howlett v. Tuttle, 15 Colo. 454, 24 Pac. Rep. 921.

⁴ Laws 1889, p. 64. See French v. Deane, 19 Colo. 504, 24 L. R. A. 387, 36 Pac. Rep. 609. The words, in the act referred to, "wrong done to the

person," are not restricted to physical or bodily injuries, but include injuries to the mind and sensibilities. Williams v. Williams, 20 Colo. 51, 37 Pac. Rep. 614.

⁵ Pegram v. Stortz, 31 W. Va. 220, 6 S. E. Rep. 485; Beck v. Thompson, 31 W. Va. 459, 13 Am. St. 870, 7 S. E. Rep. 447.

⁶ Mayer v. Trobe, 40 W. Va. 246, 23 S. E. Rep. 58.

⁷ Spokane Truck & D. Co. v. Hoefler, 2 Wash. 45, 25 Pac. Rep. 1072, 11 L. R. A. 689, 26 Am. St. 842.

ment was sued out on the advice of an attorney after a full disclosure of the facts, nor if actual damages were not recoverable.¹

In Connecticut the cases in which punitive damages may be awarded are only those actions of tort founded on the malicious or wanton misconduct of the defendant, or upon such culpable neglect as is tantamount thereto. The expenses of litigation are not an element of actual or compensatory damages, and can only be considered in those cases in which exemplary damages may be awarded. Such expenses in excess of taxable costs, in cases in which they may be considered, limit the amount of punitive damages which can be awarded. In cases where they may be considered it is not usual to prove the expenses of litigation actually incurred, but the court may admit evidence for that purpose.²

§ 401. Exemplary damages as compensation and punishment. The difference between allowing all the circumstances belonging to a tort, tending to show that it was induced or aggravated by malice, to be shown and considered merely for more ample compensation to the party injured, and permitting it to be done with that view, and also that the amount shall operate as a punishment and a warning, is that to the extent that the latter object influences the jury the verdict will be increased; and the cases are very numerous in the books which show that very large additions must have been made for punitive effect to the amount which would otherwise have been found. Nor is this result surprising to those who have frequently participated in or witnessed the trial of tort actions, and observed the effect of the indignant denunciations of counsel, seconded by the apparently dispassionate instructions of the court, submitting the very same considerations to the jury as warranting them, in their discretion, for the good of the public, in awarding a larger sum.

In a New York case³ the court say: "In vindictive actions — and this [for assault and battery] is agreed to come within that class — jurors are always authorized to give exemplary

¹ *Levy v. Fleischer*, 12 Wash. 15, 67, 71 Am. St. 213; *List v. Miner*, 74 40 Pac. Rep. 384. Conn. 50, 49 Atl. Rep. 856.

² *Meisenbacker v. Society Concordia*, 71 Conn. 369, 378, 42 Atl. Rep.

³ *Cook v. Ellis*, 6 Hill, 466, 41 Am. Dec. 757.

damages, where the injury is attended with circumstances of aggravation; and the rule is laid down without qualification that we are not to regard either the possible or the actual punishment of the defendant by indictment and conviction at the suit of the people. . . . We concede that smart money, [738] allowed by a jury, and a fine imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime. The former, however, becomes *incidentally* compensatory for damages, and at the same time answers the purposes of punishment. The recovery of such damages ought not to be made dependent on what has been done by way of criminal prosecution any more than on what may be done. Nor are we prepared to concede that either a fine, an imprisonment, or both, should be received in evidence to mitigate the damages. True, if excluded, a double punishment may sometimes ensue, but the preventive lies with the criminal rather than the civil courts." It obviously should be assumed that such double punishment occurs in every instance where the same act is the subject of a civil and a criminal suit, and in each the malicious act is submitted to the jury, with the usual instructions, in the former, in respect to exemplary damages for punishment. If the idea of punishment is excluded, and the aggravations are permitted to be considered only as elements of the injury to the wronged party, the civil action is merely a means of private redress for the particular injury such party suffers from an act which, in a general way, affects the whole community. He is entitled to that redress without prejudice from the existence of a liability to respond to the public.

§ 402. Exemplary damages for penal offense. The courts of some states only allow exemplary damages, including the punitive element, for such tortious acts, accompanied with malice or wanton misconduct, as are not criminal offenses.¹

¹ Wabash Printing & Pub. Co. v. Rep. 119; Farman v. Lauman, 73 Ind. Crumrine, 123 Ind. 89, 21 N. E. Rep. 568; Koerner v. Oberly, 56 id. 284. 26 904; Tracy v. Hackett, 19 Ind. App. Am. Rep. 34; State v. Stevens, 103 133, 65 Am. St. 398, 49 N. E. Rep. 185; Ind. 55, 53 Am. Rep. 482, 2 N. E. Austin v. Wilson, 4 Cush. 273, 50 Rep. 214; Freese v. Tripp, 70 Ill. 496; Am. Dec. 766; Murphy v. Hobbs, 7 Meidel v. Anthis, 71 Ill. 241; Stowe v. Heywood, 7 Allen, 118; Fay v.

But, more generally, liability to punishment in a prosecution for the same act as an offense against the state is held not to affect the civil remedy; the jury have, notwithstanding, the same discretion to allow damages beyond compensation for punishment.¹ The reasoning upon which this double [739] liability to punishment is maintained is not very satisfactory. It is not a cogent answer to the objection that the additional damages imposed for punishment in the civil action go to the injured party. He is not entitled to them if he is otherwise compensated; nor does the fact that this mulct goes to him instead of the state render its imposition any less a punishment, which is repeated and duplicated when, upon the same principle and for the same public purpose, he is fined again in a prosecution in the name of the state.²

Parker, 53 N. H. 342, 16 Am. Rep. 270; Bixby v. Dunlap, 56 N. H. 456; Cherry v. McCall, 23 Ga. 193; Butler v. Mercer, 14 Ind. 479.

The legislature may provide for the recovery of punitive damages in cases where an injury is caused by an illegal act, although the same illegal act may subject the defendant to a criminal prosecution. State v. Schoonover, 135 Ind. 526, 35 N. E. Rep. 119.

¹ *Baldwin v. Fries*, 46 Mo. App. 288; *Cole v. Tucker*, 6 Tex. 266; *Roach v. Caldbeck*, 64 Vt. 593, 24 Atl. Rep. 989; *Hauser v. Griffith*, 102 Iowa, 215, 71 N. W. Rep. 223; *Rhodes v. Rogers*, 151 Pa. 634, 24 Atl. Rep. 1044; *Jackson v. Wells*, 13 Tex. Civ. App. 275, 35 S. W. Rep. 528; *Shook v. Peters*, 59 Tex. 393; *Bundy v. Maginess*, 76 Cal. 532, 18 Pac. Rep. 668; *Smith v. Bagwell*, 19 Fla. 117, 45 Am. Rep. 12; *Boetcher v. Staples*, 27 Minn. 308, 7 N. W. Rep. 263; *Brown v. Evans*, 17 Fed. Rep. 912; *Chiles v. Drake*, 2 Met. (Ky.) 146, 74 Am. Dec. 406; *Sowers v. Sowers*, 87 N. C. 303; *Barr v. Moore*, 87 Pa. 385, 30 Am. Rep. 367; *Wiley v. Keokuk*, 6 Kan. 94; *Jockers v. Borgman*, 29 id. 109, 121, 44 Am. Rep. 621; *Cook v. Ellis*, 6

Hill, 460, 41 Am. Dec. 757; *Corwin v. Walter*, 18 Mo. 71, 59 Am. Dec. 285; *Jefferson v. Adams*, 4 Harr. 321; *Wilson v. Middleton*, 2 Cal. 54; *Edwards v. Leavitt*, 46 Vt. 126; *Hoadley v. Watson*, 45 id. 289, 12 Am. Rep. 197; *Phillips v. Kelly*, 29 Ala. 628; *Roberts v. Mason*, 10 Ohio St. 277; *Garland v. Wholeham*, 26 Iowa, 185; *Lucas v. Flinn*, 35 id. 9; *Hendrickson v. Kingsbury*, 21 id. 379; *Wheatley v. Thorn*, 23 Miss. 62; *Fry v. Bennett*, 4 Duer, 247; *Pike v. Dilling*, 48 Me. 539; *Godard v. Grand Trunk R. Co.*, 57 Me. 202; *Johnson v. Smith*, 64 Me. 553; *Wolff v. Cohen*, 8 Rich. 144; *Cosgriff v. Miller*, — Wyo. —, 68 Pac. Rep. 206, 216, citing the text; *Wagner v. Gibbs*, — Miss. —, 31 So. Rep. 431.

² In *Ward v. Ward*, 41 Iowa, 687, Beck, J., said: "It is the settled rule in this state, that, in cases of this kind, where the proper facts are shown, and it appears that the act complained of is punishable under the criminal statutes, punitive and exemplary damages may be allowed. *Guengerich v. Smith*, 36 Iowa, 587; *Garland v. Wholeham*, 26 id. 185; *Hendrickson v. Kingsbury*, 21 id. 379. Among the objects attained by the allowance of exemplary dam-

[740] When punitive damages are allowed the law uses the suit of a private party as an instrument of public protection; not for the sake of the suitor, but for that of the public. It is not the form of the action that gives the right to the jury

ages are the punishment of the wrong-doer, and the example whereby others are deterred from the commission of like wrong—and it is often said such damages are allowed for these purposes. Sedg. on Measure of Damages, p. 287, note; 1 Hilliard on Torts, p. 251, note *a*; *Anthony v. Gilbert*, 4 Blackf. 348; *Taylor v. Church*, 8 N. Y. 452, 460; *Bailey v. Dean*, 5 Barb. 297, 303; *Roberts v. Mason*, 10 Ohio St. 277, 280. Indeed, it appears that one of the objects of punishment in all cases is to prevent the repetition of the crime by the culprit and others. The example of punishment, it is presumed, will deter others from the commission of the offense in the future. Counsel for defendant insists that while in proper cases exemplary damages may be allowed for the purpose of punishing the defendant, they ought not to be carried to the extent that they may serve as an example to others; that is, the defendant ought not to suffer for the purpose of public good. It is true that vindictive damages are never allowed alone for the purpose of public good, through the example given in their assessment. The effect upon the public is but an incident, just as the effect of punishment in criminal cases incidentally operates to deter others from the commission of crime."

In *Brown v. Swineford*, 44 Wis. 285, 28 Am. Rep. 582. *Ryan, C. J.*, said: "A very able and solemn appeal was made to the court to exclude the rule of exemplary damages in actions of tort, when the tort is punishable as a crime. The position was founded upon the clause in section 8, article II, of the

constitution, that no person, for the same offense, shall be twice put in jeopardy of punishment. It was argued, with very great force, that punitive damages given in the right of the public, in addition to full compensation to the sufferer by an act which is at once a tort and a crime, as in this case, and in *McWilliams v. Bragg*, 3 Wis. 424, and *Birchard v. Booth*, 4 id. 67, subjects the tort-feasor to punishment twice for the same offense. And it might have been added, that while the statute limits the pecuniary fine upon criminal prosecution for such an act, there is but vague limit to the punitive damages which a jury may find in a civil action. It certainly appears to be an incongruity that one may be punished by the public for the crime, upon criminal prosecution, by fine limited by statute, and again punished in favor of the sufferer, but in right of the public, for the same act, by punitive damages, with little limit but the discretion of the jury. This is but another illustration of what appears to be the incongruity of the entire rule of exemplary damages. On this subject the writer adheres to what he said in *Bass v. Railway Co.*, 42 Wis. 672, confirmed by comments which he has seen about it in legal periodicals. And he believes that his views of punitive damages, as an original question, are sanctioned by every present member of the court.

"The particular view now insisted on was overlooked in *McWilliams v. Bragg*, *Birchard v. Booth*, and all the cases in this court in which the action was against the actual tort-

to give such damages, but the moral culpability of the [741] defendant.¹ After there has been one trial in which his culpability has been tried with a view to punishment in the interest of the public, any other trial for the same purpose,

feisor, subject to criminal conviction for the act. In *Railroad Co. v. Finney*, 10 Wis. 388; *Bass v. Railway Co.*, 36 id. 450, 17 Am. Rep. 495, 42 Wis. 654, 24 Am. Rep. 437; *Craker v. Railway Co.*, 36 Wis. 657, 17 Am. Rep. 504, and other cases where the action was against the master for the tort of the servant, it could not well arise. So far, therefore, it is a question of first impression here. It would have been no subject of regret to the court if the obligation of the constitution called upon it to abridge the application of the rule. But the court is unable to hold that the constitutional provision has any controlling bearing on the question. The constitution only re-enacts what was the general, if not literally universal, rule at common law. See authorities collected in 1 Bish. Crim. Law, §§ 980-987. The word *jeopardy* is therefore used in the constitution in its defined technical sense at the common law. And in this use it is applied only to strictly criminal prosecutions by indictment, information, or otherwise. *Commonwealth v. Cook*, 6 Serg. & R. 577, 9 Am. Dec. 465; *State v. McKee*, 1 Bailey, 651; *People v. Goodwin*, 18 Johns. 187, 9 Am. Dec. 203; *United States v. Gibert*, 2 Sumn. 19; *United States v. Haskell*, 4 Wash. C. C. 402. See, also, *State v. Crane*, 4 Wis. 400. The cases generally hold that the rule in criminal cases, that one shall not twice be put in jeopardy, implies no more than the bar of a judgment to an action for the same cause. But no case is known where a conviction upon an indictment has been held a bar to a civil action for dam-

ages growing out of the same act; *a fortiori*, none in which a recovery in a civil action has been held a bar to an indictment for the same act. And the whole purview of section 8 plainly shows that the putting in jeopardy prohibited is confined to criminal prosecutions. Indeed, this is manifest, in the clause itself, which is confined to the same *offense*, used in the same sense as *criminal offense*, in the first clause of the section. Of course the same act may be an offense (in the sense of crime) against the state, and an offense (in the sense of tort) against a private person. It is manifest that a judgment for one is not a bar to the other. And it might be difficult on principle to hold a criminal conviction as a bar to the recovery of punitive damages in a civil action, and not a bar to the recovery of compensatory damages; not a bar to any civil action. See *Jacks v. Bell*, 3 C. & P. 316.

"The radical difficulty in the position of counsel appears to be that judgment for the criminal offense is for the offense against the public; judgment for the tort is for the offense against the private sufferer; that though punitive damages go in the right of the public for example, they do not go by way of public punishment, but by way of private damages; for the act as a tort, and not as a crime; to the private sufferer, and not to the state. Though they are allowed beyond compensation of the private sufferer, they still go to him for himself, as damages allowed to him by law in addition to his actual damages; like the double

¹ *Hamilton v. Third Avenue R. Co.*, 53 N. Y. 24.

whatever may be the form of the proceeding, is in substance and effect putting the accused again in jeopardy of punishment for the same offense, and vexing him again for the same [742] cause. Nor is the objection removed though the first verdict and the judgment thereon be provable on the second trial in mitigation, though this would, to the extent of the mitigation, lessen the injury resulting from double punishment. And in some jurisdictions it is provable in mitigation.¹

§ 403. Exemplary damages as matter of right. It is for the court to determine whether the evidence tends to show facts which warrant exemplary damages; the sufficiency of the facts is for the jury.² There is a difference of opinion as to whether damages for punitive effect can be claimed as a matter of right. The affirmative is well maintained in a Wisconsin case (which has recently been overruled in deference to the weight of authority³) where the jury were told that they ought to give exemplary damages if the facts justified their

and treble damages sometimes allowed by statute. Considered as strictly punitive, the damages are for the punishment of the private tort, not of the public crime. It is unfortunate that damages should ever have been suffered to go beyond actual compensation, under a liberal rule like that given in *Craker v. Railway Co.*, 36 Wis. 657, 17 Am. Rep. 504. But the rule so given and so generally established is a sin against sound judicial principle, not against the constitution. . . . The argument and consideration of this case have gone to confirm the present members of this court in their disapprobation of the rule of exemplary damages which they have inherited. But they fear to complicate the difficulties and incongruities of the rule by the exception urged; and do not feel at liberty to change or modify the rule at so late a day, against the general current of authority elsewhere." See *Malone v. Murphy*, 2 Kan. 250; *Whitney v.*

Hitchcock, 4 Denio, 461; *Wheeler v. Randall*, 48 Ill. 182.

¹*Taylor v. Carpenter*, 2 Woodb. & M. 1, 22; *State v. Autery*, 1 Stew. 399; *Johnston v. Crawford*, Phillips, 342; *Porter v. Seiler*, 23 Pa. 424, 62 Am. Dec. 341; *Southwick v. Ward*, 7 Jones, 64, 75 Am. Dec. 453; *Shook v. Peters*, 59 Tex. 393.

²*Chicago, etc. R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Chicago v. Martin*, 49 Ill. 241, 95 Am. Dec. 590; *Heil v. Glanding*, 42 Pa. 493, 82 Am. Dec. 537; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351; *Milwaukee R. Co. v. Arms*, 91 U. S. 489; *Hawk v. Ridgway*, 33 Ill. 473; *Mabb v. Stewart*, 133 Cal. 556, 65 Pac. Rep. 1055; *Kenyon v. Cameron*, 17 R. I. 122, 20 Atl. Rep. 233; *Merchants' & Planters' Oil Co. v. Kentucky Refining Co.*, 16 C. C. A. 212, 69 Fed. Rep. 218.

³*Robinson v. Superior Rapid Transit R. Co.*, 91 Wis. 345, 59 Am. St. 896, 34 L. R. A. 205, 68 N. W. Rep. 961; *Haberman v. Gasser*, 104 Wis. 98, 80 N. W. Rep. 105.

allowance. In answer to an exception to this instruction it was said: "It cannot be assumed that the law, in giving this power of punishment to juries, designed that it should be exercised arbitrarily, wantonly or capriciously. It was not designed that it should be withheld or applied from any personal motive of favoritism or animosity existing in the breast of the jury. On the contrary, it must have been designed that it should be exercised in a uniform and equal manner, without respect to persons and with the single purpose of accomplishing the object of granting the power at all, that of protecting the community from such injuries. This can only be accomplished by giving juries to understand that where the facts are such as authorize them to exercise the power it ought to be exercised; regard being had, in fixing the amount of the punishment to be inflicted in each instance, to all the circumstances of the case bearing upon the degree of malice, insult and aggravation."¹ Under the Iowa civil damage statute the jury may be instructed that the plaintiff is entitled to exemplary damages if they find in his favor. The instructions approved by the court recognized that usually the allowance of such damages is discretionary.² In Vermont, Mississippi, Kentucky, Illinois, Missouri, New York, Rhode Island, Tennessee, Wisconsin, Alabama, Maryland, North Dakota, North Carolina and Maine punitive damages cannot be claimed as matter of right.³ The amount which may be recovered as

¹ *Hooker v. Newton*, 24 Wis. 292; 93 id. 44; *Consolidated Coal Co. v. Hodgson v. Milward*, 3 Grant's Cas. 406; *Platt v. Brown*, 30 Conn. 336; 162; *Carter v. Illinois Central R. Co.*, 17 Ky. L. Rep. 1352, 34 S. W. Rep. 907; *Goodall v. Thurman*, 1 Head, 209; *Nicholson v. Rogers*, 139 Mo. 136, 31 S. W. Rep. 260; *Carson v. Smith*, 133 Mo. 606, 34 S. W. Rep. 855; *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. Rep. 308, 11 L. R. A. 784; *Jacobs v. Sire*, 4 N. Y. Misc. 598, 23 N. Y. Supp. 1063; *Kenyon v. Cameron*, 17 R. I. 122, 20 Atl. Rep. 233; *Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. Rep. 344; *Robinson v. Superior Rapid Transit R. Co.*, *supra*; *Snow v. Carpenter*, 49 Vt. 496; *Boardman v. Goldsmith*, 48 Vt. 401; *New Orleans, etc. R. Co. v. Burke*, 53 Miss. 209, 24 Am. Rep. 629; *Kentucky*

² *Miller v. Hammers*, 93 Iowa, 746, 61 N. W. Rep. 1087.

³ *Browning v. Jones*, 52 Ill. App. 597; *Mausur-Tebbetts Implement Co. v. Smith*, 65 id. 319; *Martin v. Leslie*,

punishment is for the jury in the first instance,¹ but subject to the power of the court to set aside the verdict if it is so excessive that it is convinced that the jury have been influenced by passion or prejudice.²

§ 404. **Enhancement and mitigation of exemplary damages.** The expenses of the particular action to redress a wrong, except as they may be taxed as costs, are not allowed for the purpose of compensation. But in some courts, where the wrong is accompanied by such aggravations or induced by such motives as to justify exemplary damages, a less strict rule governs in determining the extent of compensation; in other words, damages are given with a more liberal hand,³ and may be made to embrace losses and injuries which would otherwise be excluded; and among these the counsel fees and other expenses not included in the costs taxed.⁴ But these are, per-

Central R. Co. v. Gastineau's Adm'r, 83 Ky. 119; Louisville & N. R. Co. v. Brooks' Adm'r, id. 129, 4 Am. St. 135; Wabash, etc. R. Co. v. Rector, 104 Ill. 296; McNay v. Stratton, 9 Ill. App. 215; Webb v. Gilman, 80 Me. 177, 13 Atl. Rep. 688; Louisville & N. R. Co. v. Bizzell, 131 Ala. 429, 437, 30 So. Rep. 777; Gambrell v. Schooley, 93 Md. 48, 65, 43 Atl. Rep. 730, 52 L. R. A. 87; Linblom v. Sonsteli, 10 N. D. 140, 86 N. W. Rep. 357; Tucker v. Winders, 130 N. C. 147, 41 S. E. Rep. 8.

¹ Hildreth v. Hancock, 55 Ill. App. 572; Doremus v. Hennessy, 62 id. 391; Union Mill Co. v. Prenzler, 100 Iowa, 540, 69 N. W. Rep. 876; Reizenstein v. Clark, 104 Iowa, 287, 73 N. W. Rep. 588; Graham v. Pacific R. Co., 66 Mo. 536; New Orleans, etc. R. Co. v. Burke, *supra*; Southern R. Co. v. Kendrick, 40 Miss. 374, 90 Am. Dec. 333; Johnson v. Smith, 64 Me. 553.

² Rogers v. Henry, 32 Wis. 327; Belknap v. Railroad, 49 N. H. 358; McCarthy v. Niskern, 22 Minn. 90; McConnell v. Hampton, 12 Johns. 234; Gregory v. Coleman, 3 Tex. Civ. App. 166, 22 S. W. Rep. 181.

It is said in some cases that the

punitive damages should be in reasonable proportion to the actual damages. Mobile & M. R. Co. v. Ashcraft, 48 Ala. 15. Where the former have been in the proportion of eight or more to the latter the judgments have been reversed. Willis v. McNeill, 57 Tex. 465; Railroad Co. v. Nichols, cited in the last case; International, etc. R. Co. v. Telephone & Tel. Co., 69 Tex. 277, 5 Am. St. 45, 5 S. W. Rep. 517. It is probably the doctrine of these cases, not that the compensatory damages shall bear any exact or approximate ratio to the exemplary, but that the imposition of the latter in a large sum, if the former are small, may be considered for the purpose of determining whether the jury was influenced by improper motives.

³ Emblen v. Myers, 6 H. & N. 54.

⁴ Welch v. Durand, 36 Conn. 182, 4 Am. Rep. 55.

In *St. Peter's Church v. Beach*, 26 Conn. 364, Ellsworth, J., said: "It is part of the case that the actual damage suffered by the plaintiffs in the destruction of their property does not exceed \$10, and that defendant's con-

haps, more frequently rejected.¹ Injury to the standing [743] and credit of the defendant may be considered in awarding exemplary damages.² As to the admissibility of evidence of the social standing of the parties and wealth of the defendant

duct was not wanton or malicious. Of course, the plaintiffs were entitled, as the court stated, to recover their actual damage; but the court further instructed the jury that if the plaintiffs had been compelled to come into court to vindicate their rights, the jury might take into consideration the expenses attending such vindication beyond the taxable costs as actual damage. If this be a just interpretation of the rule of actual damages, such damages will become just and legal in every case, whether of tort or contract; for the plaintiff may always say that he is compelled to come into court to vindicate his rights. But not to criticise the form or language of the charge, we think there is in it a radical error, viz.: that in cases where a penal sum or smart money are not to be allowed the expenses of the litigation may be allowed as damages; for the judge stated that none but actual damages were to be assessed, and proceeded to say that the expenses might be allowed; and, although the actual loss or injury did not exceed \$10, the jury rendered a verdict for \$197.91. Now, the expenses of litigation are never damages sued for in any case, when the action is brought for the wrong itself, not even if the tort be wanton or malicious. They are not the natural and proximate consequence of the wrongful act, which is the universal rule, but are remote, future and contingent. They may follow

the wrong, and are very likely to, but not of course, or necessarily. Besides, damages sued for must be such as exist, and can be, and are, in some form satisfactory to the law, stated in the declaration and made matter of proof; but these expenses accrue subsequently to the bringing of the suit, and cannot be stated in the declaration, nor can they become matter of proof.

"In actions of tort founded on the misconduct or culpable neglect of the defendant, it is usually and entirely proper for the judge to say to the jury that they are not necessarily confined in assessing damages to the actual loss of property to the plaintiff, but may allow smart money, measured by the circumstances of aggravation; and may, from their general knowledge of the course of the courts, if the case warrants it in their judgment, take into account the expenses of the trial beyond the taxable costs."

In *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55, and several earlier cases the court sustained instructions in accordance with the above views, as damages appropriate only to actions in which smart money may be given. *Linsley v. Bushnell*, 15 Conn. 225, 38 Am. Dec. 79; *Beecher v. Derby Bridge Co.*, 24 Conn. 132; *Ives v. Carter*, id. 392; *Mason v. Hawes*, 52 id. 12, 52 Am. Rep. 552; *Wynne v. Parsons*, 57 Conn. 73, 17 Atl. Rep. 362.

¹ *Day v. Woodworth*, 13 How. 365; *Earl v. Tupper*, 45 Vt. 275; *Barnard v. Poor*, 21 Pick. 378; *Fairbanks v. Witter*, 18 Wis. 287, 86 Am. Dec. 765; *Warren v. Cole*, 15 Mich. 265; *Kelly*

v. Rogers, 21 Minn. 146; *Howell v. Scoggins*, 48 Cal. 355; *Talk v. Waterman*, 49 Cal. 224.

² *Mayer v. Duke*, 72 Tex. 445, 10 S. W. Rep. 565.

[744] there are diverse rulings, not corresponding to the conflict in respect to vindictive damages. In an action for false imprisonment Thompson, C. J., said in an early New York case:¹ "Although the defendant is a man of very large fortune, the plaintiff's injury is not thereby enhanced." In a late case in New Hampshire, by a passenger against a railroad company for wrongful expulsion from its cars, Sargent, J., said: "We must remember that in considering this question of actual damage, of compensation for actual injury, it is immaterial what may be the character, standing, condition or means of the defendant. The rule of damages is compensation for the plaintiff's injury; that is all; and that would be the same whether the defendant be a railroad or a private individual, whether the private individual were rich or poor. The question is not how much the defendant is able to pay, but what is a fair compensation to this plaintiff for all the injury he has suffered? That injury is the same whether the defendant is the richest railroad or the poorest individual in the community. . . . In regard to the question of exemplary damages, . . . it would be very different from the one we have been considering. In that case the jury undertake, first, to give the plaintiff damages as a compensation for his injury; and second, they undertake also to punish the offender for the wrong he has done; and when that element is introduced it becomes proper to inquire into the condition and circumstances of the defendant; because what would be a severe punishment for a poor man, by way of fine or exemplary damages, might not be felt by one that was rich. What would be sufficient as damages, by way of example and punishment, for a day laborer would be nothing by way either of example or as a punishment for this defendant as a corporation. Not only the ability of the defendant, but the motives and intentions accompanying the act, the malice or oppression exhibited, the

In Kansas the same doctrine is held. *Titus v. Corkins*, 21 Kan. 722. And in Ohio, that in such cases these expenses may be taken into account in estimating compensatory damages. *Roberts v. Mason*, 10 Ohio St. 277; *Winters v. Cowen*, 90 Fed. Rep. 99. See *Marshall v. Betner*, 17 Ala.

832; *Bracken v. Neill*, 15 Tex. 109; *Flack v. Neill*, 22 id. 253; *New Orleans, etc. R. Co. v. Allbritton*, 38 Miss. 242, 75 Am. Dec. 98; *Thompson v. Powning*, 15 Nev. 195.

¹ *McConnell v. Hampton*, 12 Johns. 236.

wrong and injustice of the act, may be inquired into with a view to fix the proper measure of punitive or exemplary damages."¹

In other cases it has been held, and the better doctrine from its intrinsic reasonableness is, that so far as the cause of action rests upon an injury to character, or an insult to the [745] person, compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from his wrongful act the greater.² But in such cases, as it is rather the reputation for, than the possession of, wealth which is the cause of this increased rank, the testimony should correspond, and only the general question as to his circumstances can be asked, and not the details.³

§ 405. Same subject. But when exemplary damages are claimed a different question is presented. The defendant's pecuniary ability is then a matter for the consideration of the jury, on the ground that a given sum would be a much greater punishment to a man of small means than to one of larger.⁴

¹ *Belknap v. Railroad*, 49 N. H. 373, 374; *Smith v. Wunderlich*, 70 Ill. 437; *Tanke v. Vangsnes*, 72 Minn. 236, 75 N. W. Rep. 217.

² *Johnson v. Smith*, 64 Me. 553; *Humphries v. Parker*, 52 Me. 507-8; 2 Greenl. Ev., § 269. See §§ 1218, 1219, 1238, 1254; *Mullin v. Spangenberg*, 112 Ill. 140, 145.

³ *Stanwood v. Whitmore*, 63 Me. 100; *Johnson v. Smith*, *supra*.

⁴ *Brown v. Evans*, 17 Fed. Rep. 912; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303; *Jones v. Greeley*, 25 Fla. 629, 6 So. Rep. 448; *Drohn v. Brewer*, 77 Ill. 280; *White v. Murland*, 71 id. 250, 22 Am. Rep. 100; *Mullin v. Spangenberg*, 112 Ill. 140; *Buckley v. Knapp*, 48 Mo. 152; *Bell v. Morrison*, 27 Miss. 68; *Webb v. Gilman*, 80 Me. 177, 13 Atl. Rep. 688; *Spear v. Hiles*, 67 Wis. 370, 30 N. W. Rep. 506; *Spear v. Sweeney*, 88 Wis. 545, 550, 60 N. W. Rep. 1060; *Reeves*

v. Winn, 97 N. C. 246, 2 Am. St. 287, 1 S. E. Rep. 448; *Tucker v. Winders*, 130 N. C. 147, 41 S. E. Rep. 8; *Sloan v. Edwards*, 61 Md. 89; *Johnson v. Allen*, 100 N. C. 131, 5 S. E. Rep. 666; *Johnson v. Smith*, 64 Me. 553; *Belknap v. Railroad*, 49 N. H. 373; *McBride v. McLaughlin*, 5 Watts, 375; *Jones v. Jones*, 71 Ill. 562; *McCarthy v. Niskern*, 22 Minn. 90; *Winn v. Peckham*, 42 Wis. 493; *Birchard v. Booth*, 4 id. 67; *Barnes v. Martin*, 15 id. 210, 82 Am. Dec. 670; *Wagner v. Gibbs*, Miss. —, 51 S. Rep. 434; *Coughiff v. Miller*, — Wyo. —, 68 Pac. Rep. 206, 217, citing the text; *Whithard v. Westbrook*, 40 Miss. 311; *Courvasier v. Raymond*, 23 Colo. 113, 118, 47 Pac. Rep. 284; *Cumberland Telegraph & Telephone Co. v. Poston*, 94 Tenn. 696, 30 S. W. Rep. 1040; *Nashville Street R. v. O'Bryan*, 104 Tenn. 28, 55 S. W. Rep. 300; *Telephone & Tel. Co. v. Shaw*, 102 Tenn. 311, 52 S. W.

For this purpose the reputed wealth of the defendant may be proven, subject to his right to controvert the plaintiff's evidence.¹ In cases where it is competent for the plaintiff to prove the wealth of the defendant to increase the damages, it is equally competent for the defendant to show a want of it to diminish them. And in Maine he cannot be deprived of this right by the omission of the plaintiff to offer any proof on that point, or to make any claim of damages on that ground;² the rule is otherwise in Illinois.³ In actions for breach of promise to marry, proof of the defendant's wealth is allowed as a material consideration in fixing compensation.⁴ In Iowa such proof, even with a view to punitive damages, is not allowed;⁵ and such is the rule in Kentucky.⁶ In Missouri if a case warrants exemplary damages evidence of the pecuniary condition of the plaintiff and of his family is admissible.⁷ There must be proof of the rank and influence of the parties, else a charge on the point is erroneous; and if there are several defendants the rank and influence of some of them ought not to be cause for increasing the damages against those who were without either.⁸

In actions for torts, the damages for which cannot be measured by a legal standard, all the facts constituting and accompanying the wrong should be proved; and though there be a legal standard for the principal wrong, if aggravations exist

Rep. 163; *Matheis v. Mazet*, 164 Pa. 580, 30 Atl. Rep. 434. See §§ 1218, 1219, 1238, 1254.

Under the Georgia code the worldly circumstances of the parties cannot be considered, except where the entire injury is to the peace, happiness or feelings of the plaintiff (*Georgia R. Co. v. Homer*, 73 Ga. 251), as in malicious prosecution. *Coleman v. Allen*, 79 id. 637, 11 Am. St. 449, 5 S. E. Rep. 204.

¹ *Draper v. Baker*, 61 Wis. 450, 50 Am. Rep. 143, 21 N. W. Rep. 527; *White v. Murtland*, 71 Ill. 250, 261, 22 Am. Rep. 112.

If a corporation is the defendant its officers may be asked as to its entire paid-up capital stock, its liabilities, assets, surplus, and the divi-

dends paid for five years past, and how they were paid. *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. Rep. 53.

² *Johnson v. Smith*, 64 Me. 553.

³ *Mullin v. Spangenberg*, 112 Ill. 140.

⁴ See ch. 23.

⁵ *Hunt v. C. & N. W. R. Co.*, 26 Iowa, 363; *Guengerech v. Smith*, 34 id. 348.

⁶ *Givens v. Berkley*, 21 Ky. L. Rep. 1653, 56 S. W. Rep. 158, overruling *Louisville, etc. R. Co. v. Mahoney's Adm'x*, 7 Bush, 238. *Beavers v. Bowen*, 24 Ky. L. Rep. 882, 70 S. W. Rep. 195, is to the same effect.

⁷ *Dailey v. Houston*, 58 Mo. 368; *Beck v. Dowell*, 40 Mo. App. 71.

⁸ *Martin v. Leslie*, 93 Ill. App. 44, 55.

they may be proved to enhance damages; and every case of personal tort must necessarily go to the jury on its special facts; these embrace the *res gestæ*, the age, sex and *status* of the parties; this, whether the case be one for compensation only, or also for exemplary damages, where they are allowed.¹

¹East Tennessee, etc. R. Co. v. Fleetwood, 90 Ga. 23, 15 S. E. Rep. 778; Hildreth v. Hancock, 55 Ill. App. 572; Huckle v. Money, 2 Wils. 205; Craker v. Chicago, etc. R. Co., 36 Wis. 657, 17 Am. Rep. 504; Lyon v. Hancock, 35 Cal. 372; Jones v. Jones, 71 Ill. 562; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Fowler v. Chichester, 26 Ohio St. 9; Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341; Bell v. Morrison, 27 Miss. 68; Scripps v. Reilly, 38 Mich. 10; Andrews v. Askey, 8 C. & P. 7; Hall v. Hollender, 4 B. & C. 660. The text is quoted with approval in Beck v. Dowell, 111 Mo. 506, 20 S. W. Rep. 209, in which evidence of the pecuniary condition of the plaintiff was received, the action being for personal injuries and punitive damages being recoverable. But see § 1254.

In Craker v. Railroad Co., *supra*, Ryan, C. J., said: "In Wilson v. Young, 31 Wis. 574, Lyon, J., inadvertently fell into some subtleties found in Mr. Sedgwick's excellent work, which appear to us all now to

confuse compensatory and exemplary damages. The distinction was not in that case, and the passage in Sedgwick was cited and approved, as such high authorities often are, without sufficient consideration. We all now concur in disapproving the distinction.* In giving the elements of damages, Mr. Sedgwick distinguishes between 'the mental suffering produced by the act or omission in question: vexation; anxiety;' which he holds to be ground for compensatory damages; and 'the sense of the wrong or insult, in the sufferer's breast, from an act dictated by a spirit of wilful injustice, or by a deliberate intention to vex, degrade or insult,' which he holds to be ground for exemplary damages only. Sedgwick's Meas. Dam. 35. Mr. Sedgwick himself says that the rule in favor of exemplary damages 'blends together the interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender,' (id. 38); and following him, this court held in the leading

* In Wilson v. Young it was held that in an action for assault and battery *compensatory* (as distinguished from *punitive*) damages are of two kinds: (1) Those which may be recovered for the actual personal or pecuniary injury and loss; the elements of which are, loss of time, bodily suffering, impaired physical or mental powers, mutilation and disfigurement, expenses of surgical and other attendance, and the like. (2) Those which may be recovered for injuries to the feelings arising from the insult or indignity, the public exposure and contumely, and the like. The compensation of the first kind is to be determined without reference to the question whether the defendant was influenced by malicious motives in the act complained of; and, on the other hand, evidence of threatening or aggravating language, or malicious conduct on the plaintiff's part (not constituting a legal justification of the defendant's act), cannot be considered in mitigation of such damages. The compensatory damages of the second kind depend entirely upon the nature of the defendant; and as evidence of such malice may be given to increase that kind of damages, no evidence of threatening or malicious words or acts on plaintiff's part, just previous to the assault, though not constituting a legal justification, should be admitted to increase or even defeat such damages.

[747] To rebut malice the defendant may show any pertinent facts; the advice of counsel as to acts usually thus influenced is admissible to rebut the presumption of malice,¹ and to prevent exemplary damages,² but the adviser must be one entitled

case of *McWilliams v. Bragg*, 4 Wis. 424, and has often since reaffirmed, that exemplary damages are 'in addition to actual damages.' In actions of tort, as a rule, when the plaintiff's right to recover is established, he is entitled to full compensatory damages. When proper ground is established for it, he is also entitled to exemplary damages in addition. The former are for the compensation of the plaintiff; the latter for the punishment of the defendant and for example to others. This is Sedgwick's blending together of the interest of society and the interest of the plaintiff. And it is plain that there cannot well be common ground for the two. The injury to the plaintiff is the same, and for that he is entitled to full compensation, malice or no malice. If malice be established, then the interest of society comes in to punish the defendant and deter others in like cases by adding exemplary to compensatory damages. We need add no authority to Mr. Sedgwick's that in actions for personal tort, mental suffering, vexation and anxiety are subject of compensation in damages. And it is difficult to see how these are to be distinguished from the sense of wrong and insult arising from injustice and intention to vex and degrade. The appearance of malicious intent may, indeed, add to the sense of wrong; and equally whether such

intent be really there or not. But that goes to mental suffering, and mental suffering to compensation. So it seems to us. But if there be a subtle, metaphysical distinction, which we cannot see — what human creature can penetrate the mysteries of his own sensations, and parcel out separately his mental sufferings and his sense of wrong! — so much for compensatory and so much for vindictive damages? And if one cannot scrutinize the anatomy of his own, how impossible to dissect the mental agonies of another, as a surgeon does corporal muscles. If possible, juries are surely not metaphysicians to do it. And we must hold that all mental suffering directly consequent upon tort, irrespective of all such inscrutable distinctions, is ground for compensatory damages in an action for the tort."

In an action in New Jersey by a parent for the abduction of his infant children (*Magee v. Holland*, 57 N. J. L. 86, 72 Am. Dec. 341), Elmer, J., said: "The right of the jury to consider all the circumstances of the case, and to award exemplary damages, necessarily drew with it the right to consider the injury done to the feelings of the father, as well as other circumstances of aggravation. . . . It was not insisted on behalf of the defendant that exemplary damages cannot be awarded in any case, that principle being too well

¹ *Union Mill Co. v. Prenzler*, 100 Iowa, 540, 69 N. W. Rep. 876; *Jacobs v. Crum*, 62 Tex. 401.

² *Cochrane v. Tuttle*, 77 Ill. 361; *Stone v. Swift*, 4 Pick. 389, 16 Am. Dec. 349; *Bonesteel v. Bonesteel*, 30

Wis. 511. See *Jasper v. Parnell*, 67 Ill. 358; *Dyer v. Denham*, 54 Ga. 224; *Johnson v. Camp*, 51 Ill. 219; *Carpenter v. Barker*, 44 Vt. 441; *Cole v. Curtis*, 16 Minn. 182; *Ash v. Marlowe*, 20 Ohio, 119; § 1240.

to act in that capacity,¹ by being an attorney at law in [748] good standing,² or believed by the defendant to be an attorney;³ and the statement of facts submitted must be full and fair, else the advice given will not justify the presumption that there was no malice.⁴ In such case it is a material question whether the defendant acted prudently, wisely and in good faith, and for this purpose information on which he acted, whether true or false, is original and material evidence.⁵

§ 406. Exemplary damages based on actual damages. Bad motive by itself is not a tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful.⁶ But one who does an act maliciously must be careful to see that it is lawful; otherwise, though the actual injury may be slight, the exemplary damages may be considerable. Actual damage must be found as a predicate for the recovery of exemplary damages.⁷ The

established in this state to admit of question. The argument urged was, that to justify such damages there must be fraud, wantonness, malice or oppression, and that all these ingredients were wanting in this case. I am not willing to concede that, in an action of this kind, the jury might not properly look at all the circumstances, and apportion the damages to the actual wrong done to the plaintiff's feelings and paternal affection and rights, without any positive proof of malice or oppression."

¹ *Olmstead v. Partridge*, 16 Gray, 281; *Stanton v. Hart*, 37 Mich. 539; *Livingston v. Burroughs*, 33 Mich. 511; *Strand v. Young*, 36 Md. 246.

² *Roy v. Goings*, 112 Ill. 656, holding that such standing will not be inferred because the attorney consulted was commissioned as state's attorney. See § 1240.

³ *Murphy v. Larson*, 77 Ill. 172.

⁴ *Roy v. Goings*, 112 Ill. 656. See § 1240.

⁵ *Livingston v. Burroughs*, 33 Mich. 511.

⁶ *Boardman v. Marshalltown Grocery Co.*, 105 Iowa, 445, 75 N. W. Rep. 343; *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543; *Jenkins v. Fowler*, 24 Pa. 308, 310; *Cooley on Torts*, 690. See § 3.

⁷ *Hanewacker v. Ferman*, 152 Ill. 321, 38 N. E. Rep. 924; *Martin v. Leslie*, 93 Ill. App. 44; *Dickinson v. Atkins*, 100 id. 401; *Boardman v. Marshalltown Grocery Co.*, *supra*; *Girard v. Moore*, 86 Tex. 675, 26 S. W. Rep. 945; *Hilfrich v. Meyer*, 11 Wash. 186, 39 Pac. Rep. 455; *Kiff v. Youmans*, *supra*; *Stacy v. Portland Pub. Co.*, 68 Me. 287; *Kuhn v. Chicago, etc. R. Co.*, 74 Iowa, 137, 37 N. W. Rep. 116; *Schippel v. Norton*, 38 Kan. 567, 16 Pac. Rep. 804; *Trawick v. Martin-Brown Co.*, 79 Tex. 460, 14 S. W. Rep. 564; *Maxwell v. Kennedy*, 50 Wis. 648, 7 N. W. Rep. 657; *Jones v. Matthews*, 75 Tex. 1, 12 S. W. Rep. 823; *Flanary v. Wood*, 73 S. W. Rep. 1072 (Tex. Ct. of Civ. App.); *Freese v. Tripp*, 70 Ill. 490; *Reed v. Horn*, 73 id. 596; *McNay v. Stratton*, 9 Ill. App. 215; *Schimmelfennig v. Donovan*, 13 id. 47; *Houghton v. Forest Park*

latter have been denied when the former was merely nominal.¹ In an action for libel in which the jury had rendered a verdict for one dollar, and a motion was made to set it aside for inadequacy,² Peters, J., said: "The legal signification of the verdict is either that there was no actual and express malice entertained toward the plaintiff by the defendant's agent, or that, if there was, it did the plaintiff no injury. There is no room for punitive damages here. There is no foundation for them to attach to or to rest upon. It is said in vindication of the theory of punitive damages that the interests of the individual injured and of society are blended. Here the interests of society have virtually nothing to blend with. If the individual has but a nominal interest society can have none. Such damages are to be awarded against a defendant for punishment. But if the individual injury is merely technical and theoretical, what is punishment to be inflicted for? If a plaintiff upon all such elements of injury as were open to him is entitled to recover but nominal damages, shall he be the recipient of penalties awarded on account of an injury or a supposed injury to others besides himself? If there is enough in the defense to mitigate the damages to the individual, so did it mitigate the damages to the public as well. Punitive damages are the last to be assessed in the elements of injury to be considered by the jury and should be the first to be rejected

Highlands Amusement Co. — Mo. —, 70 S. W. Rep. 878, citing the text. See *Courtney v. Blackwell*, 150 Mo. 245, 51 S. W. Rep. 668, as to the effect of the inadvertent failure of the jury to separately assess compensatory damages, the whole award being designated as punitive damages.

It is said in *McNay v. Stratton*, *supra*, that the rule does not apply in trespass, but it is apprehended that much may depend upon the circumstances.

In *Hefley v. Baker*, 19 Kan. 9, the jury found actual damages when there was only a right to nominal damages, and such as might have been awarded as punitive; because

the last was not given the judgment was reversed.

The recovery of exemplary damages has been sustained in Canada, in the absence of actual injury, for sending a postal card with matter on it charging the plaintiff with having engaged in a confidence game. *O'Brien v. Semple*, Montreal L. Rep. 6 Super. Ct. 344.

¹*Schwartz v. Davis*, 90 Iowa. 324, 57 N. W. Rep. 849; *First Nat. Bank v. Kansas Grain Co.*, 60 Kan. 30, 55 Pac. Rep. 277 (compare *Hefley v. Baker*, 19 Kan. 9, stated in preceding note); *Barber v. Kilbourn*, 16 Wis. 485.

²*Stacy v. Portland Pub. Co.*, 63 Me. 287.

by facts in mitigation. We think the irresistible inference is that if the instruction had been given as it was requested the verdict would not have been increased thereby to the extent of a cent. There may be cases, no doubt, where the actual damage would be but small and the punitive damages large. But this is not of such a kind. It would have been proper in this case for the presiding justice to have informed the jury that if the actual damages were nominal and no more, they need not award punitive damages."¹

The argument in favor of the opposing view has no little weight. It is thus put by Judge Bond of the St. Louis court of appeals: "Having a clear legal right to actual or general damages and such punitive damages as the jury might award, how can it be logically said that because the jury only gave him one, he must be deprived of that? Had the jury given him a substantial amount as actual damages, and also awarded punitive damages, the validity of their verdict would be beyond question under the facts showing that the publication was false, and under the law permitting a separate recovery for actual and punitive damages in cases of libel. This being so, with what reason can the defendant complain that the jury found against him for damages of the one kind when they had the undoubted right to find against him for both kinds? Appellants' theory that punitive damages are conditioned upon a further finding of some substantial sum as actual damages is occasioned by a misapprehension of the essence and object of punitive damages. These are recoverable in certain civil actions, not to compensate the plaintiff, but solely to punish the defendant. This legal motive would suffer defeat if punitive damages could not be given for a malicious attack upon a reputation too well established to receive substantial injury at the hands of a libeler. Moreover, wherever there is an infringed legal right entitling a party to recover both kinds of damages, there can be no reason depriving a jury of the power to inflict punitive damages because the compensating damages were found by them to be only nominal. A verdict for nominal damages of itself establishes the full actionable right of the plaintiff, and as that right implies in law permission to the

¹ See *Meidel v. Anthis*, 71 Ill. 241; *Gunsely v. Perkins*, 30 Mich. 492.

jury to give punitive, as well as actual, damages, it is a mere logical sequence that a verdict for nominal damages establishes the right of the plaintiff to a verdict upon the issue as to punitive damages.¹

The Alabama court also takes issue with the rule which generally prevails. The true theory of exemplary damages is that of punishment, involving the ideas of retribution for wilful misconduct, and an example to deter from its repetition. The position of the supreme court of Maine can be sustained in principle, it seems to us, only by assuming that which is manifestly untrue, namely, that no act is criminal which does not inflict individual injury capable of being measured and compensated for in money. Many acts denounced as crimes by our statutes, or by the common law, involve no pecuniary injury to the individual against whom they are directed, and which, while the party aggrieved could not recover damages as compensation beyond a nominal sum, are yet punished in the criminal courts, and may also be punished in civil actions by the imposition of "smart money," and on the same principle, acts readily conceivable which involve malice, wilfulness, or wanton and reckless disregard of the rights of others, though not within the calendar of crimes, and inflicting no pecuniary loss or detriment measurable by a money standard on the individual, yet merit such punishment as the civil courts may inflict by the imposition of exemplary damages.²

In substance, the same view is held by the court of appeals of the second circuit. The action was for the infringement of a copyright. The Texas cases referred to in the opening of this section are disposed of by saying that the law of that state is peculiar on the subject of exemplary damages. The applicability of the cases cited from Iowa, Maine and Wisconsin is conceded. "They are, however, plainly at variance with the theory upon which exemplary damages are awarded in the federal courts, namely, as something additional to, and in no-wise dependent upon, the actual pecuniary loss of the plaintiff, being frequently given in actions 'where the wrong done to the plaintiff is incapable of being measured by a money stand-

¹ *Ferguson v. Evening Chronicle*
Pub. Co., 72 Mo. App. 462; *Mills v.*
Taylor, 85 id. 111.

² *Alabama Great Southern R. Co.*
v. Sellers, 93 Ala. 9, 30 Am. St. 17, 9
So. Rep. 375, following earlier cases.

ard.”¹ . . . But if it be once conceded that such additional damages may be assessed against the wrong-doer, and, when assessed, may be taken by the plaintiff,—and such is the settled law of the federal courts,—there is neither sense nor reason in the proposition that such additional damages may be recovered by a plaintiff who is able to show that he has lost ten dollars, and may not be recovered by some other plaintiff who has sustained, it may be, far greater injury, but is unable to prove that he is poorer in pocket by the wrong doing of defendant.”² The extent of the damage done or the force used to accomplish the act complained of does not determine the question whether the defendant is liable for punitive damages or not.³ If the injury done was not theoretical or fanciful, but quite substantial, and the plaintiff failed to recover substantial damages only because of his pleading, exemplary damages may be awarded.⁴ One of the Texas courts of civil appeals, while recognizing the rule established by the supreme court of the state that exemplary damages must rest upon actual damages, holds that where actual recoverable damage has been sustained and settled for, without including in the settlement the claim for vindictive damages, a recovery of the former, whether nominal or substantial, is not a prerequisite to the recovery of the latter.⁵ If officers refuse to obey a peremptory *mandamus* commanding them to levy a tax they will be liable for exemplary damages, although the actual damages resulting to the plaintiff were nominal.⁶

§ 407. **Motive of one wrong-doer not imputable to others.** If a wrong is done by two or more persons jointly and all are sued together, if only one of them, or less than all, acted upon such motives as are condemned by the law and punished by

¹ Citing *Day v. Woodworth*, 13 How. 370; *Wilson v. Vaughn*, 23 Fed. Rep. 229.

² *Press Pub. Co. v. Monroe*, 19 C. C. A. 429, 73 Fed. Rep. 196.

³ *Smith v. Philadelphia, etc. R. Co.*, 87 Md. 48, 51, 38 Atl. Rep. 1072.

⁴ *Favorite v. Cottrill*, 62 Mo. App. 119.

⁵ *Gregory v. Coleman*, 3 Tex. Civ. App. 166, 22 S. W. Rep. 181.

In *Flanary v. Wood*, 73 S. W. Rep. 1072, the action being for an assault and battery on the plaintiff's wife and to recover the value of property carried away, the actual damages were fixed at \$56, and the punitive at \$2,344. The latter were set aside because excessive.

⁶ *Wilson v. Vaughn*, 23 Fed. Rep.

exemplary damages, the motive of some will not be imputed to the others, and the liability of the latter will not extend beyond compensatory damages.¹ In such a case the plaintiff has his election to proceed against any or all of the wrongdoers. By making them all defendants he waives his right to exemplary damages if some of them are not subject thereto.² But the rule does not apply where the plaintiff has no such choice, as where a married woman commits a tort and the law does not give a right of action against her alone. The husband is liable as husband, though he was free from blame.³ While the ratification of a trespass by one who did not participate in it will make him liable for compensatory damages, it will not have that effect as to punitive damages,⁴ at least where the relation of master and servant⁵ or principal and agent does not exist.⁶

§ 408. Parties liable; master for servant. Where the master or employer is liable for the tort of his servant or agent, he is liable for full compensation in view of all the concomitant aggravations. If the servant commits a tort in his master's service, in the exercise of his employment or agency, it is deemed, at least for the purpose of compensation to the party injured, as the act and tort of the master. But it is otherwise as to the torts which the servant steps aside from, or goes beyond, his master's employment to commit.⁷ The

¹ *Clark v. Newsam*, 1 Ex. 131; *Becker v. Dupree*, 75 Ill. 167; *Boutwell v. Marr*, 71 Vt. 1, 11, 42 Atl. Rep. 607, 43 L. R. A. 803. To the contrary is *Reizenstein v. Clark*, 104 Iowa, 287, 73 N. W. Rep. 588, applying, apparently, the rule which governs compensatory damages against joint tortfeasors.

² It is said in *Mauk v. Brundage*, — Ohio St. —, 67 N. E. Rep. 152, 155, that compensatory damages may be awarded against all the defendants and exemplary damages against a portion of them. "Perhaps the question is not without difficulty, but it would appear practicable to allow a recovery of an amount against all as compensatory damages, and a fur-

ther amount against some as exemplary damages (and such verdict would be justified if the evidence warranted it), and it would not seem impracticable to so shape the verdict as to bring about this result."

³ *Lombard v. Batchelder*, 58 Vt. 558; *Munter v. Bande*, 1 Mo. App. 484. See ch. 36.

⁴ *Pardridge v. Brady*, 7 Ill. App. 639; *Grund v. Van Vleck*, 60 Ill. 487.

⁵ See § 403.

⁶ *Jacobs v. Crum*, 62 Tex. 401; *Robinson v. Goings*, 63 Miss. 500.

⁷ *McManus v. Crickett*, 1 East, 106; *Howe v. Newmarch*, 12 Allen, 49; *Wright v. Wilcox*, 19 Wend. 343; *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill, 480; *Illinois Central R.*

master is only liable for the act of his servant when the latter is within the scope of his employment; when he, injuriously to others, disregards by tortious act or omission their rights in the conduct of the master's business.¹

The same doctrine applies where a corporation is the [750] principal, and the employment in the course of which the servant commits the tort is within the scope of the corporate powers.² In their appropriate sphere, corporations incur lia-

Co. v. Downey, 18 Ill. 259; Pittsburgh, etc. R. Co. v. Donahue, 70 Pa. 119; Rounds v. Delaware, etc. R. Co., 64 N. Y. 129, 21 Am. Rep. 597; Foster v. Essex Bank, 17 Mass. 479; Crocker v. New London, etc. R. Co., 24 Conn. 249; Horner v. Lawrence, 37 N. J. L. 46; St. Louis, etc. R. Co. v. Wilson, 70 Ark. 136, 144, 66 S. W. Rep. 661.

¹ Id.; Johnson v. Barber, 10 Ill. 425, 50 Am. Dec. 416; Hibbard v. New York & E. R. Co., 15 N. Y. 455; Philadelphia, etc. R. Co. v. Derby, 14 How. 468; Redding v. South Carolina R. Co., 3 S. C. 1, 16 Am. Rep. 681; Toledo, etc. R. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380; Chamberlain v. Chandler, 3 Mason, 242; O'Connell v. Strong, Dudley, 265; Brasher v. Kennedy, 10 B. Mon. 28; Brackett v. Lubke, 4 Allen, 138, 81 Am. Dec. 694; Tuel v. Weston, 47 Vt. 634; Hays v. Millar, 77 Pa. 338, 18 Am. Rep. 445; Reynolds v. Hanrahan, 100 Mass. 313; Smith v. Webster, 23 Mich. 298; Mahoney v. Mahoney, 51 Cal. 118; Southwick v. Estes, 7 Cush. 385; Bulmier v. Erie R. Co., 34 N. J. L. 151; Luttrell v. Hazen, 3 Sneed, 20; Barden v. Felch, 109 Mass. 151; Kreiter v. Nichols, 28 Mich. 496; Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Eastern Counties R. Co. v. Broom, 6 Ex. 314; Seymour v. Greenwood, 7 H. & N. 355.

² St. Louis, etc. R. Co. v. Kilpatrick, 67 Ark. 47, 54 S. W. Rep. 971; Haunson v. European, etc. R. Co., 62 Me.

84, 16 Am. Rep. 404; Goddard v. Grand Trunk R. Co., 57 Me. 202; Atlantic, etc. R. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Passenger R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78; Brokaw v. New Jersey, etc. R. Co., 32 N. J. L. 328, 90 Am. Dec. 659; Monument Bank v. Globe Works, 101 Mass. 57; Philadelphia, etc. R. Co. v. Derby, 14 How. 468; Noyes v. Rutland, etc. R. Co., 27 Vt. 110; Jeffersonville, etc. R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; Ramsden v. Boston, etc. R. Co., 104 Mass. 117, 6 Am. Rep. 200; Baltimore, etc. R. Co. v. Blocher, 27 Md. 277; Green v. Omnibus Co., 7 C. B. (N. S.) 290; Hopkins v. Atlantic, etc. R. Co., 36 N. H. 9, 72 Am. Dec. 287; Malecek v. Tower Grove, etc. R. Co., 57 Mo. 17.

The supreme court of the United States has often affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible, in the same manner and to the same extent as an individual is responsible under similar circumstances. Philadelphia, etc. R. v. Quigley, 21 How. 202, 210; National Bank v. Graham, 100 U. S. 639, 702; Salt Lake City v. Hollister, 118 id. 256, 261, 6 Sup. Ct. Rep. 1055; Denver & Rio Grande R. v. Harris, 122 U. S. 597, 608, 7 Sup. Ct. Rep. 1286. A corporation is doubtless liable like an individual to make compensation for any tort committed by an agent in the course of his employment, although the act is done

bility under the same conditions as private persons; they may thus be guilty of assault and battery,¹ slander and libel,² malicious prosecution, false imprisonment,³ and fraud.⁴ An action for a wrong lies against a corporation where its act — the thing done — is within the purpose of the corporation, and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual.⁵ There is a legal unity of principal and agent as well in respect to the [751] tortious, as the rightful, acts of the latter, done in the course of his employment.⁶ This identity of master and serv-

wantonly and recklessly, or against the express orders of the principal. *Philadelphia & Reading R. v. Derby*, 14 How. 468; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. Rep. 1039; *Howe v. Newmarch*, 12 Allen, 49; *Ramsden v. Boston & A. R.*, 104 Mass. 117. A corporation may even be held liable for a libel or a malicious prosecution by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. *Philadelphia, etc. R. v. Quigley*, 21 How. 202, 211; *Salt Lake City v. Hollister*, *supra*; *Reed v. Home Savings Bank*, 130 Mass. 443, 445, and cases cited; *Krulevitz v. Eastern R.*, 140 Mass. 573, 5 N. E. Rep. 500; *McDermott v. Evening Journal*, 43 N. J. L. 488, 44 id. 430; *Bank of New South Wales v. Owston*, L. R. 4 App. Cas. 270. Per Justice Gray in *Lake Shore, etc. R. Co. v. Prentice*, 147 U. S. 101, 109, 13 Sup. Ct. Rep. 261.

¹ *Mobile & O. Co. v. Seales*, 100 Ala. 368, 13 So. Rep. 917; *Denver, etc. R. v. Harris*, 122 U. S. 597, 7 Sup. Ct. Rep. 1286; *Atlantic, etc. R. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Passenger R. Co. v. Young*, 21 Ohio St. 518, 8 Am. Rep. 78; *Higgins v. Watervliet I. & R. Co.*, 46 N. Y. 23, 7 Am. Rep. 293; *Craker v. Chicago, etc. R. Co.*, 36 Wis. 657,

17 Am. Rep. 504; *Eastern Counties R. Co. v. Brown*, 6 Ex. 314; *Seymour v. Greenwood*, 7 H. & N. 355; *Monument Bank v. Globe Works*, 100 Mass. 57.

² *Samuels v. Evening Mail Ass'n*, 9 Hun. 288; *Philadelphia, etc. R. Co. v. Quigley*, 21 How. 202; *Whitfield v. South Eastern R. Co.*, 96 Eng. C. L. 115; *Maynard v. Firemen's Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *Aldrich v. Press Printing Co.*, 9 Minn. 133.

³ *Green v. Omnibus Co.*, 7 C. B. (N. S.) 290; *Vance v. Erie R. Co.*, 32 N. J. L. 334, 90 Am. Dec. 665; *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439; *Goff v. Great Northern R. Co.*, 3 El. & E. 672; *Roe v. Birkenhead, etc. R. Co.*, 7 Ex. 36; *Wheeler & W. Manuf. Co. v. Boyce*, 36 Kan. 350, 13 Pac. Rep. 609, 59 Am. Rep. 571; *Jefferson County Savings Bank v. Eborn*, 84 Ala. 529, 4 So. Rep. 386; *Jordan v. Alabama, etc. R. Co.*, 74 Ala. 85, 49 Am. Rep. 800, overruling *Owsley v. M. & W. P. R. Co.*, 37 Ala. 360, which held that a corporation was not liable for malicious prosecution. See § 1234.

⁴ *Id.*; *Story on Agency*, § 452.

⁵ *Green v. Omnibus Co.*, *supra*, per Erle, C. J.

⁶ *New Orleans, etc. R. Co. v. Bailey*, 40 Miss. 452; *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S. W. Rep. 557, 46 L. R. A. 549.

ant involves the necessary legal consequence that the master is responsible in damages for the wrongful act of the servant, done within the scope of his employment, to the extent of full compensation; but there is some division of judicial opinion as to the basis of the master's liability for exemplary damages.¹ The immediate ground of such damages is, of course, the malice or misconduct which warrants their imposition against a natural person; but the diversity is in respect to the question whether the malice and misconduct of the servant is the malice of the principal, as the act which induced or accompanies is his, without particular direction or ratification. In a work of much merit it is laid down that "in any case where exemplary damages may be recoverable against the servant they should be allowed against the master, if it appears that he had reasonable notice of the negligent habits of the servant, or if he left the servant without control or supervision in the work."² This doctrine is obviously sound; but it is based on an actual fault of the master, not solely on that of the servant; the conclusion of liability does not result purely from the identity of master and servant.

§ 409. *Same subject.* In a New York case³ *Church, C. J.*, said: "For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not

¹ *Louisville & N. R. Co. v. Kelly's Adm'x*, 100 Ky. 421, 441, 38 S. W. Rep. 852, quoting most of the preceding part of this section.

It is not settled in Louisiana that the doctrine of exemplary damages applies to corporations. *Rutherford v. Shreveport & H. R. Co.*, 41 La. Ann. 793, 6 So. Rep. 644. But it seems to have been applied to a municipal corporation. *McGary v. Lafayette*, 4 La. Ann. 440.

² *Shearman & Red. on Neg.*, § 749 (4th ed.).

³ *Cleghorn v. New York, etc. R. Co.*, 56 N. Y. 47, 15 Am. Rep. 375, approved in *Sullivan v. Oregon R. & N. Co.*, 12 Ore. 392, 53 Am. Rep. 364.

7 Pac. Rep. 508, and in *Lake Shore, etc. R. Co. v. Prentice*, 147 U. S. 101, 115, 13 Sup. Ct. Rep. 261.

"The rule adopted by the courts of this state is such as not to permit the recovery of exemplary damages against the master for the act or negligence of his servant unless he has authorized his misconduct, or ratified it, or unless the conduct complained of is that of the servant while he is in the service, after his unfitness is known to the master." *Muckle v. Rochester R. Co.*, 79 Hun. 32, 29 N. Y. Supp. 732; *Wright v. Glens Falls, etc. R. Co.*, 24 App. Div. 617, 48 N. Y. Supp. 1026.

liable to be punished in punitive damages unless he is chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established. Corporations incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman; or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard; or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant unless such conduct is of the character before specified." According to this view, as was said by Metcalf, J., "the act of a servant is not the act of a master, even in legal intendment or effect, unless the master personally directs or subsequently adopts it. In other cases he is liable for the acts of his servant, when liable at all, not as if the act were done by himself, but because the law makes him answerable therefor."¹ It has been often said and decided that the master is not liable for the voluntary, wilful and malicious act of his servant;² but when so held, according to the best authorities, the servant has gone outside the master's business to commit the wrong. In an English case the court say: "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if in order to perform his master's orders he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negli-

¹ *Parsons v. Winchell*, 5 Cush. 592. *Co. v. Vanderbilt*, 1 Hill, 480; *Vanderbilt v. Richmond Turnpike Co.*, 2

² *Dane's Abr.*, ch. 59, art. 2; *Wright v. Wilcox*, 19 Wend. 343, 32 N. Y. 479; *Story on Agency*, § 456. *Am. Dec.* 507; *Richmond Turnpike*

gent and careless conduct for which the master will be liable.”¹ And in another: “Suppose a servant driving along a road, in order to avoid a danger, intentionally drove against a carriage of another, would not the master be responsible?”² Grover, J., in a New York case,³ states the principle very clearly. A servant employed to remove and pile lumber had disobeyed his employer’s orders in piling it where it was the cause of the [753] injury in question. The judge said: “It was an act done by him in the prosecution of their (the master’s) business, and they are not relieved from responsibility therefor by his departure from their instructions in the manner of doing it. The test of the master’s responsibility for the act of his servant is not whether such act was done according to the instructions of the master to the servant, but whether it is done in the prosecution of the business that the servant was employed by the master to do. If the owner of a building employs a servant to remove the roof from his house, and directs him to throw the materials upon his lot, where no one would be endangered, and the servant, disregarding this direction, should carelessly throw them into the street, causing an injury to a passenger, the master would be responsible therefor, although done in violation of his instructions. But should the servant, for some purpose of his own, intentionally throw material upon a passenger, the master would not be responsible for the injury, because it would not be an act done in his business, but a departure therefrom by the servant to effect some purpose of his own.”⁴

The same principle is still more comprehensively stated by Hoar, J.: “The master is not responsible as a trespasser unless by direct or implied authority to the servant he consents to the wrongful act. But if a master give an order to a servant which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable, if the servant in executing the order makes use of force in a manner or to a degree which is

¹ *Croft v. Alison*, 4 B. & Ald. 590. *Long Island R. Co.*, 76 App. Div. 323,

² *Seymour v. Greenwood*, 6 H. & N. 78 N. Y. Supp. 469.

359. ⁴ *Citing Weed v. Panama R. Co.*

³ *Congrove v. Ogden*, 49 N. Y. 257, 17 N. Y. 362, 72 Am. Dec. 474; *Mall* 10 Am. Rep. 361. See *Kastner v. v. Lord*, 39 N. Y. 381.

unjustifiable. And in an action of tort, in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work. So that if a servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable. But if the [754] act be done in the execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner."¹ Accordingly, in a subsequent case, it was held that a master who orders his servants to go to the house of a person named and remove certain furniture, if a sum due the master thereon is not paid, is liable for a wilful assault committed by them, if done in the execution of the order, and not for some private end or advantage of their own.² The wantonness or mischief done by the servant in the execution of his master's orders will enhance the damages against the latter.³

Ryan, C. J., in an action against a railroad company for a wanton outrage committed by a conductor in attempting to kiss a female passenger, thus illustrated the fallacy of any distinction in the liability of the master between wilful and negligent injuries: "We do not understand it to be denied that if such an assault on the respondent had been attempted by a stranger, and the conductor had neglected to protect her, the appellant would be liable. But it is denied that the act of the conductor in maliciously doing himself what it was his duty, for the appellant to the respondent, to prevent others from doing, makes the appellant liable. It is contended that,

¹ *Howe v. Newmarch*, 12 Allen, 56. See *Lynch v. Metropolitan Elevated R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141; *Staples v. Schmid*, 18 R. I. 224, 26 Atl. Rep. 193, 19 L. R. A. 824.

² *Denver, etc. R. v. Harris*, 122 U. S. 597, 7 Sup. Ct. Rep. 1286; *Levi v. Brooks*, 121 Mass. 501; *Passenger R.*

Co. v. Young, 21 Ohio St. 524-5; *Bar-den v. Felch*, 109 Mass. 154; *Toledo, etc. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489; *Chicago, etc. R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114.

³ *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383.

though the principal would be liable for the negligent failure of the agent to fulfill the principal's contract, the principal is not liable for the malicious breach by the agent of the contract which he was appointed to perform for the principal. As we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*."¹

§ 410. Same subject. In those states where exemplary damages are limited to compensation, and the punitive [755] element is excluded, when the master's liability for the servant's act is determined the whole question is resolved. If he is liable for the act he is liable for the increased injury which results from the manner in which it is done. But in some states where the element of punishment is admitted it is held that, though the misconduct took place while the servant was on duty for his master, and he did the act in the prosecution of his master's business, still there must be a ratification, unless the previous directions included the commission of the wrong in question, or the master had prior notice of the unfitness of the servant.² The retention of the servant in his

¹ Craker v. Chicago, etc. R. Co., 36 Wis. 673, 17 Am. Rep. 504.

² Warner v. Southern Pacific Co., 113 Cal. 105, 45 Pac. Rep. 187, 54 Am. St. 327, reviewing local cases and limiting Gorman v. Southern Pacific Co., 97 Cal. 1, 33 Am. St. 157, 31 Pac. Rep. 1112; Trabing v. California Navigation & Imp. Co., 121 Cal. 137, 53 Pac. Rep. 644; Fohrmann v. Consolidated Traction Co., 63 N. J. L. 391, 43 Atl. Rep. 892; Haver v. Central R. Co., 64 N. J. L. 312, 45 Atl. Rep. 593; Staples v. Schmid, 18 R. I. 224, 19 L. R. A. 824, 26 Atl. Rep. 193; McGown v. International & G. N. R. Co., 85 Tex. 289, 20 S. W. Rep. 80; Norfolk & W. R. Co. v. Anderson, 90 Va. 1, 17 S. E. Rep. 757; Same v. Neely, 91 Va. 539, 22 S. E. Rep. 367, 11 Am. St. 881; Mace v. Reed, 89 Wis. 449, 62 N. W. Rep. 186; Fohn-

son v. Superior Rapid Transit R. Co., 94 Wis. 345, 68 N. W. Rep. 961, 59 Am. St. 896, 34 L. R. A. 205; Vassau v. Madison Electric R. Co., 106 Wis. 301, 82 N. W. Rep. 152; Lake Shore, etc. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. Rep. 261; Cowen v. Winters, 37 U. C. A. 628, 96 Fed. Rep. 929; Winters v. Cowen, 90 Fed. Rep. 99; Woodward v. Ragland, 5 D. C. App. Cas. 220; Maiseubucker v. Society Concordia, 71 Conn. 369, 43 Atl. Rep. 67, 71 Am. St. 213; Rueping v. Chicago & N. R. Co., — Wis. —, 93 N. W. Rep. 843; Eviston v. Cramer, 57 Wis. 570, 15 N. W. Rep. 760; Haines v. Schultz, 50 N. J. L. 481, 14 Atl. Rep. 488; City Nat. Bank v. Jeffries, 73 Ala. 183; Murphy v. Central Park R. Co., 48 N. Y. Super. Ct. 96; Sullivan v. Oregon R. & N. Co., 12 Ore. 392, 53 Am. Rep. 681, 7

employ with knowledge of his wrongful act does not, according to some adjudications, as matter of law, amount to a ratification of such act,¹ but it is evidence from which the jury may find a ratification.² If the benefits of the act done by the

Pac. Rep. 508; *International, etc. R. Co. v. Garcia*, 70 Tex. 207, 7 S. W. Rep. 802; *Ricketts v. Chesapeake & O. R. Co.*, 33 W. Va. 433, 25 Am. St. 901, 10 S. E. Rep. 801, 7 L. R. A. 354; *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. 753, 11 S. W. Rep. 139, 3 L. R. A. 634 (*sub nom.* *Dillingham v. Anthony*); *Redwood v. Metropolitan R. Co.*, 6 D. C. 302 (but see *Flannery v. Baltimore & O. R. Co.*, 4 Mackey (D. C.), 111, a later case); *Hagan v. Providence, etc. R. Co.*, 3 R. I. 88; *Turner v. North Beach, etc. R. Co.*, 33 Cal. 594; *Kline v. Central Pacific R. Co.*, 37 Cal. 400, 99 Am. Dec. 282; *Ackerson v. Erie R. Co.*, 32 N. J. L. 254; *McKeon v. Citizens' R. Co.*, 42 Mo. 79; *Louisville, etc. R. Co. v. Smith*, 2 Duvall, 556; *Hill v. New Orleans, etc. R. Co.*, 11 La. Ann. 292; *The Amiable Nancy*, 3 Wheat. 546; *Moody v. McDonald*, 4 Cal. 297; *Railroad Co. v. Finney*, 10 Wis. 388; *Craker v. Chicago, etc. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Bass v. Chicago, etc. R. Co.*, 42 Wis. 654, 24 Am. Rep. 437; *Hays v. H. & G. N. R. Co.*, 46 Tex. 280; *G. H. & S. A. R. Co. v. Donahoe*, 56 id. 162; *Houston, etc. R. Co. v. Cowser*, 57 id. 293; *Willis v. McNeill*, id. 465; *Ristine v. Blocker*, 15 Colo. App. 224, 61 Pac. Rep. 486 (applying the rule to the

act of 1889 authorizing exemplary damages); *Kastner v. Long Island R. Co.*, 76 App. Div. 323, 78 N. Y. Supp. 469, and local cases cited.

Mr. Justice Gray has recently said for the supreme court of the United States in *Lake Shore, etc. R. Co. v. Prentice*, 147 U. S. 101, 114, 13 Sup. Ct. Rep. 261: The law applicable to this case has been found nowhere better stated than in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict, but excepted to an instruction that punitive damages were not to be allowed as against the principal unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed. This instruction was held to be right for the following reasons: "In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such wilfulness, recklessness or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual ought to be punished.

¹ *McGown v. International & G. N. R. Co.*, 85 Tex. 289, 20 S. W. Rep. 80; *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. 753, 11 S. W. Rep. 139, 3 L. R. A. 634.

In Missouri the retention of the servant after his wrongful act is a ratification of it. *Tanger v. Southwest Missouri Electric R. Co.*, 85 Mo. App. 28. But ratification is not a

condition precedent to such liability in that state. *Haebl v. Wabash R. Co.*, 119 Mo. 325, 24 S. W. Rep. 737.

² *Robinson v. Superior Rapid Transit R. Co.*, 94 Wis. 345, 68 N. W. Rep. 961, 34 L. R. A. 205, 59 Am. St. 896; *Woodward v. Ragland*, 5 D. C. App. Cas. 220; *Bass v. Chicago, etc. R. Co.*, 42 Wis. 654, 24 Am. Rep. 437.

servant are accepted with knowledge of the facts connected with it the act is ratified.¹ A ratification of the act of a servant of a corporation results from the inaction of its officers.² A corporation advised by one of its superior agents of a tort committed on a stranger by a subordinate ratifies such tort by strenuously endeavoring to prove that the act done was not tortious, and, in defense of an action, making an unwarranted and violent attack on the conduct and character of the plaintiff.³ In answer to the contention that punitive damages were not recoverable against a corporation for libel, the court said: But the charges published were gathered and circulated by its agents in the course of their ordinary business, such agents acting within the scope of their authority and the duty intrusted to them.⁴

In other states it is held that the master may be liable to punitive damages for the act of his servant when the servant is so liable, and the aggravated wrong was done in the master's service, and under such circumstances that the master is liable

If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the case to implicate the principal and make him *particeps criminis* of his agent's act. No man should be punished for that of which he is not guilty. Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his serv-

ant." *Hagan v. Providence & W. R. Co.*, 3 R. L. 88, 91.

In a case ruled in Hawaii, in 1891, the rule was said to be that the master is not liable for exemplary damages unless he participated in the act complained of. *Duncan v. Wilder Steamship Co.*, 8 Hawaii, 411, 415.

The master's liability for exemplary damages may be influenced by the powers of the employee in some cases, as where an attachment is wrongfully sued out. *Emerson v. Skidmore*, 7 Tex. Civ. App. 641, 25 S. W. Rep. 671.

¹ *Avnkian v. Noble*, 121 Cal. 216, 53 Pac. Rep. 559; *Kilpatrick v. Haley*, 13 C. C. A. 480, 66 Fed. Rep. 135; *G. H. & S. A. R. Co. v. Donahoe*, 56 Tex. 162; *Jacobs v. Crum*, 62 id. 401.

² *San Antonio, etc. R. Co. v. Grier*, 20 Tex. Civ. App. 138, 49 S. W. Rep. 148.

³ *Pullman Palace Car Co. v. Lawrence*, 71 Mo. 782, 22 So. Rep. 91.

⁴ *Times Pub. Co. v. Carlisle*, 30 C. C. A. 475, 487, 34 Fed. Rep. 762.

for full compensation, though the particular act was not directly or impliedly authorized nor ratified. In Ohio it is held that a corporation may be subjected to exemplary and punitive damages for the tortious acts of its agents or servants, done within the scope of their employment, in all cases where natural persons, acting for themselves, if guilty of like acts, would be liable to such damages.¹ In a comparatively recent case in Maine this subject was very thoroughly considered where a railroad company was the master and defendant.² Walton, J., delivering the opinion of a majority of the court, said: "We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to mal- [756] treat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense, and only tends to confuse the mind and confound the judgment. Neither guilt, malice nor suffering is predicable of this ideal existence called a corporation. And yet, under cover of its name and authority, there is, in fact, as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped or put in the stocks,—since, in fact, no corrective influence can be brought to bear upon them except that of pecuniary loss,—

¹ *Atlantic, etc. R. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382.

² *Goddard v. Grand Trunk R.*, 57 Me. 202, 223.

it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants will, for a moment, reflect upon the absurdity of their own thoughts, this anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggage-men can be secured who will not handle and smash trunks and band-boxes, as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences called corporations; and that is the pocket of the monied power that is concealed behind them; and, if that is reached, they will wince. When it is thoroughly understood that it is not [757] profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before."¹

§ 411. **Same subject.** In South Carolina, Tennessee, Indiana, Kansas, Pennsylvania, Arkansas, North Dakota, Alabama, New Hampshire, Mississippi, Kentucky, Maryland, Illinois, Nevada, Georgia and Missouri substantially the same view of the liability of corporations to punitive damages prevails.² In Kentucky the rule of liability is carried further than

¹ *Hanson v. European, etc. R. Co.*, 62 Me. 84.

² *East Tennessee, etc. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. Rep. 778; *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884, 38 S. E. Rep. 94, 52 L. R. A. 621; *Canfield v. Chicago, etc. R. Co.*, 59 Mo. App. 354; *Haehl v. Wabash R. Co.*, 119 Mo. 325, 24 S. W. Rep. 737; *Tanger v. Southwest Missouri Electric R. Co.*, 85 Mo. App. 28; *Rucker v. Smoke*, 37 S. C. 377, 16 S. E. Rep. 40, 34 Am. St. 758; *Boyer v. Coren*, 92 Md. 366, 48 Atl. Rep. 161;

Mobile & O. R. Co. v. Seales, 100 Ala. 368, 13 So. Rep. 917; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 23 So. Rep. 53; *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S. W. Rep. 557, 46 L. R. A. 549; *Highland Avenue & Belt R. Co. v. Robinson*, 125 Ala. 483, 28 So. Rep. 28, and local cases cited; *Randolph v. Hannibal, etc. R. Co.*, 18 Mo. App. 609; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103; *Louisville & N. R. Co. v. Ballard*, 88 Ky. 159, 2 L. R. A. 694, 10 S. W. Rep. 429, 85 Ky. 301, 7

in other jurisdictions. It is held there that the men in charge of a railroad train act for the company; its entire power, *pro hac vice*, is vested in them; "as to passengers *in transitu* they should be considered as the corporation itself. It is, therefore,

Am. St. 600, 3 S. W. Rep. 430; Dawson v. L. & N. R. Co., 6 Ky. L. Rep. 668; Wheeler & W. Manuf. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. Rep. 609; Fell v. Northern Pacific R. Co., 44 Fed. Rep. 248; Philadelphia, etc. R. Co. v. Larkin, 47 Md. 155, 28 Am. Rep. 442; Quinn v. South Carolina R. Co., 29 S. C. 381, 7 S. E. Rep. 614, 1 L. R. A. 682 (modified as to the element of wilfulness in Pickens v. South Carolina & G. R. Co., 54 S. C. 498, 506, 32 S. E. Rep. 567); Hart v. Railroad Co., 33 S. C. 427, 12 S. E. Rep. 9, 10 L. R. A. 794 (a proprietary company was made liable for exemplary damages because of the act of its lessee); Louisville & N. R. Co. v. Garrett, 8 Lea. 438, 41 Am. Rep. 640; Haley v. Mobile O. & R. Co., 7 Baxter, 243; Chicago, etc. R. Co. v. Scurr, 57 Miss. 456; Lake Shore, etc. R. v. Rosenzweig, 113 Pa. 519, 6 Atl. Rep. 545 (compare Philad. Traction Co. v. Orbann, 119 Pa. 37, 12 Atl. Rep. 816); Southern Exp. Co. v. Brown, 67 Miss. 260, 19 Am. St. 306; Henning v. Western U. Tel. Co., 41 Fed. Rep. 864; Malloy v. Bennett, 15 id. 371; Beale v. Railway Co., 1 Dill. 568; Citizens' Street R. v. Steen, 42 Ark. 321; Springer Transportation Co. v. Smith, 16 Lea. 498; Alabama, etc. R. Co. v. Frazier, 93 Ala. 45, 9 So. Rep. 303; Hopkins v. Atlantic, etc. R. Co., 36 N. H. 9, 72 Am. Dec. 287; Vicksburg, etc. R. Co. v. Patton, 31 Miss. 156, 66 Am. Dec. 552; New Orleans, etc. R. Co. v. Hurst, 36 Miss. 660, 74 Am. Dec. 785; New Orleans, etc. R. Co. v. Bailey, 40 Miss. 395; Bowler v. Lane, 3 Met. (Ky.) 311; Louisville, etc. R. Co. v. Mahony, 7 Bush, 235; Baltimore, etc. R. Co. v. Blocher, 27 Md. 227; Jacobs' Adm'r v. Louisville, etc.

R. Co., 10 Bush, 263; Perkins v. Missouri, etc. R. Co., 55 Mo. 201; Travers v. Kansas Pacific R. Co., 63 Mo. 421; Chicago, etc. R. Co. v. Dickson, 63 Ill. 151, 14 Am. Rep. 114; Illinois Central R. Co. v. Hammer, 72 Ill. 353; Singer Manuf. Co. v. Holdfodt, 86 Ill. 459; New Orleans, etc. R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689. See Quigley v. Central Pacific R. Co., 11 Nev. 364-5, 21 Am. Rep. 757.

In Lake Shore, etc. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. Rep. 261, the Illinois court is classed among those which oppose punitive liability against corporations if the servant's acts were not authorized or ratified, and three decisions are cited as sustaining that doctrine. The Mississippi court has had occasion to determine what the law of Illinois is on this point. It has said: "A critical examination of these cases will demonstrate that the supreme court of the United States not only misconceived the views of the Illinois court in those cases, but overlooked the many other Illinois cases which distinctly held the contrary. The cases cited by the supreme court in support of its holding that authorization or ratification by the principal of the wrongful act of the agent or servant is a prerequisite to recovery of punitive damages are Grand v. Van Vleck, 69 Ill. 478; Becker v. Dupree, 75 Ill. 167, and Rosenkrans v. Barker, 115 Ill. 331, 3 N. E. Rep. 93, 56 Am. Rep. 169, and in our opinion are not in point and do not support the position of the United States supreme court. . . . They were all cases in which punitive damages were sought to be recovered against a private person on account of the

as responsible for their acts in the conduct of the train and the treatment of the passengers as the officers of the train would be for themselves if they were the owners of it. Public interests require this rule. They also demand that the corporation should be, and it is, liable for exemplary damages in case of an injury to a passenger resulting from a violation of duty by one of its employees in the conduct of the train, if it be accompanied by oppression, fraud, malice, insult or other wilful misconduct evincing a reckless disregard of consequences.¹ As to female passengers the rule goes still further. Their contract of passage embraces an implied stipulation that the corporation will protect them against general obscenity, immodest conduct or wanton approach."² It was held that the rule does not extend to "indecorous conduct" on the part of an employee to a female passenger.³ On a second appeal the allowance of exemplary damages, on the ground that the employees were insulting "either in words, tone or manner," was approved.⁴ In

act of an agent charged with a single specific duty in cases where the agent, without any authority, did that which he was not directed to do. Reference is made to *Singer Manuf. Co. v. Holdfott*, 86 Ill. 455, 29 Am. Rep. 43, and *Toledo, etc. R. Co. v. Hannon*, 75 Ill. 298, as holding the contrary rule. *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 23 So. Rep. 53.

Under the "Adair Liquor Law" exemplary damages may be recovered from a dealer whose clerk has violated it in contravention of his express instructions. *Kear v. Garrison*, 13 Ohio Ct. Ct. 447; *Schneider v. Hosier*, 20 Ohio St. 98.

A statute which provides that when a personal injury is received by a servant or employee in the service or business of the master or employer, the latter is liable to answer in damages to the former as if he were a stranger, and not engaged in such service or employment, includes punitive damages if the injury does not produce death. *Southern R. Co.*

v. Bunt, 131 Ala. 591, 32 So. Rep. 507.

¹ *Memphis & Cincinnati Packet Co. v. Nagel*, 97 Ky. 9, 29 S. W. Rep. 743; *Louisville & N. R. Co. v. Kelly's Adm'x*, 100 Ky. 421, 38 S. W. Rep. 852; *Dawson v. L. & N. R. Co.*, 6 Ky. L. Rep. 668; *Hughes v. Louisville & N. R. Co.*, 104 Ky. 768, 48 S. W. Rep. 671. See *Louisville & N. R. Co. v. Kingman*, 18 Ky. L. Rep. 82, 35 S. W. Rep. 264.

² *Louisville & N. R. Co. v. Ballard*, 85 Ky. 307, 3 S. W. Rep. 530.

³ *Id.*

⁴ *Louisville & N. R. Co. v. Ballard*, 88 Ky. 159, 10 S. W. Rep. 429, 2 L. R. A. 694.

In a case in the superior court a railroad conductor refused to carry a female passenger to the station to which she had bought a ticket, which had been taken up by another conductor, she being made to pay the additional fare demanded. She was compelled to leave the train and spend the night in a depot, where she was molested by an

Mississippi it is the duty of the conductor of a passenger train to preserve order thereon and protect the passengers from insult and injury. If he fails to do this the company is liable for an injury to a passenger; but it is not answerable in punitive damages for weak and inefficient conduct on his part, though it is liable therefor if the conductor wilfully fails or refuses to act or manifests conduct which indicates that his sympathy is with the wrong-doers.¹ Wallace, J., said on a motion for a new trial in a libel case in which the plaintiff was given a verdict for \$20,000, the actual damages being small: "It cannot be doubted that when the owner of a newspaper delegates to others the power to edit it and publish it and manage its affairs generally, he is responsible for all the acts of omission and commission of his employees in this behalf, and cannot shirk liability for their misconduct because he has abandoned to others that supervision which he might have exercised himself."² Ryan, C. J., speaking for the court in Wisconsin, on the right of railroad companies to adopt and enforce reasonable regulations for the safety and convenience of passengers as well as their own security, vindicates also the soundness of the principle that the company may incur, through its agents, a liability for vindictive damages. Referring to the officers in charge of a passenger train, he says: "These officers may be guilty of acts of arbitrary oppression, beyond endurance, toward passengers, which might warrant resistance. But we feel warranted by principle and authority to hold that in the enforcement of order on the train, and in the execution of reasonable regulations for the safety and comfort of the pas-

employee of the defendant and others. An instruction permitting the award of punitive damages if the jury believed that any of the defendant's agents or employees, on duty as such, were insulting in conduct or manner toward the plaintiff while she was in or about the train or depot, or that the defendant wilfully exposed the plaintiff to insults or wanton approaches of other persons in its depot, was approved, regardless of the existence of malice on the part of either of the con-

ductors. *Louisville & N. R. Co. v. Grundy*, 12 Ky. L. Rep. 293.

The master is liable in exemplary damages for injuries inflicted by the reckless or wanton negligence of his servant while in the discharge of his duties. *City Transfer Co. v. Robinson*, 12 Ky. L. Rep. 555 (Ky. Super. Ct.).

¹ *New Orleans, etc. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689.

² *Malloy v. Bennett*, 15 Fed. Rep. 371.

sengers, and for the security of the train, the authority of these officers, exercised upon the responsibility of the corporations, must be obeyed by the passengers, and that forcible resistance cannot be tolerated. They act on the peril of the corporation, and their own. Indeed, as that fictitious entity, the corporation, can act only through natural persons, its officers and servants, and as it of necessity commits its trains absolutely to the charge of officers of its own appointment, and passengers of necessity commit to them their safety and comfort *in transitu*, under conditions of such peril and subordina- [758] tion, we are disposed to hold that the whole power and authority of the corporation, *pro hac vice*, is vested in these officers; and that as to passengers on board they are to be considered as the corporation itself; and that the consequent authority and responsibility are not generally to be straitened or impaired by any arrangement between the corporation and the officers; the corporation being responsible for the acts of the officers in the conduct and government of the train, to the passengers traveling by it, as the officers would be for themselves, if they were themselves the owners of the road and train. We consider this rule essential to public convenience and safety and sanctioned by great weight of authority.”¹ In Georgia if a street-car conductor uses insulting language and is “very impolite and gruff” to a passenger whom he ejects, a charge upon the question of punitive damages is proper.² In South Carolina the following language is used: When one person invests another with authority to act as his agent for a

¹ *Bass v. Chicago, etc. R. Co.*, 36 Wis. 463, citing *Commonwealth v. Power*, 7 Met. 596; *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62; *Jencks v. Coleman*, 2 Sumn. 221; *Pittsburgh, etc. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Philadelphia, etc. R. Co. v. Derby*, 14 How. 468; *Chamberlain v. Chandler*, 3 Mason, 242; *Nieto v. Clark*, 1 Cliff. 145; *Stephen v. Smith*, 29 Vt. 160; *Moore v. Fitchburg R. Co.*, 4 Gray, 465, 64 Am. Dec. 83; *Vinton v. Middlesex R. Co.*, 11 Allen, 304, 87 Am. Dec. 314; *Coleman v. New York, etc. R. Co.*, 106

Mass. 160; *Sullivan v. P. & R. R. Co.*, 30 Pa. 324, 72 Am. Dec. 698; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. 365; *Sherley v. Billings*, 8 Bush, 147, 8 Am. Rep. 451; *Higgins v. Water-vliet Turnpike & R. Co.*, 46 N. Y. 23, *Baltimore, etc. R. Co. v. Blocher*, 37 Md. 277; *Chicago, etc. R. Co. v. Parks*, 18 Ill. 460; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; 2 Redf. 220, 230.

² *Atlanta Consolidated St. R. Co. v. Keeny*, 99 Ga. 260, 25 S. E. Rep. 629, 33 L. R. A. 824.

specified purpose, all the acts done by the agent in pursuance or within the scope of his agency are and should be regarded as really the acts of the principal. If the agent, in doing the act which he is deputed to do, does it in such a manner as would render him liable for exemplary damages, his principal is likewise liable, for the act is really done by him.¹ In Oregon if the officers actually wielding the whole executive power of the corporation participated in and directed all that was planned and done, their malicious, wanton or oppressive intent may be treated as the intent of the corporation, for which it must answer in exemplary damages.²

§ 412. **Liability of officers, municipalities and estates.** Exemplary damages may be recovered against public officers if the facts warrant,³ as where a malicious trespass has been committed under color of process,⁴ a *mandamus* disobeyed,⁵ a levy made upon property for taxes after a tender thereof.⁶ In an early Pennsylvania case they were awarded against a sheriff for the acts of his deputy, though the latter were not recognized or adopted.⁷ They have been denied against officers who unreasonably, but not corruptly, refused to permit an elector to vote,⁸ but have been allowed against officers who intentionally, maliciously and repeatedly interfered with the exercise of the plaintiff's personal rights and privileges under the federal constitution, the wrong and injury done not being compensable by a money standard.⁹ In New Brunswick punitive damages have been sustained against the counselors of a municipality for maliciously dismissing a person from his office.¹⁰ Municipal corporations cannot be subjected to vindictive damages,¹¹ unless they, in some legal way, either authorize

¹ Rucker v. Smoke, 37 S. C. 377, 16 S. E. Rep. 40, 34 Am. St. 758; Skipper v. Clifton Manuf. Co., 58 S. C. 143, 36 S. E. Rep. 509.

² Bingham v. Lipman, 40 Ore. 363, 371, 67 Pac. Rep. 98.

³ Parker v. Shackelford, 61 Mo. 68; Friedly v. Giddings, 119 Fed. Rep. 438.

⁴ Nightingale v. Scannell, 18 Cal. 315; Louder v. Hinson, 4 Jones, 369; Anonymous, Minor, 52, 12 Am. Dec. 31; Rodgers v. Ferguson, 36 Tex. 544.

⁵ Wilson v. Vaughn, 23 Fed. Rep. 229.

⁶ Willis v. Miller, 29 Fed. Rep. 238.

⁷ Hazard v. Israel, 1 Bin. 240, 2 Am.

Dec. 438.

⁸ Pierce v. Getchell, 76 Me. 216.

⁹ Scott v. Donald, 165 U. S. 58, 89, 17 Sup. Ct. Rep. 265.

¹⁰ Gallagher v. Westmoreland, 31 N. B. 194.

¹¹ Mayor v. Lewis, 92 Ala. 352, 357, 9 So. Rep. 242 (it seems); Bennett v. Marion, 102 Iowa, 425, 63 Am. St. 454,

or subsequently approve the wrongful act or neglect. The trustees of a municipality can only act by a majority vote. They are the business managers of the corporation. But after once elected, the voters and taxpayers on whom such damages must fall if awarded, cannot, during their term of office, discharge them, and usually cannot control their action within the scope of their office. Hence there is no liability for exemplary damages for mere neglect.¹ Such damages are not recoverable from the estate, or against the personal representatives of a deceased wrong-doer,² in the absence of a statute.

71 N. W. Rep. 360, quoting the text; *Hunt v. Boonville*, 65 Mo. 620, 27 Am. Rep. 299 (it seems); *Wilson v. Wheeling*, 19 W. Va. 323, 350, 42 Am. Rep. 780; *Chicago v. Langlass*, 52 Ill. 259, 4 Am. Rep. 603; *Chicago v. Kelly*, 69 Ill. 475; *Larson v. Grand Forks*, 3 Dak. 307, 19 N. W. Rep. 414; *Costich v. Rochester*, 68 App. Div. 623, 73 N. Y. Supp. 835.

¹ *Willett v. St. Albans*, 69 Vt. 330. 38 Atl. Rep. 72. Liability for such damages has been adjudged in *McGary v. Lafayette*, 4 La. Ann. 440.

² *Sheik v. Hobson*, 64 Iowa, 146, 19 N. W. Rep. 875; *Wright's Adm'r v. Donnell*, 34 Tex. 291; *Rippey v. Miller*, 11 Ired. 247.

CHAPTER X.

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SECTION 1.

PLEADING.

§ 413. Plaintiff must state a case which entitles him to damages. It is, of course, of paramount importance [759] that a plaintiff suing for damages should state such a case as entitles him thereto.¹ It is enough, on demurrer, that he states a case which gives him at least a right to nominal damages.²

¹Niebuhr v. Sonn, 29 App. Div. 360, 51 N. Y. Supp. 592; Goldman v. Gainey, 67 App. Div. 330, 73 N. Y. Supp. 738.

Even upon a hearing in damages after a default a judgment for substantial damages cannot be based upon the failure of duty upon the

part of the defendant not averred in the complaint. Soltzer v. Davenport Fire Arms Co., 74 Conn. 46, 49 Atl. Rep. 852. See § 429.

²Philip v. Durkee, 108 Cal. 300, 41 Pac. Rep. 467; Parker v. Griswold, 19 Conn. 288; Cowley v. Davidson, 10 Minn. 392; Wilson v. Clarke, 50

A party cannot by a claim of damages give himself a right to recover more than the facts stated by him will warrant.¹ Thus, a counter-claim in an action on a breach of contract, where the recovery was measured by the loss of profits, an allegation as to the contract price, the breach of the contract, and the damages sustained is not a good allegation that the profits would equal the alleged damages or that there would have been any profits, because the expense of performance might have exceeded the sum laid as damages.² In an action to recover for the conversion of stock there cannot be a recovery of the dividends accrued thereon unless a demand of their payment is alleged and their conversion is set up as a separate cause of action.³ But when in an action sounding in damages the plaintiff claims more than on the face of his declaration appears to be due, it will not vitiate a verdict; for the amount of the damages being ascertained by the jury, it is to be presumed that they were assessed according to the proof.⁴ In an orderly statement of a case brought for such redress there should be a formal allegation of damage, though if the facts alleged are such that the law draws the implication of damage, the absence of a formal allegation of injury does not render the complaint insufficient.⁵

§ 414. The *ad damnum*. The *ad damnum* is the logical and legal sequence of the case stated; but, as damages can only be claimed as the legal result of the facts alleged when proved, [760] and the *ad damnum* is only the legal conclusion therefrom, it is not of substance, and, if omitted or left blank, the

Minn. 367; Hood v. Palm, 8 Pa. 237. See Gould v. Allen, 1 Wend. 182; Rider v. Pond, 28 Barb. 447; Thompson v. Gould, 16 Abb. Pr. (N. S.) 424, 19 N. Y. 262.

Under a declaration charging positive malfeasance there cannot be a recovery of damages upon proof of non-feasance only. Macumber v. White River Log & B. Co., 52 Mich. 195, 17 N. W. Rep. 806.

¹ Wainwright v. Weske, 82 Cal. 193, 23 Pac. Rep. 12; Murphy v. Evans, 11 Ind. 517.

² Singer Manuf. Co. v. Potts, 59

Minn. 240, 61 N. W. Rep. 23; Kentucky Tobacco Ass'n v. Ashby, 9 Ky. L. Rep. 109.

³ Ralston v. Bank of California, 112 Cal. 208, 44 Pac. Rep. 476.

⁴ Kerry v. Pacific Marine Co., 121 Cal. 564, 54 Pac. Rep. 89, 66 Am. St. 65; Ex'r of Van Rensselaer v. Ex'r of Platner, 2 Johns. Cas. 17.

⁵ Green Bay & M. Canal Co. v. Kaukauna Water Power Co., 112 Wis. 323, 87 N. W. Rep. 864; Luessen v. Oshkosh Electric Light & P. Co., 109 Wis. 94, 85 N. W. Rep. 124.

judgment will nevertheless be sustained.¹ Where the declaration contains several counts, concluding with the common counts, and no damages are laid in a particular count, the court will intend the general averment of damages at the close of the common counts to apply to it.² The general damage laid at the conclusion of a declaration in the ordinary form is distributable over the several counts in it.³ But if there is a general averment of damages to the extent of a sum stated and the complaint is verified, the general *ad damnum* clause will not control such averment.⁴

§ 415. **Demand of damages in code complaint.** Under the code the claim of damages is essential when judgment is taken by default; such a judgment is erroneous if no amount of, nor a prayer for, damages be contained in the complaint, notwithstanding the latter states facts sufficient to sustain a judgment for damages.⁵ The code requires that the complaint shall contain a demand for the relief which the plaintiff claims; but compliance is principally important in cases where there is failure to answer, for the court is authorized to grant [761] any relief consistent with the case made by the complaint and

¹ *Mattingly v. Darwin*, 23 Ill. 618; *Galena, etc. R. Co. v. Appleby*, 28 Ill. 283; *Hargrave v. Penrod*, 1 Ill. 401, 12 Am. Dec. 201; *Bank of Metropolis v. Gutschlick*, 14 Pet. 19; *Proctor v. Crozier*, 6 B. Mon. 268; *Craghill v. Page*, 2 Hen. & Munf. 446; *Stephens v. White*, 2 Wash. (Va.) 260. Held to be necessary and matter of substance in *Brownson v. Wallace*, 4 Blatchf. 465.

In *Bumpass v. Webb*, 3 Ala. 109, it was held that though the declaration omit to lay damages, yet, if they are laid in the writ, the declaration is unobjectionable. In such a case, the declaration being amendable in the trial court on error, it will be considered as amended. Where the cause of action is a legal liability, certain and defined, as a promissory note, the damages being the statutory rate of interest, they need not be laid either in the writ or declara-

tion. *Digges v. Norris*, 3 Hen. & Munf. 268; *Palmer v. Euback*, id. 502; *Kennedy v. Woods*, 3 Bibb, 322. See *Snow v. Grace*, 25 Ark. 570; *Hennrie v. Sweasey*, 5 Blackf. 273; *Gilligan v. New York, etc. R. Co.*, 1 E. D. Smith, 453.

² *Adams v. McMillan*, 7 Port. 73.

³ *Gell v. Burgess*, 7 C. B. 16; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. Rep. 53.

⁴ *Kerry v. Pacific Marine Co.*, 121 Cal. 564, 54 Pac. Rep. 89, 66 Am. St. 65.

⁵ *Pittsburgh Coal Mining Co. v. Greenwood*, 39 Cal. 71; *Raum v. Reynolds*, 11 Cal. 14; *Gage v. Rogers*, 20 Cal. 91; *Lamping v. Hyatt*, 27 Cal. 102; *Gautier v. English*, 29 Cal. 165; *Parrott v. Den*, 34 Cal. 79; *Bond v. Pacheco*, 30 Cal. 530; *Simmons v. Blake*, 12 Abb. Pr. 331; *Walton v. Walton*, 32 Barb. 203; *Andrews v. Monlawa*, 8 Hun, 65; *Prince v. Lamb*, 128 Cal. 120, 125, 60 Pac. Rep. 689.

embraced within the issue.¹ The controlling part of the complaint, as to the amount of damages, is the prayer for judgment.² If the complaint in an action on a contract states facts which in law constitutes plaintiff's damages and their measure, it is not insufficient because it does not specifically allege damages.³ And so in an action *ex delicto*.⁴ It is not material that the plaintiff does not demand the precise damages to which he is entitled, or errs as to the true rule of damages he alleges; the recovery will be adjusted upon the proper basis.⁵ Present and prospective damages resulting from the total breach of an executory contract for the sale of chattels may be recovered under a general allegation of damage. But if there is no such allegation, it being alleged that there was a failure to deliver a particular chattel, or any other specific breach of the contract, damages being asked therefor, the recovery cannot cover any other breach.⁶

§ 416. Effect of not answering allegation of damage. The statement of the amount of damages is in some jurisdictions deemed an issuable fact;⁷ in others it is not.⁸ In the common-

¹ Smith v. Havens, 6 Colo. 297; 2 Wait Pr. 387; Nevada County & S. Canal Co. v. Kidd, 37 Cal. 282; Ahleson v. Western U. Tel. Co., 96 Cal. 641, 31 Pac. Rep. 583.

² Ketchum v. Van Dusen, 11 App. Div. 332, 42 N. Y. Supp. 1112; Schultz v. Third Avenue R. Co., 46 N. Y. Super. Ct. 211; Riser v. Walton, 78 Cal. 490, 21 Pac. Rep. 362; Weaver v. Mississippi & Rum R. B. Co., 28 Minn. 542, 11 N. W. Rep. 43.

³ Bartlett v. Odd Fellows' Savings Bank, 79 Cal. 218, 21 Pac. Rep. 743; Bank of British Columbia v. Port Townsend, 16 Wash. 450, 47 Pac. Rep. 896, quoting the text.

⁴ See § 413.

⁵ Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. Rep. 427; Mitchell v. Thorne, 134 N. Y. 536, 32 N. E. Rep. 10, 30 Am. St. 699.

⁶ Rathbone v. Wheelihan, 82 Minn. 30, 84 N. W. Rep. 638, citing Bowe v. Minnesota Milk Co., 44 Minn. 460, 47 N. W. Rep. 151; Missouri, etc. R. Co.

v. Byas, 9 Tex. Civ. App. 572, 29 S. W. Rep. 1122; Stewart v. Baltimore, 33 W. Va. 88, 10 S. E. Rep. 26.

⁷ Tucker v. Parks, 7 Colo. 62, 1 Pac. Rep. 427, 3 id. 486; Cole v. Hoeberg, 36 Kan. 263, 13 Pac. Rep. 275, explaining Union Pacific R. Co. v. Pillsbury, 29 Kan. 652; Patterson v. Ely, 19 Cal. 28; Dimick v. Campbell, 31 Cal. 238; Carlyon v. Lannon, 4 Nev. 156; White v. Northwest Stage Co., 5 Ore. 99; Huston v. Twin, etc. Road Co., 45 Cal. 550.

⁸ Newman v. Otto, 4 Sandf. 668; Jenkins v. Steanka, 19 Wis. 126, 88 Am. Dec. 675; Bartelt v. Braunsdorf, 57 Wis. 1, 14 N. W. Rep. 1; Thompson v. Lumley, 7 Daly, 74; McLees v. Felt, 11 Ind. 218; Raymond v. Traffarn, 12 Abb. Pr. 52; Connoss v. Meir, 2 E. D. Smith, 314; McKensie v. Farrell, 4 Bosw. 192; Woodruff v. Cork, 25 Barb. 505; Vanderslice v. Newton, 4 N. Y. 130; Howell v. Bennett, 74 Hun, 555, 26 N. Y. Supp. 627.

These cases turn upon the signifi-

law action of trespass, where the defendant fails to support by proof a special plea in bar, a trespass or cause of action of the general nature set forth in the declaration is admitted; but the trespasses precisely as laid in all their particulars and variety are not admitted. The failure of the defendant to prove his plea entitles the plaintiff to nominal damages, but nothing beyond, until he shows by proof a claim to more.¹

§ 417. *Ad damnum* limits recovery; erroneous claim of damages. The general rule is that the *ad damnum* limits the plaintiff's recovery. He cannot take judgment for a greater sum. If he does it is error,² unless the excess be merely for in-

cation given to the words "material allegation" in the codes. In states where these words are not defined by the code the courts usually give them their common-law meaning. But where those words are defined to mean an allegation essential to the claim or defense, as they are in some codes, their common-law meaning is considered to be extended.

¹Rich v. Rich, 16 Wend. 663.

Under a replication *de injuria* to a plea of *son assault demesne*, the defendant cannot give evidence in mitigation of damages to contradict the averment of aggravated injuries laid in the *narr*: he is confined to proving an excuse for the battery. He was not entitled for this reason to show in mitigation that he had been indicted, convicted and punished for the same battery. The general rule in regard to such a replication is, that, as it puts in issue only the matter alleged in the plea, nothing can be given in evidence under it which is beyond and out of the plea. Frederick v. Gilbert, 8 Pa. 454; 2 Greenl. Ev., § 96.

An assessment of damages by jury is necessary at common law though those alleged in the declaration be not denied. Thompson v. Thompson, 7 B. Mon. 421; Wells v. Commonwealth, 8 id. 459.

²Frankhouser v. Cannon, 50 Kan. 621, 32 Pac. Rep. 379; Brook v. Bayless, 6 Okl. 568, 52 Pac. Rep. 738; Gulf, etc. R. Co. v. Simonton, 2 Tex. Civ. App. 558, 22 S. W. Rep. 285; Tyner v. Hays, 37 Ark. 599; Burke v. Koch, 75 Cal. 356, 17 Pac. Rep. 228; Howard v. Gunnison, 12 Ohio Dec. 684; Beranek v. Beranek, 113 Wis. 272, 89 N. W. Rep. 146; Cooper v. Livingston, 19 Fla. 684; Stafford v. Oskaloosa, 57 Iowa, 748, 11 N. W. Rep. 668; Flournoy v. Childress, Minor, 93; Derrick v. Jones, 1 Stew. 18; McWhorter v. Sayre, 2 id. 225; Hall v. Hall, 42 Ind. 585; White v. Cannada, 25 Ark. 41; Anns v. Upton, 66 Barb. 370; Robinett v. Morris, Hardin, 93; Davenport v. Bradley, 4 Conn. 309; Henderson v. Staintor, Hardin, 118; Moore v. Texas, 1 Tex. 563; McLellan v. Crofton, 6 Me. 307; Palmer v. Reynolds, 3 Cal. 496; Dox v. Dey, 3 Wend. 356; Snow v. Grace, 25 Ark. 570; Chévolet v. Morris, 2 W. Bl. 1300; McIntire v. Clark, 7 Wend. 330; Lake v. Merrill, 10 N. J. L. 288; Herbert v. Hardenberg, id. 222; Hawk v. Anderson, 9 id. 318; Cortelyou v. Cortelyou, 2 id. 318; Daniel v. Park, id. 1001; Rowan v. Lee, 3 J. J. Marsh. 97; Edwards v. Weister, 2 A. K. Marsh. 382; Harris v. Jaffray, 3 Harr. & J. 543; Grist v. Hodges, 3 Dev. 203; Dingham v.

terest which accrued pending the suit and the objection is first made on appeal¹ or unless the proper sum is stated in the *præcipe* and the declaration, and the objection is so made.² Costs may be given in addition to the damages claimed.³ The

Austill, Minor, 89; Coursey v. Covington, 5 Harr. & J. 45; Wilde v. Crow, 10 Up. Can. C. P. 406.

In Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 374, 3 N. E. Rep. 456, the court instructed the jury not to assess plaintiff's damages above the amount claimed. In answer to an objection thereto it was said: "It does not appear from the amount of the verdict or otherwise that this instruction affected the action of the jury. While it is certainly censurable it will not justify a reversal of the judgment." This was an action of negligence. In an action of *assumpsit* the rule is the same in Illinois as elsewhere. Kelley v. Third Nat. Bank, 64 Ill. 541.

In Texas if actual and exemplary damages are claimed and the facts show the latter are not recoverable, the judgment will not be reversed because it awards as actual damages an amount in excess of the sum prayed for as such. International & G. N. R. Co. v. Gordon, 72 Tex. 44, 11 S. W. Rep. 1033.

In an action of trespass to try title to land the plaintiff is allowed to recover damages beyond the sum laid in the writ and declaration. McWhorter v. Standifer, 2 Port. 519; Graves v. Dodson, 8 Yerg. 161; Malone v. Donnally, Minor, 12; Boddie v. Ely, 3 Stew. 182.

In debt the amount stated in the caption is the debt demanded. Hampton v. Barr, 3 Dana. 578. The

ad damnum merely covers the interest (Hoff v. Hutchinson, 14 How. 486); and where the damages recovered are more than the amount laid in the declaration, it is held not to be error. Stuart v. Davidson, Peck, 203; Executors of Van Rensselaer v. Platner, 2 Johns. Cas. 18; Carver v. Adams, 40 Vt. 552; Thompson v. French, 10 Yerg. 452. See Friedley v. Schultz, 9 S. & R. 156, 11 Am. Dec. 691. In debt on a bond, damages need not be laid in the declaration or found by the jury. Taylor v. McLean, 3 Call. 481; Payne v. Ellzey, 2 Wash. (Va.) 185; Allen v. Smith, 12 N. J. L. 159.

Where the court has jurisdiction of the parties, the *ad damnum* may be amended by increasing or decreasing it, to bring the case within its jurisdiction as to amount. Merrill v. Curtis, 57 Me. 152; Converse v. Damariscotta Bank, 15 Me. 431; Hart v. Waitt, 3 Allen, 532; McLellan v. Crofton, 6 Me. 307, 19 Am. Dec. 210. But see Hoit v. Molony, 2 N. H. 322; Flanders v. Atkinson, 18 id. 167; Taylor v. Jones, 42 id. 25; McQuade v. O'Neil, 15 Gray, 52, 77 Am. Dec. 350.

Under a statute providing that the evidence of indebtedness filed as an exhibit shall be a part of the record the exhibit controls the *ad damnum*. Montgomery v. Hanover Nat. Bank, 79 Miss. 443, 30 So. Rep. 635, and cases cited.

Under the English practice if the damages assessed exceed those

¹Metropolitan Accident Ass'n v. Froiland, 161 Ill. 30, 43 N. E. Rep. 766, 52 Am. St. 359; Georgia Home Ins. Co. v. Goode, 95 Va. 751, 30 S. E. Rep. 366.

²Wells v. Matthews, 70 Ill. App. 504.

³French v. Goodnow, 175 Mass. 451, 56 N. E. Rep. 719.

declaration in an action to recover a statutory penalty is good though the damages demanded are nominal.¹ The [762] plaintiff may be allowed, in the discretion of the court, to amend the *ad damnum* by increasing it before or at the trial, and even after verdict; or he may be permitted to cure the error of a larger verdict by a *remittitur*.² The declaration in an action to recover unliquidated damages, the only indication of the sum claimed being in the *ad damnum*, should not be amended after verdict by increasing that sum without sending the cause back for a new trial.³ The objection that the recovery is in excess of the sum claimed cannot be first raised in the

claimed, the petitioner, if he desires to amend his petition, must take out a summons, which he must serve upon a co-respondent not represented at the trial. *Beckett v. Beckett*, [1901] Prob. 85.

¹ *Indiana Millers' Mut. F. Ins. Co. v. People*, 65 Ill. App. 355, 150 Ill. 474, 49 N. E. Rep. 364.

² *Excelsior Electric Co. v. Sweet*, 59 N. J. L. 441, 31 Atl. Rep. 721; *Zimmer v. Third Avenue R. Co.*, 36 App. Div. 265, 55 N. Y. Supp. 308; *Ludington v. Goodnow*, 163 Mass. 223, 46 N. E. Rep. 622; *Cullar v. Missouri, etc. R. Co.*, 84 Mo. App. 347; *Cooper v. Livingston*, 19 Fla. 684; *McClennahan v. Smith*, 76 Mo. 428; *Johnson v. Brown*, 57 Barb. 118; *Taylor v. Jones*, 42 N. H. 25; *Pierson v. Finney*, 37 Ill. 29; *Schneider v. Seely*, 40 Ill. 257; *Pickering v. Pulsifer*, 9 Ill. 79; *Dox v. Dey*, 3 Wend. 356; *Cahill v. Pintony*, 4 Munf. 371; *Lewis v. Cooke*, 1 Harr. & McIl. 159; *Green v. Wright*, 8 M. & W. 360; *Lautz v. Frey*, 19 Pa. 366; *Pickwood v. Wright*, 1 H. Bl. 643; *Hardy v. Cathcart*, 1 Marsh. 180; *Usher v. Dansey*, 4 M. & S. 94; *Deane v. O'Brien*, 13 Abb. Pr. 11; *Grass Valley Quartz Mining Co. v. Stackhouse*, 6 Cal. 413; *Baltzell v. Hickman*, 4 Litt. 265; *Wilde v. Crow*, 10 Up. Can. C. P. 406; *Fowlkes v. Webber*, 8 Hunph. 530; *Corning v. Corning*, 6 N. Y. 97; *Reed*

v. Crane, 89 Mo. App. 670; *Dallas v. Jones*, 93 Tex. 38, 49 S. W. Rep. 577, 53 id. 377.

The excess may be cured by amendment on error, when the record shows something to amend by (*Miller v. Weeks*, 22 Pa. 89); or the court is authorized to try the case as though originally brought there (*Dressler v. Davis*, 12 Wis. 58; *Palmer v. Wylie*, 19 Johns. 276; *Jackson v. Covert*, 5 Wend. 139; *Moore v. Tracy*, 7 Wend. 229); or by allowing the party to remit the excess where the appellate court has power to render such judgment as the court below might have given. *Crabbs' Ex'r v. Nashville Bank*, 6 Yerg. 332.

An offer to remit does not avail in Arkansas. *Tyner v. Hays*, 37 Ark. 599.

In New York the courts will not allow an amendment after verdict without granting a new trial. *Pharis v. Gera*, 31 Hun, 443; *Corning v. Corning*, 6 N. Y. 97.

A petition in an action for assault and battery may be amended so as to ask for exemplary damages on the facts pleaded. *Kreger v. Sylvester*, 100 Iowa, 647, 69 N. W. Rep. 1059.

³ *Excelsior Electric Co. v. Sweet*, 59 N. J. L. 441, 31 Atl. Rep. 721, reversing 57 N. J. L. 224, 30 Atl. Rep. 553.

appellate court.¹ That court will presume that the proper [763] amendment was made.² An erroneous claim of damages in a declaration does not make it demurrable; objection should be made to such claim on the trial.³ It will be convenient here to notice some claims which arise otherwise than in actions, at least in the first instance. One who presents a claim against an estate to the commissioners appointed to examine claims, the amount of the recovery being based on the *quantum meruit*, is not precluded from recovering more on appeal to the court if entitled to it. The estimate as set forth in the claim is evidence against the claimant, being an implied admission that no more is due; but it is not conclusive.⁴ In some states the rule limiting the recovery to the sum claimed does not apply to the presentment of claims to city councils after rejection thereby.⁵ Under the Ohio statute a claim so filed cannot be amended, after expiration of the time fixed for filing it, by increasing the sum claimed.⁶ But under a statute declaring that no action upon any claim or cause of action for which a money judgment only is demandable shall be maintained against any town unless a statement or bill of such claim shall have been filed, etc., the filing is essential to the maintenance of the action, and the damages recoverable are limited to the sum claimed.⁷ The rule is otherwise under a statute expressing that no action shall be maintained unless the claim on which the action is brought has been presented to the comptroller and he has neglected for thirty days after such presentment to pay the same. The claim being for unliquidated damages, the estimate of the amount thereof is not an essential part of it; hence it may be amended to demand judgment for a larger sum than was named in it.⁸

¹ *Utter v. Jaffray*, 114 Ill. 470, 2 N. E. Rep. 494; *Cunningham v. Alexander*, 58 Ill. App. 296; *Clason v. Baldwin*, 152 N. Y. 204, 46 N. E. Rep. 322.

² *Brunswick Grocery Co. v. Spencer*, 97 Ga. 764, 25 S. E. Rep. 764; *Clason v. Baldwin*, *supra*.

³ *Western U. Tel. Co. v. Hopkins*, 49 Ind. 223; *Dowd v. Seawell*, 3 Dev. 185; *Leland v. Tousey*, 6 Hill, 323; *Kent*

v. Halliday, 23 R. I. 182, 49 Atl. Rep. 700, quoting the text.

⁴ *Maughan v. Estate of Burns*, 64 Vt. 316, 22 Atl. Rep. 583.

⁵ *Wyandotte v. White*, 13 Kan. 191; *Salina v. Kerr*, 7 Kan. App. 223, 52 Pac. Rep. 901.

⁶ *Geib v. Cleveland*, 2 Ohio Dec. 360.

⁷ *Conrad v. Ellington*, 104 Wis. 367, 80 N. W. Rep. 456.

⁸ *Reed v. Mayor*, 97 N. Y. 620.

§ 418. What provable under general allegation of damage. Under a general allegation of damage the plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of; for the law implies that they will proceed from it. These are called general, as contradistinguished from special, damages which are the natural but not the necessary consequence.¹

¹ *Kingsley v. Butterfield*, 35 Neb. 228, 52 N. W. Rep. 1101; *J. M. James Co. v. Bank*, 105 Tenn. 1, 58 S. W. Rep. 261; *Abilene v. Wright*, 4 Kan. App. 708, 46 Pac. Rep. 715; *Nicholson v. Rogers*, 129 Mo. 136, 31 S. W. Rep. 260, citing the text; *Orman v. Mannix*, 17 Colo. 564, 31 Am. St. 340, 17 L. R. A. 602, 30 Pac. Rep. 1037; *Loesch v. Koehler*, 144 Ind. 278, 285, 43 N. E. Rep. 129, 35 L. R. A. 62, quoting the text; *English v. Danville*, 69 Ill. App. 288; *Rosenberger v. Marsh*, 108 Iowa, 47, 78 N. W. Rep. 837; *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. Rep. 616, citing the text; *Root v. Butte, etc. R. Co.*, 20 Mont. 354, 51 Pac. Rep. 155, quoting the text; *Dose v. Tooze*, 37 Ore. 13, 60 Pac. Rep. 380, citing the text; *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. Rep. 354; *Cain Lumber Co. v. Standard Dry Kiln Co.*, 108 Ala. 346, 18 So. Rep. 882; *Denver v. Hunan*, 9 Colo. App. 144, 47 Pac. Rep. 911; *Mood v. Western U. Tel. Co.*, 40 S. C. 524, 19 S. E. Rep. 67; *Dowdall v. King*, 97 Ala. 635, 12 So. Rep. 405; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. Rep. 445; *Serensen v. Northern Pacific R. Co.*, 45 Fed. Rep. 407, citing the text; *Moline Water Power Co. v. Waters*, 10 Ill. App. 159; *Rothschild v. Williamson*, 83 Ind. 387; *Atchison, etc. R. Co. v. Rice*, 36 Kan. 593, 14 Pac. Rep. 229; *Simmons v. Haas*, 56 Md. 153; *Hancock v. Hubbell*, 71 Cal. 537, 12 Pac. Rep. 618; *Mitchell v. Clarke*, 71 Cal. 163, 60 Am. Rep. 529; *Tucker v. Parker*, 7 Colo. 62; *Conner v. Pioneer Fire-proof Const. Co.*, 29 Fed. Rep. 629; *Bradbury v. Benton*, 69 Me. 194; *Tinsley v. Rowe*, 17 Ill. App. 326; *Hutts v. Shoaf*, 88 Ind. 395; 1 *Chitty's Pl.* 395-6; *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107; *Roberts v. Graham*, 6 Wall. 578; *Warner v. Bacon*, 8 Gray, 397, 69 Am. Dec. 253; *Potter v. Froment*, 47 Cal. 165; *Nunan v. San Francisco*, 38 Cal. 689; *Rowand v. Billinger*, 3 Strobb. 373; *Andrews v. Stone*, 10 Minn. 72; *Squire v. Gould*, 14 Wend. 159; *Spencer v. St. Paul, etc. R. Co.*, 21 Minn. 362; *Wampach v. Same*, id. 364; *Alston v. Huggins*, 2 Brev. 309; *Fagen v. Davison*, 2 Duer. 153; *Bedell v. Powell*, 13 Barb. 183; *Adams v. Barry*, 10 Gray, 361; *Cole v. Swans-ton*, 1 Cal. 51, 52 Am. Dec. 288; *Ryerson v. Marseillis*, 16 N. J. L. 450; *Trenton Mut. L. & F. Ins. Co. v. Perrine*, 23 id. 402, 57 Am. Dec. 400; *Strang v. Whitehead*, 12 Wend. 64; *Vanderslice v. Newton*, 4 N. Y. 130; *Burrell v. New York & S. Solar Salt Co.*, 14 Mich. 34; *Bogert v. Burkhalter*, 2 Barb. 525; *Tomlinson v. Derby*, 43 Conn. 562; *Bristol Manuf. Co. v. Gridley*, 28 Conn. 201; *Baldwin v. Western R. Co.*, 4 Gray, 333; *Solms v. Dias*, 16 Abb. Fr. 311; *Plimpton v. Gardiner*, 64 Me. 260; *Lewis v. Paull*, 42 Ala. 136; *Shaw v. Hoffman*, 21 Mich. 151; *Birchard v. Booth*, 4 Wis. 67; *Patten v. Libbey*, 32 Me. 378; *Agnew v. Johnson*, 12 Pa. 471, 62 Am. Dec. 303; *Hart v. Evans*, 8 Pa. 13; *Boyden v. Burke*, 14 How. 575; *Olmstead v. Burke*, 25 Ill. 86; *Hallock v. Belcher*, 42 Barb. 199;

§ 419. **Special damages must be alleged.** Special damages are required to be stated in the declaration for notice to the defendant and to prevent surprise at the trial.¹ This rule applies to a cross-bill in equity where such damages are claimed as a set-off.² Under a general averment of damage, interest may be recovered on an alleged breach of a contract to pay money; for it is the precise legal measure of damages [764] on that breach. When damages are sought to be recovered for the breach of a special contract the action must be upon that contract;³ and when it is so under a general allegation of damage the plaintiff may prove and recover those damages which necessarily result, and are therefore implied by law from the breach assigned.⁴ If a contractor in a building contract is prevented by the other party from fulfilling it, under such a general allegation he will be entitled to recover the profits he would have made had he been suffered to complete the work;⁵ for the breach of a contract of sale the profits with reference to the market value at the time the defendant was bound to deliver or accept the goods according to the contract may be recovered. If special circumstances existed, entitling the purchaser to greater damages, because the default

Hunter v. Stewart, 47 Me. 419; *Pren-tiss v. Barnes*, 6 Allen, 410; *Stevens v. Lyford*, 7 N. H. 360; *Hutchinson v. Granger*, 13 Vt. 386; *Laraway v. Perkins*, 10 N. Y. 371; *O'Leary v. Rowan*, 31 Mo. 117; *Park v. Mc-Daniels*, 37 Vt. 594; *Lusk v. Briscoe*, 65 Mo. 555; *Adams v. Gardner*, 78 Ill. 568; *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279; *Gray v. Ballard*, 22 Minn. 278; *De Forest v. Leete*, 16 Johns. 122; *Butler v. Kent*, 19 id. 228, 10 Am. Dec. 219; *Dumont v. Smith*, 4 Denio, 319; *Johnson v. Von Kettler*, 84 Ill. 315; *North Point Consolidated Irrigation Co. v. Utah & S. L. Canal Co.*, 23 Utah, 199, 206, 63 Pac. Rep. 812, citing the text; *Carroll v. Caine*, 27 Wash. 402, 406, 67 Pac. Rep. 993, citing the text; *Pioneer Press Co. v. Hutchinson*, 63 Minn. 481, 65 N. W. Rep. 938, citing the text.

¹ Id.

If proof of special damages is not objected to when it is offered the right to have it ruled out is waived. *Lashus v. Chamberlain*, 6 Utah, 385, 24 Pac. Rep. 188; *Roberts v. Graham*, 6 Wall. 578.

The rule stated does not apply to actions in justices' courts. *Lee v. Western U. Tel. Co.*, 51 Mo. App. 375.

² *Hooper v. Armstrong*, 69 Ala. 343.

³ *Trunkey v. Hedstrom*, 131 Ill. 201, 23 N. E. Rep. 587; *Royalton v. Royalton & W. Turnpike Co.*, 14 Vt. 311.

⁴ *Lashus v. Chamberlain*, 6 Utah, 385, 24 Pac. Rep. 188.

⁵ *Burrell v. New York & S. Solar Salt Co.*, 14 Mich. 34; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. Rep. 1020; *Ennis v. Buckeye Pub. Co.*, 44 Minn. 105, 46 N. W. Rep. 314; *Masterton v. Mayor*, 7 Hill, 61, 42 Am. Dec. 38.

defeated a particular purpose known to the contracting parties, they must be stated, and also the facts which, under the circumstances, rendered the injury greater.¹ If a publication is not libelous *per se* an averment of special damage to the effect that the plaintiff has been greatly injured in his business, has been unable to obtain employment, and has been deprived of the right to follow his vocation, is not a sufficient statement of special damages.² The special loss or injury resulting from slander, if the words spoken are not actionable *per se*, must be particularly set forth; an allegation of damage and injury in name and fame is not good.³

§ 420. Same subject; illustrations. Where the action is for the conversion or destruction of property, or any tortious act or omission involving its loss, the law infers an injury measured by its value, and the injured party may recover by that standard under the general averment of damage.⁴ But if he is entitled to recover other damages, they are special and exceptional, arising from peculiar circumstances which must be alleged and proved. Evidence of the value of horses for the purpose for which they were used may be received under an allegation of general damages in an action to recover for their wrongful killing.⁵ Loss of subscriptions will not be legally inferred from the destruction of a subscription list;⁶ of an account from the destruction of an account book.⁷ The expense of keeping horses, or boarding them elsewhere, is not a necessary result of eviction from a barn;⁸ nor is it a necessary result of detaining an animal that it will be reduced in flesh by being kept on short pasturage; or that from detaining a

¹ Fletcher v. Tayleur, 17 C. B. 21; Smeed v. Foord, 1 E. & E. 602; Messmore v. New York, etc. Co., 40 N. Y. 422; Griffin v. Colver, 16 N. Y. 489; Cole v. Swanston, 1 Cal. 50; Liljengren Furniture & L. Co. v. Mead, 42 Minn. 420, 44 N. W. Rep. 306; Miller v. Burch, 19 Ky. L. Rep. 629, 41 S. W. Rep. 307; Sloss Marblehead Lime Co. v. Smith, 11 Ohio Ct. Ct. 213; Citizens' St. R. Co. v. Burke, 98 Tenn. 650, 40 S. W. Rep. 1085; Watkins v. Junker, 4 Tex. Civ. App. 629, 23 S. W. Rep. 802.

² Railroad v. Delaney, 102 Tenn. 289, 52 S. W. Rep. 151.

³ Pollard v. Lyon, 91 U. S. 225.

⁴ B. L. Blair Co. v. Rose, 26 Ind. App. 487, 60 N. E. Rep. 10, quoting the text.

⁵ Loesch v. Koehler, 144 Ind. 278, 43 N. E. Rep. 139.

⁶ Numan v. San Francisco, 38 Cal. 689.

⁷ Id.

⁸ Shaw v. Hoffman, 21 Mich. 151.

mare, a breeding season will be lost.¹ A wrong by which the owner is deprived of possession of his property does not necessarily oblige him to incur expense to regain possession;² or if [765] his horse is injured, expense for its care and cure.³ Under an allegation that a horse was greatly injured and damaged evidence is admissible to show that the injury was permanent, and also the value of the services of the horse while disabled.⁴ To recover for loss of rents, or injury to business, there must be a statement of facts from which such a loss must arise, and the allegation of a loss of that kind.⁵ Injury to a sucking colt is not necessarily the result of harm done to its dam.⁶ In an action to recover for the destruction of a fence and injury done to trees by the direct acts of the defendant, there cannot be a recovery for labor made necessary to prevent the destruction of crops unless the declaration alleges the facts which made such labor necessary.⁷ The loss of profits as the result of the wrongful levy of an attachment upon goods is a special damage.⁸ Under a complaint alleging the plaintiff's wrongful and unlawful ejectment from premises occupied by him he may recover compensation for injury to his goods and property, and for mental anguish and injury to his feelings and sense of shame in being turned into the street, these being general damages;⁹ but not for discomforts to himself and family because of the condition of the building he thereafter moved into, nor for injuries to his goods by reason of their exposure to the weather. These are special damages.¹⁰

¹ *Stevenson v. Smith*, 28 Cal. 102, 67 Am. Dec. 107.

² *Gray v. Ballard*, 22 Minn. 278; *Ross v. Malone*, 97 Ala. 529, 12 So. Rep. 182; *Boggan v. Bennett*, 102 Ala. 400, 14 So. Rep. 742; *Patee v. McCabe-Bierman Wagon Co.*, — Mo. App. —, 71 S. W. Rep. 374.

³ *Harper v. Missouri, etc. R. Co.*, 70 Mo. App. 604; *Patten v. Libbey*, 32 Me. 378.

⁴ *La Duke v. Exeter*, 97 Mich. 450, 56 N. W. Rep. 851, 37 Am. St. 357.

⁵ *Wampach v. St. Paul, etc. R. Co.*, 21 Minn. 364; *Agnew v. Johnson*, 22 Pa. 471, 62 Am. Dec. 303; *Spencer v. St. Paul R. Co.*, 21 Minn. 363; *Plimp-*

ton v. Gardiner, 64 Me. 360; *Taylor v. Dustin*, 43 N. H. 493; *Potter v. Froment*, 47 Cal. 165; *Dickinson v. Boyle*, 17 Pick. 78, 28 Am. Dec. 281; *Parker v. Lowell*, 11 Gray, 353.

⁶ *Gamble v. Mullin*, 74 Iowa, 99, 36 N. W. Rep. 909.

⁷ *Krueger v. Le Blanc*, 62 Mich. 70, 28 N. W. Rep. 757.

⁸ *Bradley v. Borin*, 53 Kan. 628, 36 Pac. Rep. 977.

⁹ *Rauma v. Bailey*, 80 Minn. 366, 83 N. W. Rep. 191; *Moyer v. Gordon*, 113 Ind. 282, 14 N. E. Rep. 476.

¹⁰ *Rauma v. Bailey*, *supra*; *Fillebrown v. Hoar*, 124 Mass. 580.

Proof that the plaintiff was deprived of the use of pasture as the result of the tearing down and removal of his fence is inadmissible under a general allegation of damages.¹

But where a tort or breach of contract is so alleged that loss is the direct and necessary consequence damages therefor may be recovered under a general allegation.² An allegation in a complaint in an action for a breach of duty growing out of the implied contract of a bank to honor the plaintiff's checks that the plaintiff is a trader and engaged in business, permits the recovery of substantial damages, as by the general impairment of the plaintiff's credit, though there is no averment of that fact. But it is otherwise as to the loss of patronage or confidence of particular persons.³ Disgrace and a feeling of mortification are the natural result of a slander and damages therefor are recoverable under a general allegation of injury to reputation.⁴ Under a complaint claiming damages for the destruction of a country dwelling and outhouse, there may be a recovery for the loss of trees surrounding the dwelling.⁵ In a suit to recover for the breach of a contract not to engage in the hotel business evidence of the loss of patrons may be given without specifying the individuals, as may decrease of profits.⁶ But the general rule is in actions for slander of title and the like that if the special damage is a loss of customers or of a sale of property, the persons who ceased to be customers or who refused to purchase must be named,⁷ and that loss of custom or of credit from particular persons must be pleaded.⁸

¹ *Macy v. Carter*, 67 Mo. App. 323.

² *Jutte v. Hughes*, 67 N. Y. 267; *Reckert v. Snyder*, 9 Wend. 416; *Francis v. Schoellkopf*, 53 N. Y. 152; *Richardson v. Chasen*, 10 Q. B. 756; *Hart v. Evans*, 8 Pa. 13; *McKeon v. See*, 4 Robert. 449; *St. John v. Mayor, etc.*, 6 Duer, 315; *Ruff v. Rinaldo*, 55 N. Y. 664; *Laraway v. Perkins*, 10 N. Y. 371; *Dewint v. Wiltse*, 9 Wend. 325; *Ten Cate v. Fansler*, 10 Okl. 7, 65 Pac. Rep. 375; *B. L. Blair Co. v. Rose*, 26 Ind. App. 487, 60 N. E. Rep. 10.

³ *J. M. James Co. v. Bank*, 105 Tenn. 1, 58 S. W. Rep. 261.

⁴ *Nicholson v. Rogers*, 129 Mo. 136, 31 S. W. Rep. 260.

⁵ *Wrought-Iron Range Co. v. Graham*, 25 C. C. A. 570, 579, 80 Fed. Rep. 474.

⁶ *Lashus v. Chamberlain*, 6 Utah, 385, 24 Pac. Rep. 188.

⁷ *Stevenson v. Love*, 106 Fed. Rep. 466; *Linden v. Graham*, 1 Duer, 670; *Wilson v. Dubois*, 35 Minn. 471, 29 N. W. Rep. 68, 59 Am. Rep. 335. But see *Ratliffe v. Evans*, [1882] 2 Q. B. 524.

⁸ *Fleming v. Bank of New Zealand*, [1900] App. Cas. 577.

The plaintiff declared in case that the defendant had placed a quantity of sand, lime and other building material in a highway opposite to and adjoining his premises, so as to interrupt the free passage to his store, and damaged his goods. It was held that proof that customers were prevented from frequenting the store, and that a tenant who occupied it quit it in consequence of the annoyance, and that the store afterwards remained unoccupied was inadmissible because not alleged as special damages.¹ No more than nominal damages can be recovered in an action upon the warranty against incumbrance on the general assignment of a breach. The fact that the plaintiff had discharged an incumbrance cannot be proved unless specially alleged, for it is not a damage necessarily arising from the breach assigned.² The law does not imply that the vendee of chattels will incur expense because of the breach of an implied warranty in their sale.³ Nor that his business will be damaged by the loss of trade because of a defect in an article, the vendor not being informed that he had contracted to incur such liability.⁴ An unmarried woman cannot recover damages on account of her prospects of marriage being lessened by the personal injury for which she sues, unless such special damage be alleged.⁵ Where the disfigurement was of a girl of five years and no allegation was made as to the loss of marriage prospects, the court said, referring to the case last cited, the plaintiff was presumably a married woman, and not a child of five years, as to which it could hardly be said that she could truthfully set up any special averment as to loss of marriage, and therefore the case would fall within the general rule that damages not following directly as a consequence of the particular circumstances must be specially pleaded. The loss of a particular prospect of marriage must be specially pleaded, no doubt, but why should the loss of the general prospect belonging to a child whose injury so disfigures her as to make marriage almost impossible. Such a loss is a natural consequence of the injury.⁶ In an action for a nuisance, the

¹ *Squier v. Gould*, 14 Wend. 159.

⁴ *Sutherland v. Round*, 6 C. C. A.

² *De Forest v. Leete*, 16 Johns. 122. 428, 57 Fed. Rep. 467.

³ *Snowden v. Waterman*, 105 Ga.

⁵ *Hunter v. Stewart*, 47 Me. 419.

384, 31 S. E. Rep. 110.

⁶ *Smith v. Pittsburgh & W. R. Co*
90 Fed. Rep. 783.

plaintiff's premises being affected by the flow of filth from the defendant's adjacent privy, the plaintiff was not permitted to show that the nuisance tainted his well, from which he was in the habit of drawing to make beer, and in consequence [766] the beer was unmerchantable, because not alleged as special damages.¹

When damages are the gist of the action they must be specially alleged.² In case of public nuisance the plaintiff must aver special damages to him, inasmuch as the law does not presume or imply damage to any particular individual from the public offense.³ But for a private nuisance, such as turning the course of an ancient stream so that it no longer flowed through the plaintiff's field, it is an intendment of law that he is injured by the loss of the water. Then to determine this damage, proof to show that he was thereby compelled to haul water from a distance to supply the uses of the stream was held to be only giving the jury certain *data* from which to estimate the real damage; it was not a claim for a distinct injury not necessarily resulting from the nuisance.⁴ The depreciation in value of private property in consequence of a nuisance adjacent to it is a natural consequence; but the failure of the owner to find a purchaser for the property at a stated price is not such a consequence.⁵ The noise occasioned by the operation of a railroad in a street, and the impracticability of turning teams therein, are not the necessary consequence of the situation, and damages therefor cannot be recovered unless the facts are alleged.⁶

§ 421. *Same subject.* The law infers bodily pain and suffering from personal injury, and loss of time from the disabling effect thereof.⁷ A claim for damages for permanent injury is not a demand for special damages, but for the damages which necessarily flow from injuries received.⁸ In some jurisdictions loss of earnings in a special employment or

¹ *Solms v. Lias*, 16 Abb. Pr. 311.

² *Swan v. Tappan*, 5 Cush. 104.

³ *Hart v. Evans*, 8 Pa. 13. See § 1058.

⁴ *Id.*

⁵ *Comminge v. Stevenson*, 76 Tex. 612, 13 S. W. Rep. 556.

⁶ *Root v. Butte, etc. R. Co.*, 20 Mont. 354, 51 Pac. Rep. 155.

⁷ *Abilene v. Wright*, 4 Kan. App. 708, 46 Pac. Rep. 715. See §§ 1241, 1242.

⁸ *Bibb County v. Ham*, 110 Ga. 340, 35 S. E. Rep. 656, quoting the first sentence of this section; *Bradbury v. Benton*, 69 Mo. 194.

profession or from any peculiar condition of the party injured must be alleged.¹ In others, when the complaint states facts showing that the injury has been such as to render it impossible for the injured party to pursue his ordinary business, and damages are claimed for the loss of time therein, the plaintiff is permitted to show upon the trial what his business is and what damages he has suffered by reason of inability to pursue the same. This is held on the reasonable presumption that ordinarily the business of the plaintiff will be known to the defendant and the latter will not be surprised at the introduction of evidence on that point; and under the codes if the defendant is ignorant concerning it he may move to have the complaint made more definite and certain.² If the plaintiff's profession is stated and it is alleged that he has been unable to attend to it, he may show the amount of his monthly earnings.³ Under the allegation that the plaintiff was a preacher and that the injuries sustained rendered him unable to carry on his occupation on account of a partial loss of voice, a recovery may be had for lessened earning power.⁴ Under a gen-

¹ *Coontz v. Missouri Pacific R. Co.*, 115 Mo. 669, 22 S. W. Rep. 572; *Slaughter v. Metropolitan Street R. Co.*, 116 Mo. 269, 23 S. W. Rep. 760; *Morris v. Winchester Repeating Arms Co.*, 73 Conn. 680, 49 Atl. Rep. 180; *Finken v. Elm City Brass Co.*, 73 Conn. 423, 47 Atl. Rep. 670; *Conner v. Pioneer Fire-Proof Const. Co.*, 29 Fed. Rep. 629; *Pueblo v. Griffin*, 10 Colo. 366, 15 Pac. Rep. 616; *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 45 Am. Rep. 54, 15 N. W. Rep. 887 (the court intimate that if the practice would permit the defendant to demand that plaintiff make his allegations more specific it would hold otherwise); *Heiser v. Loomis*, 47 Mich. 16, 10 N. W. Rep. 60; *Tomlinson v. Derby*, 43 Conn. 562; *Taylor v. Monroe*, *id.* 36; *Baldwin v. Western R. Co.*, 4 Gray, 333. See § 1247.

Where the allegation was that owing to the plaintiff's inability to attend to his business he was obliged to hire his business and work done,

to his damage in a sum specified, evidence of the loss of profits as a partner in the business was inadmissible. *Lombardi v. California Street R. Co.*, 124 Cal. 311, 57 Pac. Rep. 66.

² *Homan v. Franklin County*, 90 Iowa, 185, 57 N. W. Rep. 703; *Chicago & E. R. Co. v. Meech*, 163 Ill. 305, 314, 45 N. E. Rep. 290; *North Chicago Street R. Co. v. Brown*, 178 Ill. 187, 52 N. E. Rep. 864; *Chicago City R. Co. v. Anderson*, 182 Ill. 298, 55 N. E. Rep. 366; *Frobisher v. Fifth Avenue Transportation Co.*, 81 Hun, 544, 30 N. Y. Supp. 1090; *Luck v. Ripon*, 52 Wis. 196, 8 N. W. Rep. 815; *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208, 41 Am. Rep. 19, 11 N. W. Rep. 514; *Bloomington v. Chamberlain*, 104 Ill. 268; *Wade v. Leroy*, 20 How. 34. See § 1247.

³ *Collins v. Dodge*, 37 Minn. 503, 35 N. W. Rep. 368.

⁴ *Warsaw v. Fisher*, 24 Ind. App. 46, 55 N. E. Rep. 42.

eral allegation of damage the loss of profits from any special engagement cannot be shown,¹ nor the loss of profit from a farm.² If a complaint alleges damages because of hindrance to the plaintiff's business and expenses of cure, it cannot be shown what he might have made by going into a particular business.³ Under an allegation in an action by an infant to recover for personal injuries that the plaintiff has lost the use of his right arm, has become and will continue to be a confirmed invalid, there may be a recovery for the impairment of ability to pursue the ordinary vocations of life.⁴ In an action to recover for injuries sustained by an assault the plaintiff may, without an allegation of the fact, show that he became subject to fits as the result of it.⁵ But in an action where the damages claimed are all special and the allegation is that plaintiff was "hurt," "bruised" and "wounded," evidence of fractures of the shoulder, arm and hand and a temporary strain of the hip resulting in permanent injury and some disability has been ruled to be inadmissible.⁶ It may be doubted whether this case declares the law as it is in Michigan. The rule there is that the plaintiff is not bound to aver all the physical injuries which he sustained, or which may have resulted from or have been aggravated by the tort, even though they do not necessarily result from the original injury. If such injuries can be traced to the act complained of, and are such as would naturally follow from the injury, they need not be specially averred. Hence under an allegation that the plaintiff was seriously hurt, and his back and spine was so hurt, crippled, bruised, sprained and injured, testimony may be received to show that chronic inflammation and tenderness of the spine might result.⁷ If all the allegations as to the in-

¹ *Chicago & E. R. Co. v. Meech*, 163 Ill. 305, 45 N. E. Rep. 290; *Oldfather v. Zent*, 14 Ind. App. 89, 41 N. E. Rep. 555; *Chicago v. O'Brennan*, 65 Ill. 160; *Chicago West Division R. Co. v. Klauber*, 9 Ill. App. 613.

² *Homan v. Franklin County*, 90 Iowa, 185, 57 N. W. Rep. 703.

³ *Beardstown v. Smith*, 150 Ill. 169, 37 N. E. Rep. 211.

⁴ *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. Rep. 616.

⁵ *Tyson v. Booth*, 100 Mass. 258; *Sloan v. Edwards*, 61 Md. 89.

⁶ *Shadock v. Alpine Plankroad Co.*, 79 Mich. 7, 44 N. W. Rep. 158. Compare *Storrs v. Grand Rapids*, 110 Mich. 483, 68 N. W. Rep. 258.

⁷ *Montgomery v. Lansing City R. Co.*, 103 Mich. 46, 61 N. W. Rep. 543, 29 L. R. A. 287, and local cases cited.

injuries sustained and the consequences thereof are in the past tense there cannot be a recovery for future suffering.¹ It is otherwise if it is alleged that the plaintiff has not recovered.² Except in cases of very serious personal injury it is not inferred as a matter of law that the plaintiff has incurred expense for medical or surgical aid,³ or on account of his inability to conduct his business.⁴ But if the character of the injuries sustained is alleged and it is serious, it is to be expected that expenses will be incurred, and these may be recovered under the general allegation of damages.⁵ An allegation that the plaintiff was put, and will still be put, to much expense in the treatment of his injuries, is sufficient to admit proof of medical expenses.⁶

It is implied that injury to the feelings follows serious personal hurts⁷ or insult, and that such is the case on the part of a parent whose daughter has been seduced.⁸

In an action for malicious prosecution whatever shows the extent and character of the mental suffering endured by the plaintiff may be proven without special allegations—as that

¹ Shultz v. Griffith, 103 Iowa. 150, 72 N. W. Rep. 445, 40 L. R. A. 117; Kalemach v. Michigan Central R. Co., 87 Mich. 509, 49 N. W. Rep. 1082. Compare La Duke v. Exeter, 97 Mich. 450, 56 N. W. Rep. 851, 37 Am. St. 457.

² Meier v. Shrunck, 79 Iowa. 22, 44 N. W. Rep. 209.

³ South Covington, etc. R. Co. v. Ware, 84 Ky. 267; Folsom v. Underhill, 36 Vt. 580; Louisville & N. R. Co. v. McEwan, 17 Ky. L. Rep. 406, 31 S. W. Rep. 465.

An allegation that the plaintiff incurred considerable expense, to wit: in the sum of \$—, in securing medical attention, nursing and medicine, does not authorize the recovery of doctor's bills, cost of medicine, etc. Jesse v. Shuck, 11 Ky. L. Rep. 463, 12 S. W. Rep. 304.

⁴ Edge v. Third Avenue R. Co., 57 App. Div. 29, 67 N. Y. Supp. 1002; Gumb v. Twenty-third Street R. Co., 114 N. Y. 411, 21 N. E. Rep. 993.

In the last case it was alleged that the plaintiff was personally injured and that his property was damaged, and he was put to expense in repairing it and in endeavoring to be healed of his hurts, and was prevented from going on with his business. Evidence that he employed men to work in his place was inadmissible.

⁵ Evansville, etc. R. Co. v. Holcomb, 9 Ind. App. 198, 36 N. E. Rep. 39.

⁶ McCready v. Staten Island Electric R. Co., 51 App. Div. 338, 64 N. Y. Supp. 996.

⁷ Chicago City R. Co. v. Taylor, 170 Ill. 49, 48 N. E. Rep. 831; T. & P. R. Co. v. Curry, 64 Tex. 85; Brown v. Hannibal, etc. R. Co., 99 Mo. 310, 12 S. W. Rep. 655; Chicago, etc. R. Co. v. Warner, 103 Ill. 538; Central R. & B. Co. v. Lanier, 83 Ga. 587, 10 S. E. Rep. 279; Chicago v. McLean, 133 Ill. 148, 8 L. R. A. 765, 24 N. E. Rep. 527.

⁸ Phillips v. Hoyle, 4 Gray, 568.

he had a family dependent upon him for support, one of whom was sick and needed the care of the plaintiff.¹ The complaint in an action for false imprisonment and malicious prosecution alleged that the plaintiff was greatly injured in his health, credit and reputation, and was exposed to and suffered great pain of body and mind, and was prevented from transacting and performing his necessary affairs and business. This was not sufficient to admit evidence of the destruction of the plaintiff's law business.² In an action for false imprisonment the law does not imply injury from deficient food during confinement, or from the bad condition of the jail;³ nor that expenses are incurred for the services of an attorney to get discharged.⁴ In the absence of wilfulness in failing to stop a train on signal to take a passenger on there cannot be a recovery for the resulting sickness and disappointment unless such results are alleged.⁵ Under a general averment of the plaintiff's mental suffering, anxiety and suspense as the result of personal injuries, proof may be made that she was obliged to use crutches as a result of the injuries, and that she suffered shame and mortification on that account; but evidence is inadmissible to show mental suffering occasioned by the postponement of her marriage on account of her injuries.⁶

An allegation of nervous prostration and numbness in certain parts of the body as the result of injuries makes admissible evidence of sympathetic affection of other parts.⁷ Though no special allegation of injury to vision is alleged as the result of a physical injury, it is such a natural consequence thereof that proof of it may be made, as may proof that such injury resulted in a shock to the nervous system which injured the optic nerve, diminished the power of making calculations and subsequently produced emaciation.⁸ It is not the natural

¹ *Davis v. Seeley*, 91 Iowa, 583, 60 N. W. Rep. 183, 51 Am. St. 536.

² *Evins v. Metropolitan Street R. Co.*, 17 App. Div. 511, 62 N. Y. Supp. 495; *Stanfield v. Phillips*, 78 Pa. 73.

³ *Atchison, etc. R. Co. v. Rice*, 36 Kan. 593, 14 Pac. Rep. 229; *Johnson v. Von Kettler*, 84 Ill. 315.

⁴ *Strang v. Whitehead*, 12 Wend. 61; *Thompson v. Lumley*, 7 Daly, 74.

⁵ *Illinois Central R. Co. v. Siddons*, 53 Ill. App. 607.

⁶ *Beath v. Rapid R. Co.*, 119 Mich. 512, 78 N. W. Rep. 537.

⁷ *Illinois Central R. Co. v. Griffin*, 25 C. C. A. 413, 80 Fed. Rep. 278; *Will v. Mendon*, 108 Mich. 251, 66 N. W. Rep. 58.

⁸ *Baltimore City P. R. Co. v. Baer*, 90 Md. 97, 44 Atl. Rep. 992; *West*

or probable result of mere bodily injuries that loss of memory and impaired mental vigor shall follow.¹ Under an allegation that the plaintiff's spine was severely and permanently injured and that he was otherwise severely bruised, hurt and wounded, and became disabled, etc., evidence may be received to show a withering of the flesh about one of the thighs and hip as the result of a partial paralysis.² An allegation of injury to a hip, hip joint, pelvis and thigh is broad enough to admit evidence of a resulting disease of the sciatic nerve.³ The declaration in an action for injuries caused by a dog stated that the plaintiff's nervous system was permanently injured by the shock and fright, that she had suffered, continued to suffer and would continue to suffer pain; that the injury was permanent, her nervous system being permanently injured, her mental faculties ruined, and her blood poisoned. Proof of resulting epilepsy was admissible.⁴ Allegations that the plaintiff had suffered great bodily injury; that he became and still continued sick, sore and disabled, and that he was prevented for a long time from attending to his business, authorize proof of any bodily injury resulting from the accident, in the absence of a motion for a more specific statement.⁵ But if the allegations as to the result of the injury are specific the rule is less expansive. Where it was stated that the plaintiff received severe and painful contusions to her head, body and arms, and that her scalp was lacerated, whereby she sustained severe nervous shock and concussion of the brain and injured eyesight, was for a time rendered unconscious and permanently injured, evidence that her heart was affected, that the dorsal muscle on the right side was paralyzed, that she suffered from vertigo, and had a curvature of the spine, was admissible.⁶ On the other hand, it was laid

Chicago Street R. Co. v. Levy, 182 Ill. 525, 55 N. E. Rep. 554. Compare Geoghegan v. Third Avenue R. Co., 51 App. Div. 369, 64 N. Y. Supp. 630.

¹ Atchison, etc. R. Co. v. Willey, 57 Kan. 764, 48 Pac. Rep. 25.

² Canfield v. Jackson, 112 Mich. 120, 70 N. W. Rep. 444.

³ Beath v. Rapid R. Co., 119 Mich. 512, 78 N. W. Rep. 537.

⁴ Fye v. Chapin, 121 Mich. 675, 80 N. W. Rep. 797.

⁵ Ehrgott v. Mayor, 96 N. Y. 264, 277, 48 Am. Rep. 622.

⁶ Kleiner v. Third Avenue R. Co., 162 N. Y. 193, 56 N. E. Rep. 497; Hergert v. Union R. Co., 25 App. Div. 218, 49 N. Y. Supp. 307.

down that if the defendant is informed that the plaintiff was permanently injured, crushed, bruised and wounded in his back and loins, and in various other parts of his body, both externally and internally, some of his ribs broken, and because of such injuries he became sick, sore, lame and disordered and suffered great mental and physical pain and distress, he is bound to expect evidence of any sickness or any injury to the plaintiff, either mental or physical, the origin or aggravation of which can be traced to the act complained of.¹ An allegation that the injury was to the head, side and ribs to such an extent as rendered the plaintiff unfit to perform his duties, and that such condition will be permanent, is broad enough to admit evidence of a permanent disorder of the heart.² Under an allegation that the plaintiff received a wound at the upper right angle of the forehead, a fracture of the skull, concussion of the brain, and a fracture of the nasal bone, all of which gave him severe bodily pain and shock to his physical and mental system, it cannot be shown that he was afflicted with hystero epilepsy in the absence of proof that that disease is the necessary and immediate result of such injuries.³ An allegation that the plaintiff was beaten and wounded on the head, whereby he was wounded and is, and for a long time will be, sick, and has suffered and will suffer great bodily pain and discomfort, sustains the admission of evidence of physical and mental suffering naturally and proximately resulting from the wrong done.⁴ General averments of bodily injury permanent in their nature are sufficient to admit proof of uterine difficulty.⁵

§ 422. Not necessary to allege matter of aggravation. Where there are aggravations accompanying a tort it does not

¹ *Williams v. Oregon Short Line R. Co.*, 18 Utah, 210, 54 Pac. Rep. 991, 72 Am. St. 777; *Croco v. Same*, 18 Utah, 311, 54 Pac. Rep. 985, 44 L. R. A. 285.

² *Myers v. Erie R. Co.*, 44 App. Div. 11, 60 N. Y. Supp. 422.

³ *Ackman v. Third Avenue R. Co.*, 52 App. Div. 483, 65 N. Y. Supp. 97. Compare *Levison v. Bernheimer*, 31 N. Y. Misc. 26, 62 N. Y. Supp. 1128.

⁴ *Harshman v. Rose*, 50 Neb. 113, 69 N. W. Rep. 755.

⁵ *Samuels v. California Street Cable R. Co.*, 124 Cal. 294, 56 Pac. Rep. 1115; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. Rep. 266, 13 Am. St. 174, 5 L. R. A. 498; *Denver, etc. R. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. Rep. 1286.

appear to be necessary in common-law pleading to specially [767] aver them in order to let in proof of them in an action for the tort; and such seems to be the rule in some code states, though the decisions are not a unit.¹ Where exemplary damages are provided for by statute, the claim being unliquidated, and the only limit to the recovery of such damages being that they must be reasonable, they may be recovered under a complaint in the common-law form.² In a replevin suit the trial

¹ *Davis v. Seeley*, 91 Iowa, 583, 60 N. W. Rep. 183, 51 Am. St. 536, citing the text; *Pierce v. Carpenter*, 65 Mo. App. 191; *Wilkinson v. Drew*, 75 Me. 360; *Dailey v. Houston*, 58 Mo. 361; *Southern Exp. Co. v. Brown*, 67 Miss. 260, 19 Am. St. 306, 7 So. Rep. 318, 8 id. 425; *Peers v. Nevada Power, Light & Water Co.*, 119 Fed. Rep. 400, 404, citing the text; *Schofield v. Ferrers*, 46 Pa. 438.

Exemplary damages are not special damages which need be claimed *eo nomine* in the complaint. *Wilkinson v. Searcy*, 76 Ala. 176; *Alabama, etc. R. Co. v. Arnold*, 84 id. 159, 4 So. Rep. 359; *Savannah, etc. R. Co. v. Holland*, 82 Ga. 257, 10 S. E. Rep. 200; *Gustafson v. Wind*, 62 Iowa, 281, 17 N. W. Rep. 523; *Richmond Passenger, etc. R. Co. v. Robinson*, — Va. —, 41 S. E. Rep. 719. But the facts which warrant the assessment of the former must be alleged under the codes of some states. *Sullivan v. Oregon R. & N. Co.*, 12 Ore. 392, 53 Am. Rep. 364, 7 Pac. Rep. 508; *Welsh v. Stewart*, 31 Mo. App. 376.

"If the wrongful act is of such a character that the law will give to the injured party both compensatory and exemplary damages the petition should so describe it that it may appear to be a case in which such damages may be recovered." *Potter v. Stamfli*, 2 Kan. App. 788, 44 Pac. Rep. 46; *Jacobs' Adm'r v. Louisville & N. R. Co.*, 10 Bush, 263; *Savannah, etc.*

R. Co. v. Holland, 82 Ga. 257, 10 S. E. Rep. 200; *Spellman v. Richmond, etc. R. Co.*, 35 S. C. 475, 14 S. E. Rep. 947. But the rule has been changed by statute so that it is not now necessary to allege punitive and actual damages in separate counts. *Glover v. Charleston & S. R. Co.*, 57 S. C. 228, 35 S. E. Rep. 510; *Appleby v. South Carolina & G. R. Co.*, 60 S. C. 48, 38 S. E. Rep. 237.

In Minnesota if the alleged wrongful act does not in itself imply malice the plaintiff must, if he intends to claim exemplary damages, allege the facts entitling him thereto—must state as an ultimate fact the intent or purpose of the defendant in doing the act. *Vine v. Casney*, 86 Minn. 74, 90 N. W. Rep. 158.

The facts upon which the claim for exemplary damages is predicated must be set out, but it is not essential that it be claimed, in so many words, that some or all of the damages are punitive. *Railroad v. Ray*, 101 Tenn. 1, 46 S. W. Rep. 554.

In Texas the claims for actual and exemplary damages must be separately stated. *Belo v. Wren*, 63 Tex. 727.

An allegation that the act complained of was done unlawfully, wantonly and maliciously, and with the fraudulent intent to deprive the plaintiff of the value of the property, is sufficient, without a statement of the circumstances showing

² *Williams v. Williams*, 20 Colo. 51, 37 Pac. Rep. 614.

court instructed the jury that in estimating damages they were not confined to the value of the property; but if they thought the taking was accompanied by circumstances of outrage and oppression they could go beyond its value. The property was valued at \$150, and a verdict for \$250 was sustained, notwithstanding objection that the declaration contained no clause of special damage, or that the taking was accompanied with such aggravation. Strong, J., said: "The rules of pleading do not require that the circumstances which attended the taking should be specially averred in order to entitle the plaintiff to recover damages commensurate with them. If consequential damages are claimed, not necessarily or naturally resulting from the tortious act, they must be specially alleged. But if outrage and oppression attended the taking they belong to the wrongful act itself, and are not merely special injury."¹

It is held that this doctrine, that the circumstances attending a trespass to realty may be given in evidence for the purpose of enhancing damages, though not alleged in the declaration, does not apply where those circumstances of themselves constitute an independent cause of action, as where in trespass *de bonis* there is an assault upon the person.² In an action of trespass to real estate, where the breaking and entering the close was by breaking down and removing fences, it was held correct to instruct the jury that the breaking and entry were the substantive ground of the action; and so far as this was effected by the act or means of breaking down a fence belonging to the close, the damage occasioned thereby might properly be taken into consideration as part of the damage to be recovered. It was part of the natural and necessary consequences of the act charged.³ In a like action in New Jersey

it to have been so done. *San Antonio, etc. R. Co. v. Kniffen*, 4 Tex. Civ. App. 484, 23 S. W. Rep. 457.

¹ *Schofield v. Ferrers*, 46 Pa. 438.

² *Plumb v. Ives*, 39 Conn. 120; *Simpson v. Markwood*, 6 Baxter, 340; *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. Rep. 56. See *Thayer v. Sherlock*, 4 Mich. 173.

³ *Clark v. Boardman*, 42 Vt. 667. The allegation of special damages as a matter of aggravation is not an

inference of law resulting from facts antecedently stated. *McConnel v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265, citing *Kidgell v. Moore*, 14 Jurist, 790.

In fixing a *quantum meruit* for wages on a whaling voyage, it is competent for the court to take into view the unusual protraction of the voyage, and the condition of the vessel and the crew, though not specially alleged or relied on in the libel. *Allen v. Hitch*, 2 Curtis, 147.

[768] it appeared that the defendant illegally entered upon the plaintiff's premises, and put upon his door an insulting, libelous hand-bill. The question arose whether the contents of this hand-bill could be proved. Southard, J., said: "Is this hand-bill to be regarded as part of his cause of complaint, or is it not? . . . I understand it to be admitted that it was proper to charge and prove the putting up of the hand-bill because it was of the same character with and a part of the trespass; but not proper to charge or prove the contents of the hand-bill because they do not partake of the character of the trespass, and a remedy for them must be sought by an action on the case for the libel or slander. But I do not perceive how the two are to be separated. The plaintiff complains of a trespass. The jury are to determine the extent of it and the injury resulting from it. To do this they must not only know what was done, but, as far as possible, the motives with which it was done. How will they learn them? By being informed that the defendant passed over the gravel walk? No, for this was not all he did; and this he might have done with the best intentions, and have committed no punishable trespass. That he put his foot upon the sill and left a paper there? No, for these acts might have been, and no harm done to the plaintiff. But this might also have been and the plaintiff deeply wounded by them. How is the jury, then, to say whether he was or was not injured? How are they to determine whether the defendant came as a friend or foe? to leave a paper containing information salutary to his safety, or poisonous to his reputation and peace? to commit a trespass, or to do a kindness? It can only be done by looking into the contents of the hand-bill; and shall the jury be compelled to decide, and yet precluded from this only means of judging? Suppose the contents of the bill had been of a kind and friendly nature, and designed expressly for benefit to the plaintiff, would not the defendant have been permitted to show it? And would not the jury in such case have refused the plaintiff anything? Yet the rule must operate both ways. A man enters my house and strikes my child, but when he does it adds the most malignant and unfounded slanders of him. May I not charge or prove these to show the temper with which he did it, and the [769] extent of the wrong? I may, and the jury will esti-

mate his acts accordingly. I understand the true rule on this point to be this: in trespass you may charge and prove the whole circumstances accompanying the act, and which were part of the *res geste*, in order to show the temper and purposes with which the trespass was committed and the extent of the injury. A contrary rule would certainly produce the effect argued by the plaintiff's counsel. It would take away all distinction from acts of trespass."¹

§ 423. **Matters of aggravation not traversable.** If accompanying circumstances or torts are alleged by way of aggravation they are not traversable, and may be stated in a very general manner. They are not separate and substantive subjects of damage, but serve to characterize the principal act which is the cause of action. That act must be proved or the action will fail, though the matter alleged by way of aggravation be proved, and would, if properly stated as part of the *gravamen* of the action, have alone sustained it.² Such accompanying facts, when of such a nature as to be ground for a separate action, may be alleged with certainty in connection with the act which otherwise would be the principal one, and thus a wrong which is divisible is, as an entirety, made the subject of the action.³ Where trespass to real estate is the gist of the action, and there is an illegal entry, whatever is done after the breaking and entry is but aggravation,⁴ and may be proved to enhance damages, whether it might be the subject of a distinct and different action or not. Thus, if after a tortious entry the trespasser assaulted the plaintiff,⁵ [770]

¹ Ogden v. Gibbons, 5 N. J. L. 518.

² Bracegirdle v. Orford, 2 M. & S. 77; Russell v. Carne, 1 Salk. 119; Newman v. Smith, 2 id. 642; Chamberlain v. Greenfield, 3 Wils. 292; Smalley v. Kerfoot, 2 Strange, 1094; Ford v. Kelsey, 4 Rich. 365; Rucker v. McNeeley, 4 Blackf. 179; Howard v. Black, 42 Vt. 258; Eames v. Prentice, 8 Cush. 337; Bishop v. Baker, 19 Pick. 517; Sampson v. Henry, 13 Pick. 36; Brown v. Manter, 22 N. H. 468; Howe v. Willson, 1 Denio, 181; Wright v. Chandler, 4 Bibb, 422; Carlew v. Laurie, 12 Q. B. 640; Pritch-

ard v. Long, 9 M. & W. 666; Thayer v. Sherlock, 4 Mich. 173.

³ Id.; Brewer v. Temple, 15 How. Pr. 286; Robinson v. Flint, 16 id. 240.

⁴ Brown v. Manter, *supra*; Van Leuven v. Lyke, 1 N. Y. 515, 49 Am. Dec. 346; Taylor v. Cole, 3 T. R. 292; Smalley v. Kerfoot, 2 Strange, 1094; Angus v. Rudin, 5 N. J. L. 815, 8 Am. Dec. 620; Dolph v. Ferris, 7 W. & S. 367; Beckwith v. Shordike, 4 Burr. 2092.

⁵ Plump v. Ives, 39 Conn. 120; Druse v. Wheeler, 22 Mich. 439.

debaunched his servants, uttered a slander, or was guilty of a libel, or committed a trespass to or conversion of personal property,¹ the whole wrong may be embraced in the same complaint and made parts of one cause of action, of which the illegal entry is the vital and paramount fact—essentially the ground of the action, even though not the gravest element in the estimate of damages.² Under the code matters of aggravation, as well as of mitigation, should be pleaded.³

§ 424. *Not necessary to itemize damages.* It is unnecessary in most actions where the demand is unliquidated, and sounds wholly in damages, and where there is but a single cause of action, to state specifically and in separate amounts the different elements or items which go to make up the sum total of damages. It is enough to claim so much in gross as damages for the wrong done.⁴ As a general rule, it is not necessary for a defendant in an action to recover possession of personal property to claim special damages in his answer to entitle him to recover them for the taking and detention of his property from him by the plaintiff,⁵ or in an action to recover the value of such property to specially enumerate the qualities which gave it the value claimed for it.⁶

¹ *Bracegirdle v. Orford*, 2 M. & S. 77; *Adams v. Rivers*, 11 Barb. 390; *Snively v. Fahnestock*, 18 Md. 391; *Burson v. Cox*, 6 Baxter, 360; *Ogden v. Gibbons*, 5 N. J. L. 518; *Allison v. Chandler*, 11 Mich. 542; *McAfee v. Crofford*, 13 How. 447; *United States v. Magoon*, 3 McLean, 171; *Smith v. Smith*, 50 N. H. 212.

² *McAfee v. Crofford*, 13 How. 447; *Howe v. Willson*, 1 Denio, 181; *Taylor v. Wells*, 2 Saund. 74, note; *Monts v. Witmer*, 3 Gill & J. 118; *Welch v. Piercy*, 7 Ired. 365; *Johnson v. Gorham*, 33 Conn. 513; *Barnes v. Burt*, id. 541.

³ *Leavitt v. Cutler*, 37 Wis. 46; *Klopfert v. Bromme*, 26 Wis. 372; *McKyring v. Bull*, 16 N. Y. 297, 307; *Huger v. Tibbits*, 2 Abb. Pr. (N. S.) 97; *Fink v. Justh*, 14 id. 107. But see *Allis v. Nanson*, 41 Ind. 154, and § 422.

Matter merely in mitigation need not be pleaded. *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548, 43 N. W. Rep. 476.

⁴ *Nokken v. Avery Manuf. Co.*, — N. D. —, 92 N. W. Rep. 487, citing the text; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. Rep. 53; *Binicker v. Hannibal & St. J. R. Co.*, 83 Mo. 660; *Smith v. Perry*, 13 Ky. L. Rep. 683 (Ky. Super. Ct.); *Louisville, etc. R. Co. v. Neafus*, id. 951, 18 S. W. Rep. 1030, 93 Ky. 53; *Alabama & V. R. Co. v. Hanes*, 69 Miss. 160, 13 So. Rep. 246; *Ten Cate v. Fansler*, 10 Okl. 7, 65 Pac. Rep. 375, citing the text; *Shepard v. Pratt*, 16 Kan. 209; *Dooley v. Missouri Pacific R. Co.*, 36 Mo. App. 381.

⁵ *Woodruff v. Cook*, 25 Barb. 505.

⁶ *Chicago, etc. R. Co. v. Harmon*, 12 Ill. App. 54; *Lanning v. Chicago, etc. R. Co.*, 68 Iowa, 502, 27 N. W. 478.

§ 425. Statutory damages must be specially claimed and alleged. Whenever penal damages are given by statute to the party injured, where he had a remedy at common law, if he claims the statutory damages he should do so by a reference to the statute;¹ it is not enough to state facts showing a right of action at common law, referring to the statute only in the prayer.² The facts must be averred which bring [771] the case within the statute; but if the case stated constitutes a cause of action of that form at common law, and is established, though all the elements alleged to constitute the case for which the statute gives penal damages are not proved, single damages, or those allowed by the common law, may be recovered.³ The claim for damages in the declaration in such cases may be the same whether those recoverable are penal or single.⁴ If the penalty provided by statute is a separate and distinct cause of action from the damages recoverable under the common law, though the statute allows both causes to be joined in the same action, if one is omitted it cannot be added by way of amendment pending the action.⁵

§ 426. Pleading in actions to recover for death. The law imposes upon a father who has the ability to do so the duty of supporting his minor children. Hence a complaint which shows that the deceased was a laboring man and left no widow, but only a child of tender years, sufficiently alleges that the child suffered pecuniary damages by the death of his father; it appearing that the latter was earning money at the time of his death, it will be presumed that he was able to discharge his duty to his child.⁶ But a complaint by a son of the deceased

¹ *Stevens v. Kelley*, 66 Conn. 570, 34 Atl. Rep. 502; *McCook v. Bryan*, 4 Okl. 488, 46 Pac. Rep. 506; *Williams v. Thomas*, 25 Ont. 536; *Bell v. Norris*, 79 Ky. 48; *Palmer v. York Bank*, 18 Me. 166, 36 Am. Dec. 710; *Bayard v. Smith*, 17 Wend. 88; *Keiny v. Ingraham*, 66 Barb. 250; *Royse v. May*, 93 Pa. 454; *Chapman v. Emerick*, 5 Cal. 239; *Illinois, etc. R. & C. Co. v. People*, 19 Ill. App. 141.

² *Pitt v. Daniel*, 82 Mo. App. 168.

³ *Stevens v. Kelley*, *supra*; *Starkweather v. Quigley*, 7 Hun. 16; *Dubois v. Beaver*, 25 N. Y. 123; *Sprague*

v. Irwin, 27 How. Pr. 51; *Barnes v. Quigley*, 59 N. Y. 265; *Clark v. Field*, 42 Mich. 342, 4 N. W. Rep. 19; *Swift v. Applebone*, 23 Mich. 252.

⁴ *Clark v. Field*, *supra*.

⁵ *Baldwin v. Western U. Tel. Co.*, 93 Ga. 692, 21 S. E. Rep. 212, 44 Am. St. 194.

⁶ *Kelley v. Chicago, etc. R. Co.*, 50 Wis. 381, 7 N. W. Rep. 291. See *Kearney Electric Co. v. Laughlin*, 45 Neb. 390, 63 N. W. Rep. 941; *Omaha, etc. R. Co. v. Crow*, 54 Neb. 747, 74 N. W. Rep. 1066, 69 Am. St. 741.

The pleading should disclose the

as his administrator must state facts which show a pecuniary loss resulting from the death to the widow or other relatives.¹ In some jurisdictions nominal damages may be recovered in the absence of such an averment.² In Minnesota it is said that the statute which gives the right of action assumes that the widow and next of kin of the deceased had a pecuniary interest in his life, and where the complaint names the next of kin, states their relation to the deceased and alleges damage to them, it is good though it does not recite the circumstances which may be considered in arriving at the amount of damages.³ There are numerous adjudications to this effect.⁴ A distinction

names of all the beneficiaries, but if the names of the surviving minor children of the decedent who were dependent upon him for support are averred, the omission to allege whether or not he left a widow will not make it demurrable. *Chicago, etc. R. Co. v. Oyster*, 58 Neb. 1, 78 N. W. Rep. 359.

¹ *State v. Walford*, 11 Ind. App. 392, 39 N. E. Rep. 162; *Chicago, etc. R. Co. v. Young*, 58 Neb. 678, 79 N. W. Rep. 556; *Same v. Van Buskirk*, 58 Neb. 252, 78 N. W. Rep. 514; *Topping v. St. Lawrence*, 86 Wis. 526, 57 N. W. Rep. 365; *Regan v. Chicago, etc. R. Co.*, 51 Wis. 599, 8 N. W. Rep. 292; *Safford v. Drew*, 3 Duer, 627.

The necessary implication from allegations that the deceased was unmarried, was seventeen years of age, that he was intelligent, in good health, capable of earning considerable sums of money, and that he left a father surviving, is that the father has been deprived of the reasonable value of the services of such a son for four years. But under these allegations there could not be a recovery because of the peculiar ability of the son. *Luessen v. Oshkosh Electric Light & Power Co.*, 109 Wis. 94, 85 N. W. Rep. 124.

² *Johnston v. Cleveland & T. R. Co.*, 7 Ohio St. 337, 70 Am. Dec. 75; *Chicago & A. R. Co. v. Shannon*, 43 Ill.

338; *Chapman v. Rothwell*, Ellis, Bl. & E. 168; *Oldfield v. New York & H. R. R.*, 14 N. Y. 310; *Quin v. Moore*, 15 id. 432.

³ *Barnum v. Chicago, etc. R. Co.*, 30 Minn. 461, 16 N. W. Rep. 364; *Johnson v. St. Paul & D. R. Co.*, 31 Minn. 283, 17 N. W. Rep. 622. See *Tucker v. Draper*, 62 Neb. 66, 86 N. W. Rep. 917; *Peers v. Nevada Power, Light & Water Co.*, 119 Fed. Rep. 400.

⁴ *Haug v. Great Northern R. Co.*, 8 N. D. 23, 31, 73 Am. St. 727, 42 L. R. A. 664, 77 N. W. Rep. 97. The cases are cited in the opinion of Bartholomew, C. J., who refers to the following, among others: *Chicago v. Scholten*, 75 Ill. 468; *Ihl v. Forty-second Street, etc. R. Co.*, 47 N. Y. 317; *Atchison, etc. R. Co. v. Weber*, 33 Kan. 543, 52 Am. Rep. 543, 6 Pac. Rep. 877; *Johnston v. Cleveland & Toledo R. Co.*, 7 Ohio St. 336, 70 Am. Dec. 75; *Apropos v. Costello*, 8 Wash. 149, 35 Pac. Rep. 620; *Serensen v. Northern Pacific R. Co.*, 45 Fed. Rep. 407; *Korrad v. Lake Shore, etc. R. Co.*, 131 Ind. 261, 29 N. E. Rep. 1069; *District of Columbia v. Wilcox*, 4 D. C. App. Cas. 90; *Railroad Co. v. Barron*, 5 Wall. 90; *San Antonio, etc. R. Co. v. Long*, 87 Tex. 148, 27 S. W. Rep. 113, 47 Am. St. 87, 24 L. R. A. 637; *International, etc. R. Co. v. Knight*, 91 Tex. 660, 45 S. W. Rep. 556.

is noted in some cases to the effect that when the party in whose interest the suit is brought had the legal right to demand the services of the deceased, or to demand support and maintenance at the hands of the deceased, then substantial damages will be presumed; while if recovery is sought by a collateral relative or one having no such legal claim, and who was not in fact dependent upon the deceased, the presumption of substantial damages may not be indulged.¹ Other courts, however, hold or incline to the view that a general allegation of damage is not sufficient in any case.² An allegation in an action by the administrator showing that the decedent left heirs and next of kin who are entitled to damages and who have been damaged is sufficient to admit testimony to show who are the beneficiaries.³ An allegation that a minor son was six years of age at the time of his death shows that he was unmarried.⁴ All the damages recoverable by a minor for the wrongful killing of a parent are general and need not be specified.⁵ A parent cannot recover for the loss of a child's services during its minority unless they are specially declared for.⁶ In Missouri punitive damages cannot be recovered for a wrongful killing unless they are pleaded.⁷ It is otherwise under the statute of Nevada.⁸

SECTION 2.

ASSESSMENT OF DAMAGES.

§ 427. **Writ of inquiry.** By the common-law practice the assessment of damages is by a writ of inquiry. An interlocutory judgment is first entered up that the plaintiff ought to recover his damages; but, because the court knows not what

¹ *Haug v. Great Northern R. Co.*, *supra*; *Chicago v. Scholten*, 75 Ill. 468; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Wmmt v. International, etc. R. Co.*, 74 Tex. 32, 11 S. W. Rep. 907, 5 L. R. A. 172.

² *Safford v. Drew*, 3 Duer, 627; *Regan v. Chicago, etc. R. Co.*, 51 Wis. 599, 8 N. W. Rep. 292; *Hurst v. Detroit City R.*, 81 Mich. 539, 48 N. W. Rep. 44; *Charlevoix v. Gogebic, etc. R. Co.*, 91 Mich. 59, 51 N. W. Rep. 812. See the Nebraska cases cited in first note to this section.

³ *Commercial Club v. Hilliker*, 20 Ind. App. 239, 50 N. E. Rep. 578.

⁴ *Baird v. Citizens' R. Co.*, 146 Mo. 265, 48 S. W. Rep. 78.

⁵ *Ellingson v. Chicago & A. R. Co.*, 60 Mo. App. 679.

⁶ *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Gilligan v. New York & H. R. R. Co.*, 1 E. D. Smith, 453.

⁷ *Gilligan v. McCrillis*, 84 Mo. App. 507.

⁸ *Peers v. Nevada Power, Light & Water Co.*, 119 Fed. Rep. 400.

damages he hath sustained, therefore the sheriff is commanded that by the oaths of twelve honest and lawful men he inquire into said damages, and return such inquisition into court.¹ The writ is issued accordingly, directed to the sheriff, who, in the execution of it, sits as judge and tries by a jury what damages the plaintiff hath really sustained, under very nearly the same rules of law as upon a trial by jury at *nisi prius*. When their verdict is rendered the sheriff returns the inquisition, and final judgment is thereupon entered that the plaintiff recover the damages so assessed. Some of the authorities would seem to sustain the view that as the writ of inquiry is merely an inquest of office to inform the conscience of the court they [772] may, if they please, themselves assess the damages without the intervention of the writ.² This view is supported by the authorities generally so far as it relates to actions brought for a sum certain, or which may be made certain by computation.³ It is at the option of the plaintiff to have a writ of inquiry in all cases, but not of the defendant. The latter, having suffered default, has no election in the case.⁴

§ 428. When assessed without a jury. It is the constant practice of the court, with the consent of the plaintiff, to assess the damages either by itself or by referring the cause to a master, prothonotary or the clerk for that purpose when they may be assessed by computation,—where there are records or other indisputable documents which determine the amount,—as a judgment;⁵ a note or bill of exchange;⁶ and where the

¹ Jacobs' Law Dict., Judgment, 1; Phoenix Ins. Co. v. Hedrick, 73 Ill. App. 601.

² Bruce v. Rawlins, 3 Wils. 61.

³ Price v. Dearborn, 34 N. H. 481; Renner v. Marshall, 1 Wheat. 215; Tannehill v. Thomas, 1 Blackf. 144; Van Vleet v. Adair, id. 346; Begg v. Whittier, 48 Me. 314; Crommett v. Pearson, 18 Me. 344; Blackmore v. Flemyng, 7 T. R. 446; Fleming v. Nall, 1 Tex. 246; Dicken v. Smith, 1 Litt. 209; McLain v. Rutherford, Hempst. 47; Cartwright v. Roff, 1 Tex. 78; McCoy v. Elder, 2 Blackf. 183; Reed v. Bank of Kentucky, 1 T. B. Mon. 92, 15 Am. Dec. 86; Champion

v. Crawshay, 6 Taunt. 356; Maunsell v. Massareene, 5 T. R. 87; Arden v. Cornell, 5 B. & Ald. 885; Mayhew v. Thatcher, 6 Wheat. 129; Rashleigh v. Salmon, 1 H. Bl. 252; Andrews v. Blake, id. 529; Graham v. Bickham, 4 Dall. 148.

⁴ Holdip v. Otway, 2 Saund. 107; Price v. Dearborn, 34 N. H. 481; Blackmore v. Flemyng, 7 T. R. 446; Deane v. Willamette Bridge Co., 22 Ore. 167, 174, 15 L. R. A. 614, 29 Pac. Rep. 440, citing the text.

⁵ Harrington v. Witherow, 2 Blackf. 37.

⁶ Andrews v. Blake, 1 H. Bl. 529; Rashleigh v. Salmon, id. 252; Long-

damages on protested bills of exchange are fixed by the *lex fori* these may be assessed by the court.¹ The court may not assess where the obligation is payable in a foreign currency;² nor where the interest is to be ascertained by the law of another state or country.³ The allegation in a petition in ejectment as to the damages sustained by the plaintiff by the unlawful detention of possession cannot be taken as true upon default; evidence must be received as to the damages before judgment can be rendered.⁴ And so in an action of trespass if it is not alleged that there was an express promise to pay the damages or a statement of facts from which that may be implied.⁵ Such mode of assessing damages is not forbidden by a constitutional provision preserving the right of trial by jury, because it was in use when the constitution was adopted.⁶ If the party liable for damages admits the amount thereof a court of equity will award them without the intervention of a jury.⁷ It is immaterial, so far as the right of the court to assess the damages without a jury is concerned, at what stage of the proceedings the default occurred, if neither party asks that they be assessed by a jury.⁸

§ 429. What a default or demurrer admits. A de- [773] fault only admits the defendant's liability to *some* damages, where they depend upon facts *in pais*; and, though they are stated in a common-law declaration, they are not admitted;

man v. Fenn, id. 541; Gould v. Hammersley, 4 Taunt. 148; Phipps v. Addison, 7 Blackf. 375; Randolph v. Parish, 9 Port. 76; Cullum v. Casey, id. 131, 33 Am. Dec. 304; Campion v. Crawshay, 6 Taunt. 356.

¹ Grigsby v. Ford, 3 How. (Miss.) 184.

A note on which damages are assessed must be produced, or its absence accounted for. Brandt v. Foster, 5 Iowa, 287.

The unsworn statement of an attorney or the belief or supposition of a judge are not a sufficient basis for assessing damages. Wells v. Tedrick, 69 Ill. App. 203.

² Lynch v. Barr, Sneed, 170; Maunsell v. Mascareene, 5 T. R. 87.

³ Peacock v. Banks, Minor, 387; Evans v. Irvin, 1 Port. 390; Pauling's Adm'r v. Sartain, 4 J. J. Marsh. 238; Johnson v. Williams, 1 id. 489, 20 Am. Dec. 223.

⁴ Burchett v. Herald, 98 Ky. 530, 33 S. W. Rep. 85.

⁵ Mize v. Jackson's Adm'r, 17 Ky. L. Rep. 750, 32 S. W. Rep. 467.

⁶ Seeley v. Bridgeport, 53 Conn. 1, 22 Atl. Rep. 1017; Raymond v. Danbury & N. R. Co., 14 Blatch. 133; Deane v. Willamette Bridge Co., 22 Ore. 167, 29 Pac. Rep. 440, 15 L. R. A. 614.

⁷ Schmid v. Lisiewski, 53 N. J. Eq. 670, 31 Atl. Rep. 603.

⁸ Gallagher v. Silberstein, 182 Mass. —, 64 N. E. Rep. 402.

the damages must, in most jurisdictions, be proved before and assessed by a jury.¹ The admission arising from a demurrer or a default is not an acknowledgment, or to be considered as evidence, of liability for substantial damages; nor that any such damages were suffered, or if so that the defendant was responsible for them. When the plaintiff in a tort action, standing upon default or upon demurrer overruled, has proved actual and substantial damages, resulting from the wrong complained of, such proof is in the first instance, and *prima facie*, sufficient to indicate that such injury and damage, to the extent proved, is chargeable to the defendant's fault, and that the case made is one which calls upon the defendant to meet it by counter evidence, or submit to judgment for the sum proved.² In Maine it has frequently been ruled that in case of default the assessment may be made by the court or by the jury, and that the option as to the mode is with the plaintiff.³ Such is the practice in tort actions in Connecticut,⁴ and, apparently, in Missouri.⁵ Where damages are assessed after a demurrer overruled, there is a like confession of the action.⁶

¹ Heyward v. Sanner, 86 Md. 19, 37 Atl. Rep. 798; McLeod v. Nimocks, 122 N. C. 437, 29 S. E. Rep. 577; Banks v. Gay Manuf. Co., 108 N. C. 282, 12 S. E. Rep. 741; Gohres v. Illinois Mining Co., 40 Ore. 516, 67 Pac. Rep. 666; Grinnell v. Bebb, 126 Mich. 156, 85 N. W. Rep. 467; Ferguson v. Hoshi, 25 Wash. 664, 66 Pac. Rep. 105, citing the text; Grace v. Park, 5 J. J. Marsh. 57; Goff v. Hawks, id. 341; Kennon v. McRae, 3 Stew. & Port. 249; Van Vleet v. Adair, 1 Blackf. 346; Wood v. Morgan, 6 Barb. 507; Campbell v. Woolen, 5 Blackf. 80; Langdon v. Bullock, 8 Ind. 341; Hanrick v. Farmers' Bank, 8 Port. 539; Logan v. Jennings, 4 Rawle, 355; Roulhac v. Miller, 90 N. C. 174; Hanover F. Ins. Co. v. Lewis, 23 Fla. 193, 1 So. Rep. 863.

² Sprague v. New York, etc. R. Co., 68 Conn. 345, 36 Atl. Rep. 791, 37 L. R. A. 638; Bergin v. Southern New England Telephone Co., 70 Conn. 54, 38 Atl. Rep. 888, 39 L. R. A. 192.

³ Begg v. Whittier, 48 Me. 315;

Cummings v. Smith, 50 id. 568, 79 Am. Dec. 629; Wood v. Leach, 69 Me. 560.

⁴ Raymond v. Danbury & N. R. Co., 14 Blatch. 133; Lennon v. Rawitzer, 57 Conn. 583, 19 Atl. Rep. 334.

⁵ Wetzell v. Waters, 18 Mo. 396; Snider v. St. Louis, etc. R. Co., 73 id. 465. See Gemmell v. Davis, 71 Md. 458, 18 Atl. Rep. 955.

⁶ Havens v. Hartford, etc. R. Co., 28 Conn. 69.

In Lamphear v. Buckingham, 33 Conn. 237, Butler, J., said: "Every action at law to redress a wrong or enforce a right, if properly instituted, is a syllogism, of which the major premise is the proposition of law involved, and the minor premise the proposition of fact, and the judgment the conclusion. Blackstone states it thus (Com., vol. 3, p. 396): 'The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination or sentence of the

A jury may assess damages conditionally in case of a [774] demurrer to evidence, or they may be discharged without making the assessment. In the latter case, should the demurrer be overruled, the damages may be assessed by an- [775]

law. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: — against him who hath rode over my corn, I may recover damages by law; but A. hath rode over my corn; therefore, I shall recover damages against A.' Usually the major premise is not set out in the declaration, but the proposition claimed is implied from or involved in the facts stated. The plaintiff in an action of tort, for instance, summons the defendant to answer, for that at a certain time and place he committed, in a certain manner, a certain wrong, to the plaintiff's damage, etc.; and by so doing impliedly claims that the law is so that he is entitled on those facts to recover. To this syllogism the defendant must answer according to the rules of law. If he expressly admits on the record the law and the fact, both premises, he consents to the conclusion, the judgment, or, as it is technically expressed, '*confesses judgment.*' If he declines or omits to appear pursuant to the summons, or appearing declines or omits to answer when called upon to do so, he impliedly admits both propositions or premises to be true by his default, and judgment follows, technically, as a judgment by default, pursuant to a necessary rule of law, stated broadly by Mr. Taylor (Ev., 669) thus: 'Whenever a material averment, well pleaded, is *passed over* by the adverse party without denial, whether it be by pleading in confession and avoidance, or by traversing some other matter, or by demurring in law, or by suffering judgment to go by default, it is, thereby, for the purpose

of pleading, if not for trial before the jury, conclusively admitted.' So the defendant may traverse or expressly deny the facts or the minor premise, and will be held on the same principle to have admitted the major, and, if the minor is found true, judgment — the conclusion — is awarded in the verdict. And so he may deny the major premise, the proposition of law involved, by a demurrer, and failing thereby to deny, and passing over the facts, if well pleaded and sufficient to constitute a premise, *he defaults as to them*, and thereby and by the same rule is holden to have admitted them: and if the issue in law is found, final judgment passes for the plaintiff. The facts, if well pleaded and sufficient, are admitted, not because the demurrer admits them expressly, or by force of any office it performs, but because the defendant has not denied, and has defaulted as to them. A defendant, therefore, who demurs to a declaration, admits, not by his demurrer, but his omission to deny them, all the material well-pleaded facts alleged in it; and when his demurrer is overruled, the case is in the same condition precisely that it would have been if he had suffered a default and not demurred. All the difference between the two is that in one case he denied the major premise of law, and it has been found true; and the minor having been admitted by a failure to deny, both are to be holden true; in the other, he denied neither, and, therefore, both are to be holden true.

"The condition of a case before the court after a demurrer overruled, and after a default, being precisely

other jury on a writ of inquiry.¹ A confession of judgment, but for no certain sum, in an action sounding in damages is not sufficient to authorize the court to make the assessment; a writ of inquiry is necessary.² And to warrant the assess-

the same, and the effect of demurring or defaulting being precisely the same, in admitting the facts the question as to both is answered by what is the law as to either. What then is the effect of a default? What facts does it admit? It has been said by some writers and judges that it admits *the* cause of action, and by others *a* cause of action merely. Mr. Roscoe in his work on Evidence states the proposition broadly thus: 'Suffering a judgment by default is an admission on the record of the cause of action.' The true rule is that it admits the cause of action *as alleged* in full, or to some extent, according to the nature of the action. As it admits all the *material* facts well pleaded, if a distinct, definite, entire cause of action is set forth, which entitles the plaintiff to a sum certain *without further inquiry*, it admits the cause of action in full as alleged. If by the rules of law further inquiry is to be had to ascertain the amount due, or the extent of the wrong done, and of the damages to be recovered, then it admits the cause of action, but not to the extent alleged, and subject to such inquiry. Thus, if it be debt on a bond for a sum certain, the whole is admitted, and no further inquiry is had; and so if *assumpsit* on a note or bill, and there are no indorsements entered on it, and the defendant does not move for an inquiry, the cause of action and the amount

claimed are admitted. The note must be produced, but need not be proved. *Greene v. Hearne*, 3 T. R. 301; *Roscoe Ev.*, 10th ed. 71. But in actions of tort, for unliquidated damages, a *different* rule is *necessarily* applied. In such actions the plaintiff does not declare for a specific thing, but has an unlimited license in declaring, and may allege as much of wrong and injury, and demand as much damage, as he will, and recover by proving any amount, however small, if sufficient to sustain an action. A defendant, therefore, in an action of tort is not holden to have admitted by his default the *extent* of the injury. It is assumed that, as the plaintiff may allege more than is true, he probably has done so; and the defendant by his default is considered as admitting the wrong to some extent, leaving that extent to be inquired into to enable the court to fix the damages, because such an inquiry is always and necessarily had in such cases. But he admits the wrong, and consequent right of the plaintiff to recover to some extent. By our practice this inquiry is not by writ of inquiry, or by reference, but made by the court on a hearing in damages. On that hearing it results from the very nature of the inquiry, that any evidence tending to belittle or mitigate the injury complained of and admitted, and any evidence tending to aggra-

¹ *Hanover F. Ins. Co. v. Lewis*, 23 Fla. 193, 1 So. Rep. 863; *McCreary v. Fike*, 2 Blackf. 374; *Andrews v. Hammond*, 8 id. 540.

² *Dunbar v. Lindenberger*, 3 Munf.

169; *McLeod v. Ninocks*, 122 N. C. 437, 29 S. E. Rep. 577; *Thompson v. Lumley*, 7 Daly, 74; *Harder v. Harder*, 26 Barb. 409.

ment of damages otherwise than by jury, the declaration should not embrace any claim requiring a jury. Where the common counts are added to a special count on a note or bill, a *nolle prosequi* should be entered on them before assessment of damages by the court.¹ Though the action be debt, if it be brought on an account, the damages must be assessed by a jury.² A demurrer does not admit the items of an account, and there must be a jury to assess the damages.³ Nor [776] will a default in an action for assault and battery admit any of the stated particulars; it admits the assault and battery so far as to entitle the plaintiff to maintain his action; not, however, that it was committed at the time or with the circumstances of aggravation stated in the declaration.⁴ On the assessment some damages must be found; the jury cannot find a verdict for the defendant.⁵ The failure to demur to the petition is not an admission that it sets out a cause of action so as to preclude the court from passing on the question of the defendant's liability under the facts stated. No technical rule, nor failure to demur or plead, will authorize the court to impose a liability on the defendant where, from the facts stated in the petition, or from the facts as they appear in evidence, there is no liability in law.⁶

vate it, is admissible. If in proving the extent to which he was in fault the defendant prove that he was not in fault at all, and that the injury occurred through the fault of the plaintiff, the plaintiff cannot complain. The evidence does not deprive him of his right to judgment; it merely shows that, as he is not in fact entitled to any damages, he can only have such as the law gives him by reason of the admission on the record."

Where a jury has assessed damages by the true measure in a case where the court may assess them, the verdict will not be set aside. *Newton v. Newbegin*, 43 Me. 293.

Damages should not be assessed on one count before the issues on others are disposed of. *Ewing v. Coddling*, 5 Blackf. 433; *Fleming v. Langton*, 1 Strange, 532; *Duperoy v. Johnson*,

7 T. R. 473; *McClure v. Hall*, 19 Wend. 25.

¹ *Beard v. Van Wickle*, 3 Cow. 335; *Starbuck v. Lozenby*, 7 Blackf. 268; *McFall v. Wilson*, 6 id. 260; *Carter v. Spencer*, 4 Ind. 78; *Burr v. Waterman*, 2 Cow. 33, n.; *Wood v. Lemon*, 1 Blackf. 198.

² *Wilson v. Darwin*, 1 Hill, 670; *Patterson v. Blakency*, 33 Ala. 338.

³ *Darrah v. Steamboat*, 15 Mo. 187. It is otherwise in Maine. *Hanley v. Sutherland*, 74 Me. 212.

⁴ *Baker v. Loomis*, 5 Wend. 134; *Havens v. Hartford*, etc. R. Co., 28 Conn. 69. But see *Hyde v. Moffatt*, 16 Vt. 271.

⁵ *Jackson v. Rathbone*, 3 Cow. 297; *Hanks v. Evans*, Hardin, 45; *Frazier v. Lomax*, 1 Cranch C. C. 318; *Turner v. Carter*, 1 Heal, 520.

⁶ *O'Connor v. Brucker*, — Ga. —, 43 S. E. Rep. 731. See first note to § 413.

To preserve for review the action of the court in assessing damages after default it is necessary to move to set the assessment aside and take exception to the refusal.¹ But if the action is in equity an exception to the judgment is not necessary to entitle the unsuccessful party to appeal.²

§ 430. Defendant may offer evidence in reduction of damages. The defendant is entitled to appear,³ cross-examine the plaintiff's witnesses, and introduce evidence to mitigate the damages.⁴ He may show the whole *res gestæ*; and though it may establish that the plaintiff has no legal claim to any damages, it will only have the effect to reduce or mitigate those he may recover.⁵ A default in a tort action based on negligence

¹ *Phoenix Ins. Co. v. Hedrick*, 178 Ill. 212, 52 N. E. Rep. 1034, 73 Ill. App. 601.

² *Mize v. Jackson's Adm'x*, 17 Ky. L. Rep. 750, 32 S. W. Rep. 467.

³ Under a statute providing that on a judgment for the plaintiff upon an issue of law he may proceed in the manner prescribed by the statute upon the failure of the defendant to answer, where the summons was personally served, and another section to the effect that after appearance a defendant is entitled to notice of all subsequent proceedings, there cannot be an assessment of damages in a tort action without notice to the defendant who has appeared in the action. *Davis v. Red River Lumber Co.*, 61 Minn. 534, 63 N. W. Rep. 1111.

⁴ *Johnson v. Hoxsie*, 19 R. I. 703, 36 Atl. Rep. 720; *Slater v. Skirving*, 51 Neb. 108, 70 N. W. Rep. 493, 66 Am. St. 444; *Grinnell v. Bebb*, 126 Mich. 157, 85 N. W. Rep. 467; *Gohres v. Illinois Mining Co.*, 40 Ore. 516, 67 Pac. Rep. 666; *Chicago, etc. R. Co. v. Ward*, 16 Ill. 522; *Hightower v. Hawthorne*, Hempst. 42; *South Ottawa v. Foster*, 20 Ill. 296; *Cox v. Way*, 3 Blackf. 143; *Ewing v. Coddington*, 5 id. 433; *Dennison v. Mair*, 14 East, 622; *Cairo, etc. R. Co. v. Holbrook*, 72 Ill. 419; *Thompson v. Haislip*, 14 Ark.

220; *Mizell v. McDonald*, 25 Ark. 38; *Bridges v. Stephenson*, 10 Ill. App. 369; *Madison County v. Smith*, 95 Ill. 328.

⁵ *Briggs v. Snegham*, 45 Ind. 14; *Turner v. Carter*, 1 Head, 520; *Carey v. Day*, 36 Conn. 152; *Dailey v. New York, etc. R. Co.*, 32 Conn. 356, 87 Am. Dec. 176; *Daniels v. Saybrook*, 34 Conn. 377; *Lamphear v. Buckingham*, 33 Conn. 237.

In *Havens v. Hartford, etc. R. Co.*, 28 Conn. 69, the court considered the effect of a demurrer overruled on the assessment of damages, and held that the case stood with reference to the evidence necessary and admissible, precisely as it would have stood upon default; that the admissions of the demurrer are applicable even to the principal wrongful act only in its relation to the question whether there is a cause of action, and not at all in its relation to the question of damages. And as to the scope of exonerating evidence for the purpose of mitigation, *Ellsworth, J.*, said: "Nothing would be more extraordinary than, on such a general open declaration as this, for the court to overlook and reject evidence already received, conducing to show the cause, occasion or extent of any supposed injuries sued for. We say it would be an extraordinary

throws upon the defendant, on a hearing in damages, the burden of disproving the negligence alleged,¹ as well as proving contributory negligence upon the part of the plaintiff.² The defendant in an action for slander may show that the words

spectacle—a court overlooking and disregarding material and decisive proof, upon the idea that a demurrer blinds the eyes of the judge to whatever is beneficial to the defendants. Why, on a hearing in damages even, that which might have availed as a complete defense, had it been so pleaded, may be brought in to reduce the damages—as the payment of an account, or a discharge and release, is evidence before auditors in an action of account, to prove there is nothing in arrear. In the case of *Williams v. Miner*, 18 Conn. 464, this court held that evidence tending to prove the truth of the slanderous words might be admitted to affect the question of damages, although a plea *in bar* might have been put in. In this case, Ch. J. Church says: ‘We are not satisfied that a defendant should be deprived of the benefit of mitigating circumstances for no better reason than that they conduce to prove the truth of the charge.’ The same general doctrine is held in *Hyde v. Moffatt*, 16 Vt. 271. Besides, for aught that appears, the plaintiff was willing that all this evidence should come in. He certainly did not object to it until afterwards, and perhaps the material parts of it came from his own lips in his testimony in chief or on his cross-examination. And so, too, he need not have gone into the transaction at all, if he had confidence in the consequences of the demurrer; and we think he would not, but would have remained silent, if he had not believed and was not in-

structed by counsel that the burden of proof lay on him if he expected to recover substantial damages. And certainly whatever the plaintiff might attempt to prove to aggravate the damage he sought to recover, the defendant may meet with counter-proof, and so confine him to his mere nominal damages.

‘I have already said that the most correct view of this declaration is, that the defendants are sued as common carriers for a breach of duty in not carrying the plaintiff safely and carefully to Middleton. If this be so, if negligence and omission are the gist of the action, and all that is said about the ticket and the scuffle and the special injuries sustained by the plaintiff are collateral to the issue, and need not be proved to enable the plaintiff to recover, then they are not admitted, any of them, by the demurrer, and there is nothing left for further controversy between the parties.

‘Following out this view of the declaration I inquire what are we to understand as admitted *in this case* by the demurrer? In my judgment nothing but that the defendants were common carriers on the road in question, and received the plaintiff into one of their cars to carry him with care and safety from New Haven to Middleton, and have failed to do so it agreed. This gives a complete cause of action. Strike this out of the declaration and it is by no means certain that there is enough left to enable the plaintiff to recover; but with this in and the rest stricken out there is

¹ *Walsh v. Hayes*, 72 Conn. 397, 44 Atl. Rep. 725.

² *Ebert v. Hartley*, 72 Conn. 453, 44 Atl. Rep. 724.

were spoken without express malice so as to relieve himself from the imposition of punitive damages; but he cannot disprove the cause of action by showing that the words were privileged.¹ It is settled in Tennessee that where a demurrer to the evidence in an action to recover unliquidated damages is overruled, the amount of the recovery must be fixed upon the evidence embodied in the demurrer, and upon that alone.² It is error to add interest to the amount found in favor of the plaintiff by the jury for the time elapsed prior to the inquiry, it being presumed that it was included in the verdict.³

enough left for a good cause of action. The wrongful acts specified go only to the manner and special consequences of the defendant's default. But if we are wrong in our view, if the action is founded in misfeasance rather than non-feasance, and the gist of the action is the positive acts of the defendants' agents, the result will not be essentially different; for that only one of these acts needs to be proved on the general issue—the tearing of the plaintiff's coat—the putting the hand violently upon his person—the raising him from the seat—or the attempt to eject him from the car; each would sustain the action, even in that point of view; and therefore only one is proved by the verdict or demurrer, and not even that specifically. May not the defendants show on the hearing in damages, notwithstanding the demurrer, that the plaintiff's knee was not hurt at all? Or if so that it was caused by his attempt to assail the conductor, or in his twisting his limb under the seat to keep from being ejected from the car, or in springing over the seat to avoid the conductor? If so and the injury to the knee may be denied and

disproved, the manner and degree in which it is claimed to have been done by the defendants may be disproved; for the greater includes the less, and the proof of the manner may well show, as it did in this case, that the plaintiff was the author of this particular injury; and were it true that the defendants by plea could have set up such misconduct of the plaintiff in bar of the action, which we by no means concede, still the entire proof being before the court, and it appearing that there had been no negligence, misconduct or fault of the defendants, it would be strange indeed for the court to adjudge the defendants to pay the plaintiff damages brought upon himself by his unpardonable contumacy and violence, when it is not found that the particular injury to the knee was caused by the defendants' agents at all.

“Nor does it follow from the demurrer that the character of the scuffle in the car, when the plaintiff set the rules of the company at defiance, cannot be known and judged of and made the rule of right between the parties. It cannot be so. The demurrer cannot be allowed to clothe the acts of the defendants’

¹ Heyward v. Sanner, 86 Md. 19, 37 Atl. Rep. 798.

² Manufacturing Co. v. Morris, 105

Tenn. 654, 58 S. W. Rep. 651, and cases cited.

³ Williams v. Crosby Lumber Co., 118 N. C. 928, 24 S. E. Rep. 800.

§ 431. Not allowed to disprove cause of action. It [777] is generally held that on the assessment of damages after a default, or on an equivalent state of the record, evidence denying the cause of action or tending to show that no right of action exists is inadmissible in mitigation of damages.¹ [778] In an action for false imprisonment it is not admissible to show that the plaintiff was guilty of the offense charged and the regularity of the proceedings against him. The default admitted all the material averments properly set forth in the declaration, and, of course, the false imprisonment and everything essential to establish the right to recover. The only debatable question for the examination or consideration of the jury is the amount of damages, and that ought to be examined and decided on the assumption that the false imprisonment had been committed by the defendants.² The evidence in such a case would not be admissible under the general [779] issue in justification, without being specially pleaded, unless made so by statute; and the reasons given are to prevent surprise upon the plaintiff on the trial and to enable him to meet the defendant upon equal terms in respect to the evidence.³ These reasons are equally strong against allowing the evidence without notice *in mitigation* of damages, besides the inconsistency of hearing evidence in contradiction of the legal effect of the record, and which is not pertinent to any issue presented by it. If this practice were tolerated it would enable defendants to have substantially the benefit of a justification in every case in which evidence could be procured to establish it without notice to the plaintiff of such defense; for, if admissible, and the justification should be proved, the least effect that could reasonably be given to it would be to reduce

agents (supposing them to be improper) with a character or quality which will not allow a full examination of them on their merits, or which *must* exonerate the plaintiff contrary to the justice of the case, and contrary to what would have been the result in a trial on the general issue."

¹ *Russ v. Gilbert*, 19 Fla. 54; *Leo v. Knapp*, 90 N. C. 171; *Froust v. Burton*, 15 Mo. 519; *Sweet v. McDaniels*, 39 Vt. 272; *Garnard v. Dollar*, 4 Jones,

175; *Curry v. Wilson*, 48 Ala. 638. See *McKyring v. Bull*, 16 N. Y. 297; *Martin v. New York, etc. R. Co.*, 62 Conn. 331, 25 Atl. Rep. 239; § 430.

As to the difference between the proceedings in this particular under the statutory and common-law writ of inquiry, see *Reeb v. Bosch*, 17 Ill. App. 426.

² *Forster v. Smith*, 10 Wend. 377.

³ *Id.*; 1 Chitty's Pl. 493.

the inquest to nominal damages. This would be the standard of damages in all cases upon such proof.¹ When an action is brought on a contract set out in the declaration, and there is a default on the assessment of damages, no evidence which goes to deny the existence of the contract, or tends to avoid it, is competent; the default admits it as set forth and concludes the defendant from denying it.²

A sheriff's jury was not uniformly resorted to at common law or by the English practice for the assessment of damages upon proof. When it was anticipated that some difficult point of law would arise in the course of the inquiry, or where the facts were deemed important, the inquiry was conducted before the chief justice or a judge of assize.³ So in this country as to the manner of selecting the jury and conducting the inquiry, or under what circumstances a referee by some name may perform the same office, there is no uniformity.

§ 432. *Jury tam quam.* Where there are several defendants and one suffers default and the others plead the same jury that tries the issue will assess the damages on the default. [780] If those who plead succeed, only nominal damages can be assessed against the defaulting defendant.⁴ On the determination of the issue on a plea in abatement the judgment is peremptory, and the same jury should assess damages;⁵ but if this is omitted they may be subsequently assessed as upon default by another jury or the court according to the nature of the case.⁶

§ 433. *When new jury may be called.* It was laid down in an early case in New Jersey that where the jury who try the cause omit to assess the damages, in case the matter omitted to be inquired of by them is such as goes to the very point of the issue and constitutes the gist of the action, as in *assumpsit* and trespass, and upon which, if a false verdict be found by the jury, an attaint will lie against them, then such

¹ Foster v. Smith, *ubi supra*, per Nelson, C. J.

² *Id.*; East India Co. v. Glover, 1 Strange. 612; Lamphear v. Buckingham, 33 Conn. 248-250; Curry v. Wilson, 48 Ala. 638.

³ 1 Sellon's Prac. 344; Havens v. Hartford, etc. R. Co., 28 Conn. 90.

⁴ State v. Reinhardt, 31 Mo. 95; Day v. Brawley, 1 Pa. 429.

⁵ Eichorn v. Le'maitre, 2 Wils. 367.

⁶ Frye v. Hinckley, 18 Me. 320.

matter cannot be supplied by a writ of inquiry; for there the party injured may lose his action of attain, which will not lie upon an inquest of office. But where the matter omitted to be inquired of by the principal jury does not go to the point in issue, nor constitute the gist of the action, but is collateral thereto, it may be supplied by a writ of inquiry. Therefore, in an action for dower, the jury not having assessed damages, a writ of inquiry was allowed.¹

§ 434. **Correction of error in assessment.** If the court or referee assessing damages have made a mistake in the computation of the amount, which can be clearly shown, it may, even after judgment, be corrected by the court, if it be of such a nature that it may be done without injustice to the opposite party. In an early case in New York² there was a mistake in the assessment of damages by computing interest for one year less than the actual time. It not being observed, judgment was perfected and collected; and plaintiff's satisfaction thereof was entered of record. When the mistake was shown to the court it was adjudged that the proceedings should be amended subsequently to the interlocutory judgment, [781] unless the defendant should pay the additional interest within thirty days after service of the rule. A new trial may be granted where the verdict has been taken for too small a sum in consequence of the plaintiff's attorney inadvertently computing interest for too short a time.³ And the proper mode of making such corrections, as for excessive interest, is by a new trial. Where a verdict was taken on a note and the jury had to ascertain simply principal and interest, and the error assigned was that the amount found exceeded both, it was held that, as the jury determined the matter on evidence, and it was their peculiar province to assess damages, neither the appellate court, nor even the court below, had control over the matter unless by awarding a new trial. And such a trial cannot be awarded by the appellate court for insufficiency of evidence.⁴

Under the New York code as it stood in 1892 the effect of a decision by the court of appeals affirming an order granting a

¹ *Stalcope v. Copner*, 2 N. J. L. 131.

² *Winn v. Young*, 1 J. J. Marsh. 51.

³ *Mechanics' Bank v. Menthorn*, 19 19 Am. Dec. 52.

Johns, 244.

⁴ *Baldwin v. Stebbins*, 1 Ala. 180.

new trial and directing judgment absolute in the supreme court in favor of the plaintiff, in an action to recover damages, is the same as if the whole of the plaintiff's cause of action had been admitted. The proceeding for the assessment of damages under section 194 of the code after the judgment of the court of appeals has become that of the court below is similar to the taking of an ordinary inquest of damages, and while it is better that the assessment be made at the circuit, it is not essential. The rules of the code for reviewing the trial of an action do not prevail as to such proceeding, there being no provision for making a case and exceptions or for a motion for a new trial on the judge's minutes. After the trial a motion may be made to set aside the inquisition, but such motion will not be granted upon the same grounds as a new trial would be for the mere admission of improper evidence. It is a motion addressed largely to the discretion of the court in which the proceeding was had, and when refused as not tending to the ends of justice a judgment entered upon the inquisition is not reviewable by the court upon legal grounds, though an appeal might be taken from the order of the special term refusing to set aside the inquisition to the general term, as the judicial discretion exercised by the court in acting on the motion is not confined to the special term.¹

SECTION 3.

PAYING MONEY INTO COURT.

§ 435. **Admits cause of action to amount paid.** Payment of money into court admits the cause of action stated in the declaration to the amount paid in, but nothing more; and beyond that amount the defendant may make his defense.² It is a payment *pro tanto*.³ The plaintiff has a right to take it out, and the defendant has not.⁴ The subsequent death of the

¹ *Bossout v. Rome, etc. R. Co.*, 131 N. Y. 37, 29 N. E. Rep. 753; *Bassett v. French*, 155 N. Y. 46, 49 N. E. Rep. 325 (1898). See *Thompson v. Lumley*, 7 Daly, 74.

² *Berkheimer v. Geise*, 82 Pa. 64; *Spaulding v. Vandercook*, 2 Wend. 431; *Johnston v. Columbian Ins. Co.*,

7 Johns. 315; *Murray v. Bethune*, 1 Wend. 191; *Phelps v. Town*, 14 Mich. 374; *Hubbard v. Knous*, 7 Cush. 556.

³ *Murray v. Bethune*, *supra*; *Goslin v. Hodson*, 24 Vt. 140.

⁴ *Id.*; *Reed v. Armstrong*, 18 Ind. 446; *Hopkins v. Stephenson*, 1 J. J. Marsh. 341; *Morrow v. Smith*, 4 B.

defendant, and the revival of the action against his administrator, do not change the effect of the payment.¹

§ 436. **Payment to plaintiff after suit.** Payments [782] made by the defendant to the plaintiff after suit brought may be proved under the general issue to reduce damages.² If after suit brought the defendant pays and the plaintiff receives the full amount of the claim sued for, the latter cannot afterwards obtain judgment for nominal damages so as to recover costs. Such payment, it has been held, may be proved under the general issue with notice of payment; a special plea to the further maintenance of the action is not necessary.³ When paid into court the sum paid is considered as stricken out of the declaration; if the plaintiff proves no larger indebtedness the defendant is entitled to the verdict.⁴ But if the jury find that a larger sum was due, the verdict and judgment should be for the whole amount of the plaintiff's demand;⁵ the sum paid in will be credited on the execution.

SECTION 4.

EVIDENCE.

§ 437. **Must be adapted to damages claimed.** The proof of damages must vary with the causes for which they are recoverable. They are, however, susceptible of one general division, marking a plain distinction in respect to the matter of proof; that is, a division into damages which are fixed by rules of law and measurable by pecuniary valuation; and those recoverable in other cases, in which elements of [783] damage may be considered by the jury without pecuniary estimate of the injury in evidence, or any precise legal guide for

Mon. 99; *Taylor v. Brooklyn E. R. Co.*, 119 N. Y. 561, 23 N. E. Rep. 1106; *Schnur v. Hickcox*, 45 Wis. 200; *Gilpatrick v. Ricker*, 82 Me. 185, 19 Atl. Rep. 165.

¹ *Id.*; *Carey v. Choat*, 6 Up. Can. Q. B. (O. S.) 467.

² *McMillian v. Wallace*, 3 Stew. 185; *Williams v. Tappan*, 23 N. H. 385; *Britton v. Bishop*, 11 Vt. 70; *Dana v. Sessions*, 46 N. H. 509.

³ *Buell v. Flower*, 39 Conn. 462, 12 Am. Rep. 414; *Bendit v. Annesley*, 27 How. Pr. 181. But see *Williams v. Tappan*, 23 N. H. 385.

⁴ *Bank of Columbia v. Sutherland*, 3 Cow. 336; *Dakin v. Dunning*, 7 Hill, 30, 42 Am. Dec. 33.

⁵ *Dakin v. Dunning*, *supra*; *Bennett v. Odom*, 20 Ga. 940.

determining the amount. Of the former class are damages for breach of contract, other than promises to marry, and for torts in respect to property, unaccompanied by aggravations for which punitive damages are allowed, or where the damages are at large, as in case of a private nuisance.¹ Of the latter class are all damages recoverable for bodily pain or mental suffering. The inquiry of damages, when it is properly entered upon, whether upon trial of an issue, or mere assessment, presupposes a right of action established, except where actual injury and damage are the gist of the action. In either case a specific cause of injury, stated in the declaration, is assumed; and unless it can be legally assumed the inquiry of damages is premature. On trial the plaintiff is entitled to that assumption when he has introduced proof of that cause which gives him a right to go to the jury upon it; and in cases of default or demurrer overruled, the cause stated is admitted by failure to deny it by pleading. If that assumption or admission is maintained the law declares, except in cases where actual injury is the gist of the action, that the plaintiff has sustained some damage. Whether he shall have more than nominal damages depends on whether the case stated and proved or admitted includes the legal measurement of his damages to a larger amount; or, otherwise, whether the required proof to show them has been introduced.²

In the nature of things, therefore, the evidence appropriate to the mere question of damages must relate to and tend to show the extent of the injury, and aid the jury in fixing an equivalent expression in money. In many supposable cases much of the learning which pertains to that luxuriant branch of the law may be invoked on this question, but it is not practicable or necessary for the present purpose to pursue the subject into much detail.

§ 438. **Burden of proof.** An important consideration at the outset of the inquiry of damages, and at every step in its

¹ *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 58, 11 Sup. Ct. Rep. 85; *Berlin v. Thompson*, 61 Mo. App. 234.

² "In an action *ex delicto* upon proof of part only of the injury charged or of one of several injuries laid in the

same count the plaintiff will be entitled to recover *pro tanto*, provided the part which is proved afford, *per se*, a sufficient cause of action; for torts are, generally speaking, divisible." *Jacksonville v. Loar*, 65 Ill. App. 218.

progress, is the *burden of proof*, or to what extent the plaintiff has made a *prima facie* showing. If his action is upon an express promise to pay money, the establishment of the [784] right to maintain it involves a *prima facie* showing of the amount due according to the purport and tenor of the promise. Matter of discharge or reduction must be shown by the defendant. A promise, not fulfilled, of something else which is definite in quantity and capable of valuation, presents, at first, only the one question of value at the time when the contract should have been performed.

§ 439. **Intendments against defendant for holding back evidence.** When money or property has been intrusted by the plaintiff, or has otherwise come to the defendant under such circumstances as to impose on him the duty to return or account for it, the plaintiff may rest on proof of the value of that which would naturally and directly result from the performance of that duty. The defendant's refusal or omission to account according to his duty, or to make disclosure necessary on account of his fault or superior means of information, will subject him to the consequences of having all doubts resolved on the most favorable hypothesis for the plaintiff, within his proof.¹ In other words, the law will make every reasonable intendment against him.² Thus, where a person who has wrongfully converted property will not produce it, it will be presumed against him to be of the best description.³ A man who wilfully places the property of others in a situation where it cannot be recovered, or its true amount or value ascertained,

¹ Postal Tel. Cable Co. v. Douglass, 96 Ga. 816, 22 S. E. Rep. 930; Schwier v. New York Central, etc. R. Co., 90 N. Y. 558; Iddings v. Equitable Gas Co., 8 Pa. Super. Ct. 244; Hubbert v. Borden, 6 Whart. 79; Bryant v. Stillwell, 24 Pa. 314; Askew v. Odenheimer, 1 Baldwin, 380; Mortimer v. Cradock, 7 Jurist, 45; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Betts v. Jackson, 6 Wend. 180; Gray v. Haig, 20 Beav. 219; Jones v. Murphy, 8 W. & S. 275, 301; Arrott v. Brown, 6 Whart. 9; McKeynolds v. McCord, 6 Watts, 288.

A party may account for the absence of a witness if the failure to produce him, in case of ability to do so, would warrant an inference against him. Hall v. Austin, 73 Minn. 134, 75 N. W. Rep. 1121. See Sugarman v. Brengel, 68 App. Div. 377, 74 N. Y. Supp. 167.

² Whiteside v. Connolly, 21 N. Y. Misc. 19, 46 N. Y. Supp. 940; Preston v. Leighton, 6 Md. 88.

³ Armory v. Delamirie, 1 Str. 504, 1 Smith Lead. Cas. 584; Curry v. Wilson, 48 Ala. 638.

either by mixing it with his own, or in any other manner, will be compelled to bear all the inconveniences of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole if the parts cannot be discriminated; or responding in damages for the highest value at which it can be reasonably estimated.¹

[785] § 440. Same as to plaintiff. If goods are sold without any express stipulation as to price and the vendor refuses to give clear evidence of their value, they are presumed to be worth only the lowest price for which goods of that description usually sell, unless the vendee himself be shown to have suppressed the means of ascertaining the truth; then a contrary presumption arises, and they are taken to be of the very best description.² Where a contractor was prevented by the defendant, his employer, from fulfilling his contract, for which an entire sum was to be paid, and the cost of completing it could not be shown, the plaintiff was held entitled to recover as the measure of damages the contract price.³ The plaintiff is not entitled to recover, without proof of damages, solely on the presumption *contra spoliatorem*; but, by its operation, his evidence will receive more favorable consideration, and he may have the right to resort to evidence of inferior grade.⁴ If the plaintiff refuses to produce evidence at his command, the jury may consider that fact in connection with all the testimony;⁵ but the refusal does not raise such a presumption against the party that testimony from other sources on the subject is not to be considered.⁶

§ 441. Plaintiff must prove pecuniary items; opinions. The plaintiff must prove pecuniary elements of damage, payments made, liabilities incurred, or any other losses sustained,

¹Note to *Armory v. Delamirie*, 1 Smith Lead. Cas. 589, citing *Lupton v. White*, 15 Ves. 432; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108. See *Gilbert v. Kennedy*, 22 Mich. 117; *Allison v. Chandler*, 11 Mich. 542; *Harris v. Rosenberg*, 43 Conn. 227.

²Smith's Note to *Armory v. Delamirie*, *supra*; *Clunnes v. Pessey*, 1 Camp. 8 and note.

³*Baldwin v. Bennett*, 4 Cal. 392; *Coffee v. Meiggs*, 9 Cal. 363.

⁴*Askew v. Odenheimer*, 1 Baldw. 380; *Life, etc. Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. 31; *Harden v. Hesketh*, 4 H. & N. 175.

⁵*Grinnell v. Taylor*, 85 Hun, 85, 32 N. Y. Supp. 684; *Carpenter v. Pennsylvania R. Co.*, 13 App. Div. 328, 43 N. Y. Supp. 203.

⁶*Fordyce v. McCants*, 55 Ark. 384, 18 S. W. Rep. 371.

and that they proceeded as effects from the act complained of.¹ His proof, for this purpose, must often be required to exhibit pecuniary loss occasioned by the defendant preventing, by the alleged wrong or breach of contract, a state of things which the plaintiff had contracted or otherwise prepared for, or by the destruction or partial change of an existing state of things which he had a right to have continue. In making this proof the general rule in respect to witnesses must be observed, that they can only testify to facts, except that, in matters of science and skill, or as to value, those having special knowledge may give their opinions. The exception, in other words, is that a witness may be asked his opinion as an expert when the question relates to a deduction from facts supposed, or from [786] facts which are within his knowledge, and they are peculiar to a science, art or profession in which he has special training or knowledge not common to the world. Before considering the admissibility of opinions, it may be noted that only reasonable certainty as to the amount of damages, and as to the severance or establishment of items and amounts for which there may be a recovery, is required.² A lesser degree of certainty as to future pain, as that it may continue, is not sufficient.³

§ 442. **Opinions upon subjects of common experience and observation.** In some cases a witness who is not an expert is allowed to state his conclusion as to a fact of common experience and observation, when that conclusion is arrived at by the exercise of judgment in view of a multitude of minute particulars which cannot be adequately described to a jury.⁴

¹ *Clarke v. Western U. Tel. Co.*, 112 Ga. 633, 37 S. E. Rep. 870.

"Juries are in many cases permitted to exercise their individual judgments as to values upon subjects presumptively within their own knowledge, which they have acquired through experience or observation, and the objection that no evidence was presented before them upon such subjects is insufficient to defeat their verdict." *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. Rep. 625.

² *Hawley v. Florsheim*, 44 Ill. App. 320; *Allison v. Chandler*, 11 Mich

542. See § 1248; *Ironton Land Co. v. Butchart*, 73 Minn. 39, 75 N. W. Rep. 749.

³ *Ford v. Des Moines*, 106 Iowa, 91, 75 N. W. Rep. 630.

⁴ *Smith v. Gugerty*, 4 Barb. 614; *Missouri, etc. R. Co. v. Richards*, 8 Kan. 101; *Alfonso v. United States*, 2 Story, 421; *Tibbetts v. Haskins*, 16 Me. 283; *Crouse v. Holman*, 19 Ind. 30; *Ottawa University v. Parkinson*, 14 Kan. 159; *Lewis v. Trickey*, 20 Barb. 387; *Sowers v. Dukes*, 8 Minn. 23; *Thomas v. Mallinckrodt*, 43 Mo. 58; *Doane v. Garretson*, 24 Iowa, 351;

In an action upon a building contract a mason may be asked how long, in his opinion, it would take to dry the walls of a house so as to render it safe and fit for human habitation.¹ A witness properly qualified has been allowed to give his opinion to aid in establishing how much or what proportion of the grain was left upon the straw by a tenant after threshing [787] buckwheat.² There is a growing tendency to the doc-

Dwight v. County Commissioners, 11 Cush. 201; Rogers v. Ackerman, 22 Barb. 134; Nellis v. McCarn, 35 Barb. 115; Harris v. Panama R. Co., 58 N. Y. 660; Kerr v. McGuire, 28 N. Y. 446; Phillips v. Terry, 6 Abb. Pr. (N. S.) 327; Smith v. Hill, 22 Barb. 656; Barber v. Merriam, 11 Allen, 322; Decker v. Myers, 31 How. Pr. 372; Wetherbee v. Bennett, 2 Allen, 428; Canandaigua R. Co. v. Payne, 16 Barb. 273; Priest v. Nichols, 116 Mass. 401; Vandine v. Burpee, 13 Met. 288; Brill v. Flagler, 23 Wend. 354; Whitbeck v. New York Central R. Co., 36 Barb. 644; Joy v. Hopkins, 5 Denio, 84; Sisson v. Cleveland, etc. R. Co., 14 Mich. 489; Whitman v. Boston, etc. R. Co., 7 Allen, 313; Simpkins v. Low, 49 Barb. 382; Brainard v. Boston, etc. R. Co., 12 Gray, 407; Clark v. Baird, 9 N. Y. 183; McDonald v. Christie, 42 Barb. 36; White v. Hermann, 51 Ill. 243; Ohio, etc. R. Co. v. Irvin, 27 Ill. 178; Same v. Taylor, 27 Ill. 207; La Fayette, etc. R. Co. v. Winslow, 66 Ill. 219; McCollum v. Seward, 62 N. Y. 316.

¹Smith v. Gugerty, 4 Barb. 614.

²Harpending v. Shoemaker, 37 Barb. 270. In this case Johnson, J., said: "The standard works upon the law of evidence do not furnish us any light on this question, and the reported cases do not seem to have established any clear and well defined rule upon the subject of the admissibility of evidence resting in the judgment or opinion of an informed and competent witness, in

matters of common experience and observation, having little, if any, relation to questions of science and skilled experts. Indeed, the cases appear to have created confusion and uncertainty, instead of establishing order and certainty upon this subject. I shall cite only a few of them. De Witt v. Barly, 17 N. Y. 340; Clark v. Baird, id. 183; Morehouse v. Mathews, 2 Comst. 514; People v. Eastwood, 14 N. Y. 562; Rochester & S. R. Co. v. Budlong, 6 How. Pr. 467, 10 id. 289; Cook v. Brockway, 21 Barb. 331; Nellis v. McCarn, 35 id. 115. The books are full of cases upon this subject, but enough have been cited to show that the rule is not yet fixed upon any well defined principle. . . .

"Much of the difficulty, I think, upon many of these questions, has arisen from not discriminating between mere opinion, founded and expressed upon some hypothesis stated, or statement of facts related by another, and knowledge of a witness, which is in part opinion or judgment, and in part observation and experience, in regard to the very matter upon which he is called to testify. It is every day's experience in the trial of causes at the circuit that witnesses are called upon to state their judgment or opinion upon questions of value, of quantity, of size, of distance, of time and the like, where there has been no test applied by measurement or otherwise. And this species of evidence

trine, if it be not already established, that opinions of ordinary witnesses may be given upon matters of which they have personal knowledge in all cases in which, from the very nature of the subject, the facts disconnected from such opinions [788]

has been found absolutely necessary to even a tolerable administration of justice. Indeed, to refuse it would in very many cases operate as a complete denial of justice. A brief reference to a very few of the most common cases will not be inappropriate in the discussion of this question. In actions of trespass, to recover for the destruction of crops, partial or total, by animals or otherwise, witnesses acquainted with the crop, and the average yield of such crops, after seeing the extent of the destruction, are allowed to state their judgment or opinion as to the quantity of grain destroyed. In actions of tort, for taking an unmeasured quantity of grain, or an unmeasured portion from a quantity measured, witnesses who had seen the grain before, and the portion, if any, left afterwards, are allowed to give their opinion or judgment as to the quantity taken. In actions of assault and battery, where the instrument is not produced, witnesses who saw it are uniformly allowed to state their judgment or opinion as to the length and size of it, and the distance they were at the time of the affray from the spot where it took place, the time when, etc. Many more instances might be mentioned, equally in point, in which the rule would scarcely be disputed by any one; where it is perfectly obvious that the knowledge, in great part, rests on the judgment or opinion of the witness, founded upon his observation. It is his conclusion of fact from what he saw or experienced. That this is the common law of evidence upon trials, and must have been always, will, I am confident, be con-

firmed by the assent of all judges and lawyers of much experience in trials at *nisi prius*. A question of this character, precisely, was put to the same witness upon the trial in this case. The crop, it seems, had been injured by the frost, and the witness was asked what proportion of the crop had been destroyed by the frost. He answered that, in his judgment, one-half had been thus destroyed. The question was objected to, but the answer was allowed. That it was properly allowed can, I think, admit of no doubt. The fact could scarcely be proved to the apprehension of the jury in any other way. No description in language could have brought the facts before their minds in such a manner as would enable them to form any intelligent judgment upon it. But the question rejected was precisely of the same character. It sought to ascertain the proportion or quantity of the grain left upon the straw after threshing. How could this be described to a jury, so as to enable them to decide, without the conclusion of fact of the witness, founded upon his examination? This question was not framed with much skill, but the object of it is entirely apparent. It did not call for a mere opinion, but for the knowledge of the witness, of an existing fact; knowledge inferior in degree, however, to that which is absolute and certain. But it was his knowledge, nevertheless, derived partly from observation and partly from opinion or judgment. And this knowledge must, of necessity, have existed in the mind of the witness, with far greater clearness and certainty than it could have been communicated to

cannot be so presented to a jury as to enable them to pass upon the question with the requisite knowledge.¹ But this rule does not extend to expert testimony, which is incompetent where the subject of inquiry is of such a character as to be within the knowledge of men of common education and experience, and to call for no special skill, knowledge or experience.² It is not a valid objection to the expression of an opinion by a witness that it is upon the precise question which the jury are to determine;³ but evidence of that character is only allowed when, from the nature of the case, the facts cannot be stated or described to the jury in such manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable.⁴

§ 443. *Instances of rejection and admission of opinions.* Ordinary witnesses may testify whether a person is intoxicated [789] or sober.⁵ Upon such a question it was said in a New York case: "A child six years old may answer whether a man (whom it has seen) was drunk or sober; it does not require science or

the minds of the jury by any statement he might have made of what he saw merely, however clear and lucid such statement might have been. If witnesses were to be permitted to state to a jury those facts only of which they have absolute and certain knowledge, not only the range of inquiry but the province of remedial justice would be very materially contracted."

¹ *Spear v. Drainage Com'rs*, 113 Ill. 632; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 134, 1 N. E. Rep. 364 (citing numerous cases); *Parker v. Chambers*, 24 Ga. 518; *Kearney v. Farrell*, 28 Conn. 317, 73 Am. Dec. 677; *Townsend v. Bonwill*, 5 Harr. 474; *Lund v. Tyngsborough*, 9 Cush. 36; *Detroit, etc. R. Co. v. Van Steinburg*, 17 Mich. 99; *Norton v. Moore*, 3 Head, 480; *Curtis v. Chicago, etc. R. Co.*, 18 Wis. 312; *Butler v. Mehrling*, 15 Ill. 488; *Harris v. Panama R. Co.*, 3 Bosw. 7; *Willis v. Quimby*, 31 N. H. 485; *Eastman v. Amoskeag Manuf. Co.*, 41 id. 143, 82 Am. Dec.

201; *Carrier v. Boston, etc. R. Co.*, 34 N. H. 498; *Hackett v. B. C. & M. R. Co.*, 35 id. 390; *State v. Avery*, 44 id. 392; *Whittier v. Franklin*, 46 id. 23, 88 Am. Dec. 185; *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441; *McKee v. Nelson*, 4 Cow. 355, 15 Am. Dec. 384; *Commonwealth v. Sturtevant*, 117 Mass. 122; *Benson v. McFadden*, 50 Ind. 431; *State v. Folwell*, 14 Kan. 105; *Underwood v. Waldron*, 33 Mich. 232; *Milwaukee & M. R. Co. v. Eble*, 3 Pin. 334; *Terre Haute & L. R. Co. v. Walsh*, 11 Ind. App. 13, 33 N. E. Rep. 534.

² *Missouri Pacific R. Co. v. Fox*, 56 Neb. 746, 77 N. W. Rep. 130.

³ *Transportation Line v. Hope*, 95 U. S. 297; *Bellinger v. New York, etc. R. Co.*, 23 N. Y. 42; *Cornish v. Farm Buildings F. Ins. Co.*, 74 N. Y. 293.

⁴ *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 429, 24 N. E. Rep. 179.

⁵ *People v. Eastwood*, 14 N. Y. 562.

opinion to answer the question, but observation merely; but the child could not, probably, describe the conduct of a man so that from its description others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him than by their description of his conduct. Many persons cannot describe particulars; if their testimony were excluded great injustice would frequently ensue."¹ The opinions of unprofessional witnesses may be received on the question of mental imbecility or insanity,² and as to the

¹ Id. See *Clark v. Baird*, 9 N. Y. 196.

In the last case *Johnson, J.*, said: "Evidence of opinion is also recognized as proper on the same ground of necessity in cases where language is not adapted to convey those circumstances on which the judgment must be formed. In questions of identity of persons or things language is wholly incapable to convey the appearances and sensible marks on which alone an intelligent judgment can be formed. So, too, in respect to handwriting; who would undertake to describe in words the ground upon which he recognizes his own, with any expectation, by that means, of enabling another person to pronounce upon its genuineness? In these cases the opinion of the witness is received because there are no other means of investigation adapted to the inquiry." *Mayor v. Pentz*, 24 Wend. 675; *Priest v. Nichols*, 116 Mass. 401.

² *De Witt v. Barly*, 17 N. Y. 340; *White v. Bailey*, 10 Mich. 155.

In *Beaubien v. Crotte*, 12 Mich. 501, *Campbell, J.*, after an extended review of cases, said: "From the best examination which it has been possible for us to make of the English practice, we are satisfied that in all of the courts, civil and criminal, as well as in the ecclesiastical courts, the practice concerning proof of

mental condition is the same, and permits all who have had means of observation to testify concerning the existence and measure of capacity with reference to the matter in controversy; while it does not permit those who do not testify from personal observation to give a direct opinion of capacity, except upon some given hypothesis. In every case the witnesses who speak from their own observation are expected to describe, as well as they can, what has led to their conclusions, as well as the means of observation. But the cases referred to show that, in many instances, the results of very limited observation have been permitted;—the safeguard of cross-examination and a comparison of testimony being deemed sufficient to prevent any mischief from the imperfect knowledge of single witnesses. In the United States the authorities all require the witness to state such facts as he can, in order that the jury may be better enabled to determine the value of his opinions;—stress being, of course, laid upon his opportunities of judging. In many cases the facts which can be described will be very significant to a jury, while there are many facts susceptible of a different interpretation from which a jury could obtain no light whatever without the aid of the witnesses' judgment. The

health or physical condition of another person. When questions as to the condition of the mind or body are in issue there are many things in the acts, deportment and appearance of the party which create a fixed and reliable judgment in the mind of the observer that words cannot convey to the jury. That a person appears to be sick or sad may well be known by observation, and yet there is no way to describe the appearance except by words that necessarily embody the conclusion reached by observation.¹ A non-professional witness who has observed a sick or injured person may testify as to his opinion as to such person's physical condition, and the degree of suffering he endured, such opinion being founded on his observation.²

[793] A witness cannot be permitted to express an opinion which depends upon events which may or may not transpire, and which cannot be foreseen and foretold as the result of

strongest indications of mental weakness or aberration often exist in expressions and appearances incapable of reproduction, even by an accomplished mimic; and yet decisive to any intelligent eye-witness. The great body of decisions in the United States adopt the English practice, and open the door to all testimony which can enlighten the jury, from every kind of witnesses. . . . The mere fact that a person is a physician does not of necessity qualify him to speak *ex cathedra* on this subject, especially when every one can assume the title with impunity. Men of real knowledge can always gain a respectable hearing on their own merits. The fact that in all important litigations the experts are found arrayed against each other renders it necessary for the jury to determine which is right, and in doing this they must fall back upon their own knowledge of human nature. Judge Redfield has referred to this difficulty in the chapter on Senile Dementia, Am. Law Reg., vol. 13, 458, 459. See, also,

Taylor's Med. Juris., 890, 891, 907, and *Delafield v. Parish*, 25 N. Y. 9. And where the witnesses speak from their own observation, the questions which may be put to one may be also properly put to another." *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441; *Hathaway v. National L. Ins Co.*, 48 Vt. 355.

¹ *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138, 52 Am. Rep. 653, 1 N. E. Rep. 364; *Bridge v. Oshkosh*, 17 Wis. 363; *Sydleman v. Beckwith*, 43 Conn. 9; *Thompson v. Stevens*, 71 Pa. 161; *Wilkinson v. Moseley*, 30 Ala. 562; *McDonald v. Franchere*, 102 Iowa, 496, 71 N. W. Rep. 427; *Will v. Mendon*, 108 Mich. 251, 66 N. W. Rep. 58; *Keller v. Gilman*, 93 Wis. 9, 66 N. W. Rep. 800; *Cicero*, etc. *Street R. Co. v. Priest*, 190 Ill. 592, 60 N. E. Rep. 814; *Hall v. Austin*, 73 Minn. 134, 75 N. W. Rep. 1121; *Jackson v. Wells*, 13 Tex. Civ. App. 275, 35 S. W. Rep. 528.

² *Shelby v. Clagett*, 46 Ohio St. 549, 22 N. E. Rep. 407, 5 L. R. A. 606; *Baltimore & O. R. Co. v. Rambo*, 8 C. C. A. 6, 59 Fed. Rep. 75.

any experience, nor stated as a deduction of science or law;¹ and cannot be asked his opinion of the amount of injury from a competitive business carried on in violation of an agreement,² nor of the value of the reversion of land over which a railroad has been located, for it depends on the length of time that the easement will continue, and in relation to that there has been no experience on which a satisfactory opinion can be based.³ For the same reason the opinions of witnesses are regarded as mere conjectures in respect to the detriment to a turnpike from a near railroad by reason of its trains frightening horses traveling upon such turnpike;⁴ so as to the effect of building a railroad on the good will of a mill;⁵ or the effect in depreciating the value of a stock of goods by impairing their reputation from the seizure and detention of them on an attachment.⁶ To ascertain the value of a growing crop [794]

¹ *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Norman v. Wells*, 17 Wend. 162.

² *Norman v. Wells*, 17 Wend. 136.

³ *Boston, etc. R. Co. v. Old Colony, etc. R. Co.*, 3 Allen, 142. See *Perrine v. Hotchkiss*, 58 Barb. 77.

⁴ *Troy, etc. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100.

⁵ *Canandaigua, etc. R. Co. v. Payne*, 16 Barb. 273.

In a petition for the assessment of damages caused by the location of a railroad upon a wharf used for the wood and lumber business and the land connected therewith, one who has been engaged in the lumber business for several years, on a wharf in the vicinity, and has been for several years connected with railroads, but who has no particular means of knowledge as to the effect of constructing railroads over wharves similar to that in question, is not thereby qualified to give an opinion as an expert as to the effect of the location or the value of that wharf for the business there conducted. *Boston, etc. R. Co. v. Old Colony, etc. R. Co.*, 3 Allen, 142.

⁶ *Alexander v. Jacoby*, 23 Ohio St. 358. In this case a witness testified that there would, by the mere act of seizure and levy of attachment, be a stigma or discredit cast on them which would diminish their market value in the hands of the owners, to whom they were returned, from five to fifteen per cent. He added that it arises from the fact that the community would expect to buy the goods lower on account of their having been seized by the sheriff. That it depended to some extent on the length of time the sheriff held them, and the extent that it was known in the community, and the amount of competition which existed at the time in that business at that place, and the extent of the interruption of the business. *Mellvaine, J.*, said: "We think . . . that the admission of this testimony cannot be justified. . . . The testimony given cannot be regarded as an opinion as to the market value of the goods discharged from the attachment. No reference was had to knowledge of the goods, or prices realized on sales, or prices demanded

damaged by an overflow of water, it is competent to ask a witness conversant with the growth of such crops how much, in his opinion, a given field would produce per acre.¹ A farmer may testify as to the damage done by the destruction of grass.² An expert witness' opinion is admissible in an action for breach of a covenant against incumbrances to prove the difference in value occasioned by a right of way.³ In an action for a personal injury, a physician who attended the plaintiff after he had been in the care of another physician for two weeks may be asked and testify what, so far as he can judge, had been the first physician's treatment, and in what respects it differed from his own; what effect, so far as he could judge, it had upon the plaintiff; and whether or not he saw any evidence that the plaintiff had been injured by such treatment.⁴ A physician may form and express an opinion of the nature and cause of the bodily or mental condition of his patient, derived from his knowledge, based on his attendance, treatment and examinations of the patient and in part on his sentiments and complaints as to pain and suffering, and in the same connection give his opinion whether the injuries are liable to be permanent, and as to the cause of the plaintiff's condition.⁵ Physicians may testify as to their opinions, based on a personal

or offered in the market. The opinion was not based upon a knowledge of any fact, nor upon the assumption of any fact, which fairly and reasonably indicates the amount of loss or damage resulting from the causes named, unless it be the very limited experience of the witness in relation to matters of that sort. But experience in such matters is not within the exception in favor of the opinion of experts. There is no skill or peculiar knowledge to be acquired by persons engaged in that particular line of trade, or any other trade, whereby a better opinion may be given in relation to the effect of the causes referred to. Customers would be quite as capable as tradesmen to form an opinion in relation thereto. Indeed, the only end accomplished by the admission of such testimony

is the substitution of witnesses for jurors, and theories for facts."

In *Knapp v. Barnard*, 78 Iowa, 347, 43 N. W. Rep. 197, it is held that a dealer in goods similar to those attached may testify as an expert as to the damage done by carrying over to another season goods which were only salable at certain periods.

¹ *Phillips v. Terry*, 5 Abb. Pr. (N. S.) 327; *Lommeland v. St. Paul, etc. R. Co.*, 35 Minn. 412, 29 N. W. Rep. 119.

² *Chicago, etc. R. Co. v. Larsen*, 19 Colo. 71, 34 Pac. Rep. 477.

³ *Wetherbee v. Bennett*, 2 Allen, 428.

⁴ *Barber v. Merriam*, 11 Allen, 322.

⁵ *Denver, etc. R. Co. v. Roller*, 41 C. C. A. 22, 100 Fed. Rep. 738, 49 L. R. A. 77; *Northern Pacific R. Co. v. Umlin*, 158 U. S. 271, 15 Sup. Ct. Rep. 840; *McKeon v. Chicago, etc. R. Co.*,

examination of the patient, and on statements made by him at the time, touching his physical condition.¹ If the apprehended consequences of a personal injury are such as, in the ordinary course of nature, are reasonably certain to ensue, experts may testify concerning them; but not if such consequences are contingent, speculative and merely possible.² A physician may testify as to whether a cause which is alleged to have existed would be sufficient to produce a condition which is claimed to have resulted from such cause.³ By three to two the justices of the Wisconsin court have held that an expert opinion as to the necessity of medical attendance and the services of nurses for an injured plaintiff in the future, and as to the extent to which these may be required is inadmissible.⁴ An injured person may not testify as to his opinion concerning the permanency of his injuries.⁵

A competent witness may give his opinion of the amount of work a mill would do in a given time to assist a jury in determining the amount of damage a party sustained by the fail-

94 Wis. 477, 69 N. W. Rep. 175, 35 L. R. A. 252, 59 Am. St. 809; McClain v. Brooklyn City R. Co., 110 N. Y. 459, 22 N. E. Rep. 1062; Perkins v. Concord R., 44 N. H. 223; Chicago, etc. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. Rep. 280; Sanders v. O'Callaghan, 111 Iowa, 574, 82 N. W. Rep. 969.

¹ Johnson v. Northern Pacific R. Co., 47 Minn. 430, 50 N. W. Rep. 473; Brusch v. St. Paul City R. Co., 52 Minn. 512, 55 N. W. Rep. 57.

² Strohm v. New York, etc. R. Co., 96 N. Y. 305; Turner v. Newburgh, 109 id. 301, 4 Am. St. 450, 16 N. E. Rep. 344; Griswold v. New York, etc. R. Co., 115 N. Y. 61, 12 Am. St. 775, 21 N. E. Rep. 726; Holman v. Union Street R. Co., 114 Mich. 208, 214, 72 N. W. Rep. 202; Streng v. Frank Ibert Brewing Co., 50 App. Div. 542, 64 N. Y. Supp. 34; Denver, etc. R. Co. v. Roller, 41 C. C. A. 22, 100 Fed. Rep. 739, 49 L. R. A. 77.

Where a physician testified to the effect that a man who, while riding

over a corduroy road on a wagon, was pitched out into a hole, striking his shoulder on the logs, *might* sustain such an injury as the plaintiff alleged he had received, and that the injuries sustained incapacitated the plaintiff to the extent of about two-thirds of his capacity for manual labor, it was regarded as somewhat conjectural, but not as improper to the extent of justifying the reversal of the plaintiff's judgment. Conrad v. Ellington, 104 Wis. 367, 80 N. W. Rep. 456.

³ Lucas v. Detroit City R. Co., 92 Mich. 412, 52 N. W. Rep. 745; Davey v. Janesville, 111 Wis. 628, 87 N. W. Rep. 813.

⁴ Crouse v. Chicago, etc. R. Co., 104 Wis. 473, 80 N. W. Rep. 752; Selleck v. Janesville, 104 Wis. 570, 88 N. W. Rep. 944, 76 Am. St. 892, 47 L. R. A. 691. See § 1250 for cases to the contrary.

⁵ Atlanta Street R. Co. v. Walker, 93 Ga. 462, 21 S. E. Rep. 48.

ure of a mill-wright to complete its construction within the agreed time.¹ A competent practical machinist may testify whether a machine is so made as to successfully do the work it was designed for;² but opinions as to the profits which might have been realized from the use of a machine if plaintiff's possession of it had not been disturbed are not admissible.³ The opinion of one who has never done work like that he is asked to testify as the cost of doing is inadmissible.⁴ A witness who has had several years' experience in shipping cattle and has observed their weight at the places of shipment and delivery, and who knew the age and condition of cattle shipped by the plaintiff, may testify as to their probable shrinkage between the time of their shipment and delivery.⁵ A person who has knowledge of the effect which the construction of a railroad embankment will have upon the market value of property may give his opinion thereon.⁶

§ 444. **Opinions as to amount of damages.** Ordinarily a witness is not allowed to give his opinion of the amount of *damages* a party sustains from a given act or omission, because when he does so he includes the law as well as the fact. It is the duty of the jury to assess the damages according to the rule of law which it is the province of the court to lay down for their guidance; and witnesses are allowed only to furnish the data from which the amount is arrived at.⁷ And where

¹ Clifford v. Richardson, 18 Vt. 620.

² Greenleaf v. Stockton Combined Harvester & A. Works, 78 Cal. 606, 21 Pac. Rep. 369.

³ Crabbs v. Koontz, 69 Md. 59, 13 Atl. Rep. 591.

⁴ Little Rock, etc. R. Co. v. Alister, 62 Ark. 1, 34 S. W. Rep. 82.

⁵ Cleveland, etc. R. Co. v. Heath, 22 Ind. App. 47, 53 N. E. Rep. 198.

⁶ Chicago, etc. R. Co. v. Howell, 65 Ill. App. 373.

⁷ Chicago, etc. R. Co. v. Lewis, 48 Ill. App. 274; St. Louis, etc. R. Co. v. Law, 68 Ark. 218, 57 S. W. Rep. 258; Railway Co. v. Jones, 59 Ark. 105, 26 S. W. Rep. 595; Louisville, etc. R. Co. v. Sparks, 12 Ind. App. 410, 40 N. E.

Rep. 546; Sunnyside Coal & Coke Co. v. Reitz, 14 Ind. App. 478, 43 N. E. Rep. 46; Elwood Planing Mills Co. v. Harting, 21 Ind. App. 408, 52 N. E. Rep. 621; McKinnon v. Palen, 62 Minn. 188, 64 N. W. Rep. 387; Wellington v. Moore, 37 Neb. 560, 56 N. W. Rep. 200; Jameson v. Kent, 42 Neb. 412, 60 N. W. Rep. 879; Bennett v. Wolfolk, 80 Hun. 390, 30 N. Y. Supp. 328; Landrum v. Wells, 7 Tex. Civ. App. 625, 26 S. W. Rep. 1001; Upcher v. Oberlender, 50 Kan. 315, 31 Pac. Rep. 1080; Atchison, etc. R. Co. v. Wilkinson, 55 Kan. 83, 39 Pac. Rep. 1043; Foote & Davies Co. v. Malony, 115 Ga. 985, 42 S. E. Rep. 413; Barron v. Collenbaugh, 114 Iowa, 71, 86 N. W. Rep. 53; Kochmann v. Bau.

the injury consists of distinct elements it is not competent to ask a witness to make a general estimate, but he should [795] be asked to estimate the specific items separately.¹ But where unliquidated damages result from an injury complicated in its circumstances and difficult of description, a witness acquainted personally with all the facts may be permitted to give his opinion of the total or aggregate loss or value, as some evidence of the fact.² Thus, experienced gardeners may testify as to the amount of damage done to a garden and nursery by smoke, heat and gas.³ The amount of damage resulting from an aggravated trespass has been held to be a proper subject for the opinion of a competent witness.⁴ The general rule as

meister, 73 App. Div. 310, 76 N. Y. Supp. 769; *St. Louis, etc. R. Co. v. Jacobs*, 70 Ark. 401, 68 S. W. Rep. 248; *Read v. Valley Land & Cattle Co.*, — Neb. —, 92 N. W. Rep. 622; *Morris v. Williford*, 70 S. W. Rep. 228 (Tex. Ct. of Civil Appeals); *Van Deusen v. Young*, 29 N. Y. 9; *Morehouse v. Matthews*, 2 id. 514; *Harger v. Edmonds*, 4 Barb. 256; *Giles v. O'Toole*, id. 261; *Clark v. Baird*, 9 N. Y. 183; *Rodgers v. Fletcher*, 13 Abb. Pr. 299; *Doolittle v. Eddy*, 7 Barb. 74; *Atlantic, etc. R. Co. v. Campbell*, 4 Ohio St. 553, 64 Am. Dec. 607; *Cleveland, etc. R. Co. v. Ball*, 5 Ohio St. 568; *Richardson v. Northrup*, 66 Barb. 85; *Thompson v. Dickhart*, id. 601; *Green v. Plank*, 48 N. Y. 669; *Whitmore v. Bowman*, 4 G. Greene. 148; *Norman v. Wells*, 17 Wend. 136; *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 251; *Doff v. Lyon*, 1 E. D. Smith, 536; *Evansville, etc. R. Co. v. Fitzpatrick*, 10 Ind. 129; *Armstrong v. Smith*, 44 Barb. 120; *Simons v. Monier*, 29 id. 419; *Gilbert v. Cherry*, 57 Ga. 128; *Montgomery, etc. R. Co. v. Varner*, 19 Ala. 185; *Stein v. Burden*, 24 id. 130, 60 Am. Dec. 453; *Decker v. Myers*, 31 How. Pr. 372; *Bass Furnace Co. v. Glascock*, 82 Ala. 452, 60 Am. Rep. 748, 2 So. Rep. 315; *Chandler v. Bush*, 84 Ala. 102; *Young v. Cureton*, 87 id. 737; *L. R., M. R. & T. R. v.*

Haynes, 47 Ark. 497; *Montelius v. Atherton*, 6 Colo. 224; *Central R. v. Senn*, 73 Ga. 705; *Stewart v. Lanier House Co.*, 75 id. 582; *Hurt v. St. Louis, etc. R. Co.*, 94 Mo. 225, 4 Am. St. 374, 7 S. W. Rep. 1; *White v. Stoner*, 18 Mo. App. 540; *Wakeman v. Wheeler & W. Manuf. Co.*, 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. Rep. 264; *Reed v. McConnel*, 101 N. Y. 270, 4 N. E. Rep. 718; *Houston, etc. R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808; *Bain v. Cushman*, 60 Vt. 343, 15 Atl. Rep. 171; *B. & M. R. Co. v. Schluntz*, 14 Neb. 421, 16 N. W. Rep. 439; *Same v. Beebe*, 14 Neb. 463, 16 N. W. Rep. 747.

The admission of opinions as to the amount of damages will not be cause for reversing a judgment if it is clear that the jury were not governed by them. *Huling v. Henderson*, 161 Pa. 553, 29 Atl. Rep. 276.

¹ *Dougherty v. Stewart*, 43 Iowa, 648.

² *White Deer Creek Imp. Co. v. Sassaman*, 67 Pa. 415; *Haymaker v. Adams*, 61 Mo. App. 581; *Eyerman v. Sheehan*, 52 Mo. 323; *Dent v. South Bound R. Co.*, 61 S. C. 329, 39 S. E. Rep. 527 (damage done to land by fire).

³ *Vandine v. Burpee*, 13 Met. 288.

⁴ *Razzo v. Varni*, 81 Cal. 80, 23 Pac. Rep. 848; *Chicago, etc. R. Co. v. Schaffer*, 26 Ill. App. 184.

it is stated has been said to be correct, but it does not extend so far as to preclude the plaintiff in an action for the breach of a contract to furnish telephone service from testifying to what the service would have been worth to him if it had been furnished.¹ Qualified witnesses may testify as to the damage done a fire-proof safe by reason of having holes punched in it.² A witness who is familiar with the use and value of a wagon and harness may testify as to the damage done them, the inquiry being directed as to the cost of making repairs.³ In some jurisdictions witnesses are not permitted to give opinions as to the amount of damage sustained by taking land under condemnation proceedings; they are restricted to giving estimates of its value before and after it was taken or injured;⁴ in others such opinions are received.⁵ A recent work on Evi-

¹ *Zabel v. New State Telephone Co.*, 127 Mich. 402, 86 N. W. Rep. 949.

² *Diebold Safe & Lock Co. v. Holt*, 4 Okl. 479, 46 Pac. Rep. 512.

³ *Sallee v. St. Louis*, 152 Mo. 615, 54 S. W. Rep. 463.

⁴ *Union Elevator Co. v. Kansas City Suburban Belt R. Co.*, 135 Mo. 353, 36 S. W. Rep. 1071; *Doyle v. Manhattan R. Co.*, 128 N. Y. 488, 28 N. E. Rep. 495; *Charman v. Hibbler*, 31 App. Div. 477, 52 N. Y. Supp. 212; *Richardson v. Webster City*, 111 Iowa, 427, 82 N. W. Rep. 920; *Roberts v. New York E. R. Co.*, 128 N. Y. 455, 28 N. E. Rep. 486. 13 L. R. A. 499; *Alabama, etc. R. Co. v. Burkett*, 43 Ala. 83; *Brunswick, etc. R. Co. v. McLaren*, 47 Ga. 546; *Hagaman v. Moore*, 84 Ind. 496; *Harrison v. Iowa, etc. R. Co.*, 36 Iowa, 323; *Ottawa, etc. R. Co. v. Adolph*, 41 Kan. 600, 21 Pac. Rep. 643; *Grand Rapids v. Grand Rapids & I. R. Co.*, 58 Mich. 641, 26 N. W. Rep. 159; *Atlantic, etc. R. Co. v. Campbell*, 4 Ohio St. 583, 64 Am. Dec. 607; *Brown v. Providence, etc. R. Co.*, 12 R. I. 238; *Goodwine v. Evans*, 134 Ind. 262, 33 N. E. Rep. 1031; *Elwood Planing Mills Co. v.*

Harting, 21 Ind. App. 408, 52 N. E. Rep. 621.

A witness who has testified to the value of land before and after an injury was done it may give his opinion as to the *quantum* of damages. *Railway Co. v. Combs*, 51 Ark. 324, 11 S. W. Rep. 418.

⁵ *Minnesota Belt Line R. & T. Co. v. Gluck*, 46 Minn. 463, 48 N. W. Rep. 194; *Ironton Land Co. v. Butchart*, 73 Minn. 39, 75 N. W. Rep. 749; *Schuler v. Board of Supervisors*, 12 S. D. 460, 81 N. W. Rep. 890; *Texas & St. Louis R. Co. v. Kirby*, 44 Ark. 103; *Washburn v. Milwaukee, etc. R. Co.*, 59 Wis. 364, 18 N. W. Rep. 431; *Dawson v. Pittsburgh*, 159 Pa. 317, 28 Atl. Rep. 171; *Tucker v. Massachusetts Central R.*, 118 Mass. 546; *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 290; *Spear v. Drainage Com'rs*, 113 id. 632; *Portland & R. R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784, 2 Atl. Rep. 670; *Sherman v. St. Paul, etc. R. Co.*, 30 Minn. 227, 15 N. W. Rep. 239; *Telephone & Tel. Co. v. Forke*, 2 Tex. App. Civil Cas. 318; *Railroad Co. v. Foreman*, 24 W. Va. 662; *Snyder v. Western Union R. Co.*, 25 Wis. 60; *White Deer Creek Imp. Co. v. Sassa-*

dence says that the weight of authority sanctions the more reasonable rule that opinions as to damages in condemnation cases should be received in evidence. These decisions are based upon the reasoning that, inasmuch as the amount of damages in such proceedings depends entirely upon opinions as to the value before and after the condemnation, and as these opinions are competent, it can make no material difference whether the witness gives his opinion as to the amount of damages at once or whether he is allowed simply to state to the jury his opinion as to values from which the opinion as to damages must necessarily follow by the process of substraction. The tendency of the later decisions seems to be in favor of this rule.¹ Expert evidence is not competent to show the damages resulting to a horse from its having run away, no wound or physical injury following;² but such evidence has been held proper to show the damage done a horse by poisoning.³ In an action to recover for personal injuries the question for the jury is the sum which will compensate the plaintiff therefor, which question depends upon the severity and extent of such injuries. Hence, unless the nature of the case requires it, physicians cannot characterize the injuries as serious or trivial, but must give the facts and opinions based thereon.⁴

§ 445. **Proof of value.** Proof of value is important in the great majority of cases. If the value in question is general, and there is a market value, the latter governs.⁵ The proof

man, 67 Pa. 415; Rochester & S. R. Co. v. Budlong, 6 How. Pr. 467, 10 id. 289; Hine v. New York E. R. Co., 36 Hun, 293.

¹ 1 Jones, § 390.

² Van Wagoner v. New York Cement Co., 36 Hun, 552. Compare Donnelly v. Fitch, 136 Mass. 558.

The qualities of a horse are as much matter of value as his strength or action, and if they are impaired by the wrongful conduct of a party the owner is entitled to compensation therefor. English v. Missouri Pacific R. Co., 73 Mo. App. 232.

³ Coyle v. Baum, 3 Okl. 695, 41 Pac. Rep. 359.

⁴ Stoothoff v. Brooklyn Heights R. Co., 50 App. Div. 585, 64 N. Y. Supp. 243.

⁵ Beaty v. Johnston, 66 Ark. 529, 52 S. W. Rep. 129; Watson v. Loughran, 112 Ga. 837, 38 S. E. Rep. 82; C. C. C. etc. R. Co. v. McKelvey, 12 Ohio Ct. Ct. 426; Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Graham v. Maitland, 6 Abb. Pr. (N. S.) 327; Berry v. Dwinel, 44 Mo. 255; Muller v. Eno, 14 N. Y. 597; McCarty v. Quimby, 12 Kan. 494; Smith v. Griffith, 3 Ill. 333, 38 Am. Dec. 639; Pfeil v. Kemper, 3 Wis. 315; Stevens v. Springer, 23 Mo. App. 375.

of it is not altogether by opinions; it is capable of proof as a fact in many cases. Many staple commodities and articles of merchandise are very definitely classified, and a multitude of transactions fix a standard of values every day, which are the prices paid and received for them. When the value of such property is in question a witness must exercise judgment and give his opinion as to the class to which the property belongs; but the current or market price of that class at a given time and place is a matter of fact. A witness who can by his special knowledge classify the property, and who is also acquainted with the current market price, may be asked in a single question what in his opinion is its market value; or he may testify alone to the market value, or alone to its quality, and [796] how it should be classified.¹ In such cases the market price is so precise that witnesses may be allowed to give their opinion of the value of an article described, though not seen. And so in any case when the subject to be valued can be stated hypothetically.² A witness may testify to market prices from hearsay, for in the nature of things a knowledge of them must be so gained.³

Where the question is, what was the value at a particular place, and there was no market value there, proof may be given of such value at other places, with the cost of transportation, or other facts which will enable the jury to deduce the value at the place in question.⁴ Evidence of the value at other places

¹ *Washington Ice Co. v. Webster*, 68 Me. 449; *Whitbeck v. New York Central R. Co.*, 36 Barb. 644; *Miller v. Smith*, 112 Mass. 470; *Beecher v. Denniston*, 13 Gray, 354; *McCollum v. Seward*, 62 N. Y. 316; *Mercer v. Vose*, 67 N. Y. 56; *Browne v. Moore*, 32 Mich. 254; *Shepherd v. Willis*, 19 Ohio, 142; *Todd v. Warner*, 48 How. Pr. 234.

² *Id.*; *Whiton v. Snyder*, 88 N. Y. 299. See *Toledo, etc. R. Co. v. Smith*, 25 Ind. 288.

³ *Whitney v. Thacher*, 117 Mass. 523; *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202; *Lush v. Druse*, 4 Wend. 313; *Stone v. Covell*, 29 Mich. 359; *Cliquot's Champagne*, 3 Wall.

114; *Sisson v. Cleveland, etc. R. Co.*, 14 Mich. 489; *Cleveland, etc. R. Co. v. Perkins*, 17 Mich. 296; *Savercool v. Farwell*, *id.* 308; 1 Whart. on Ev., § 449; *Thatcher v. Kancher*, 2 Colo. 698; *Texas & Pacific R. Co. v. Donovan*, 86 Tex. 378, 25 S. W. Rep. 10.

⁴ *Eddy v. Lafayette*, 1 C. C. A. 441, 49 Fed. Rep. 807; *Harris v. Panama R. Co.*, 58 N. Y. 660; *Washington Ice Co. v. Webster*, 68 Me. 449; *Berry v. Dwinel*, 44 Me. 255; *Hanson v. Lawson*, 19 Kan. 201; *Young v. Lloyd*, 65 Pa. 199; *Eaton v. Mellus*, 7 Gray, 566; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Wemple v. Stewart*, 22 Barb. 154; *Sellar v. Clelland*, 2 Colo. 532; *Gregory v. McDowel*, 8 Wend. 435;

than that in question is inadmissible where the evidence is clear that there is a value at that place.¹ But to exclude evidence of the price elsewhere, it should appear that like property had been bought and sold at the place in question in the way of trade in sufficient quantity or often enough to show a market value.² To some extent the proof of values at other places is within the discretion of the court,³ though the [797] value is to be fixed at a particular time; yet, where the damages depend upon the market value of merchandise, such, for instance, as cotton, the law contemplates the range of the entire market, and the average of prices thus found running

Dubois v. Glaub, 52 Pa. 238; Williamson v. Dillon, 1 Har. & G. 444; Cleveland, etc. R. Co. v. Perkins, 17 Mich. 296; Marshall v. New York Central R. Co., 45 Barb. 502; Savercool v. Farwell, 17 Mich. 308; Diefendorff v. Gage, 7 Barb. 18; Kansas Stock Yard Co. v. Couch, 12 Kan. 612; Grand Tower Co. v. Phillips, 23 Wall. 471; Coxe v. England, 65 Pa. 212; Toledo, etc. R. Co. v. Kickler, 51 Ill. 157; Hill v. Canfield, 56 Pa. 454.

¹Gregory v. McDowel, 8 Wend. 435; Wemple v. Stewart, 22 Barb. 154; McCarty v. Quimby, 12 Kan. 494; Durst v. Burton, 47 N. Y. 167, 7 Am. Rep. 428.

²Harris v. Panama R. Co., 58 N. Y. 660; Pacific Exp. Co. v. Lothrop, 20 Tex. Civ. App. 339, 49 S. W. Rep. 898, quoting the text.

³Durst v. Burton, *supra*. This was an action for fraud in the sale of cheese, which, by the terms of the contract, was purchased to be forwarded to and sold in New York. After the plaintiffs had proven its value in New York the defendants offered to prove that cheese was shipped and sold by plaintiffs in the London market at a certain price, and that the cheese market in New York was regulated and controlled mainly by the prices in London and Liverpool. The trial court having

excluded this evidence, the decision was affirmed. Church, C. J., said: "Where the evidence is clear and explicit that there is a market at the place of delivery, the value at other places is not strictly competent. 8 Wend. 435. Nor was it material whether the plaintiff actually realized more or less, because the result of his final disposition of it might be produced by contingencies entirely foreign to the principle upon which the rule rests. The only possible relevancy of the proposed proof was its legitimate bearing upon the value of the cheese in New York on the 11th day of August; and a majority of the court think it was properly rejected for the reasons: First, that there was explicit proof of the value of the cheese in New York. Second, the evidence offered tended not to prove the value at that time, but a considerable period afterwards. Third, the offer should have negatived any material change in the price up to the time of the sale in London, and should have embraced the circumstances, if they existed, which, presumptively at least, would repel the idea of any claim for reclamation." Lowell v. County Com'rs, 116 Mass. 403, 16 N. E. Rep. 8; Raridan v. Central Iowa R. Co., 69 Iowa, 527, 29 N. W. Rep. 599.

through a reasonable period of time,¹ so that sudden, unnatural and spasmodic values, not indicating the real state of the market, may not prevail.² Where the price or value at the time in question cannot be directly proved it may be inferred from [798] circumstances; and among those which may be proved are sales at other times near that date, especially if the property is such as bears a stable, rather than a fluctuating, price.³ Where the property to be valued cannot be definitely graded, and, therefore, is not susceptible of valuation by a precise market standard, but being property which is frequently bought and sold, has, in some sort, a market value, there is more scope for testimony which is matter of opinion in the proof of value.⁴

¹ *Graham v. Maitland*, 6 Abb. Pr. (N. S.) 327; *Smith v. Griffith*, 3 Hill, 333, 38 Am. Dec. 639.

² *Durst v. Burton*, 47 N. Y. 167, 7 Am. Rep. 423; *Kansas Stock Yard Co. v. Couch*, 12 Kan. 612; *Cronouse v. Fitch*, 14 Abb. Pr. 346. See *Wilson v. Holden*, 16 Abb. Pr. 133; § 642.

In *Trout v. Kennedy*, 47 Pa. 387, the court held it not erroneous to instruct the jury that "it is not allowable for one to trespass upon the rights of another, and in his defense allege that there was no market for the property taken or destroyed, or that it was of less value on this account than it had been before or was subsequently." The language must be taken with the context. So far as any rule for the measurement of damages was stated, it was that the plaintiff was entitled to the just and full value of the property. If, at the time of the trespass, the market was depressed, the jury were told that too much importance was not to be given to that fact. The owner might have intended to keep the property for a better market, or have designed it for his own use. And a trespasser is to have meted out to him in damages an assessment commensurate with the injury he has done. If, at any particular time,

there be no market demand for an article, it is not, of course, on that account, of no value. What a thing will bring in the market at a given time is, perhaps, the measure of its value then, but it is not the only one."

³ *Denton v. Smith*, 61 Mich. 431, 28 N. W. Rep. 160; *White v. Concord R. Co.*, 30 N. H. 188; *Benham v. Dunbar*, 103 Mass. 365; *Abell v. Munson*, 18 Mich. 306; *Roberts v. Dunn*, 71 Ill. 46; *Columbia Bridge Co. v. Geisse*, 38 N. J. L. 39; *French v. Piper*, 43 N. H. 439; *Waterson v. Seat*, 10 Fla. 326; *Campbell v. United States*, 8 Ct. of Cls. 240; *Cohen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339, 49 S. W. Rep. 898, quoting the text.

Courts will notice the usual manner in which general commercial business is carried on, and that in the purchase of grain the purchaser, as a rule, is governed by the last available quotations. *Nash v. Classen*, 163 Ill. 409, 45 N. E. Rep. 276.

⁴ *Illinois Central R. Co. v. Le Blanc*, 74 Miss. 626, 645, 21 So. Rep. 748, quoting the text. In the case cited it was held incompetent to prove the value of gravel taken from the plaintiff's land by offers made to buy it; that testimony of prices paid

The market value of city lots is established by showing the price at which they were sold, though at the time of sale there was an unusual local flurry in real estate.¹ If an article has a market value, fixed by the trade, as between a retailer and his customers, testimony as to the cost price between the manufacturer or wholesale dealer and the retailer is not competent on the question of its retail value; that must be measured by the retail market price.² If property destroyed was bought a short time before its loss, the price paid may be shown as tending to fix its market value.³ The last tax return made by the plaintiff as to the value of animals wrongfully killed is admissible as a circumstance for the jury to consider.⁴ The value of a large tract of land cannot be proven by evidence as to what it will bring when cut up into small farms. The sale in small quantities involves expense, and does not afford a sufficiently accurate basis for determining the value of the whole tract.⁵

§ 446. *Same subject; opinions.* Except in New Hampshire⁶ it is competent to prove the value of property by the opinions of witnesses who have the requisite knowledge. A witness who swears to a knowledge of horses from having kept and dealt in them for a number of years, and that he is acquainted with the horse in question, is competent to give an opinion of its value.⁷ So one acquainted with real estate, the worth of which is in dispute, may give his opinion of its value.⁸ The market or selling value of land being in question, the opinion of a geological expert, not made known so as to affect people's estimate of its value, that there is valuable stone beneath the

for gravel spread upon the streets, it not appearing what it cost to put it there, was incompetent, but that it would be otherwise if the cost of putting it there was shown.

¹ *Johnson v. McMullin*, 3 Wyo. 237, 21 Pac. Rep. 701, 4 L. R. A. 670.

² *Kittle v. Huntley*, 67 Hun. 617, 12 N. Y. Supp. 519.

³ *Southern R. Co. v. Tharp*, 101 Ga. 569, 30 S. E. Rep. 795; *Luse v. Jones*, 39 N. J. L. 707.

⁴ *Jacksonville, etc. R. Co. v. Jones*, 34 Fla. 286, 15 So. Rep. 924.

⁵ *Silliman v. Gano*, 90 Tex. 637, 39 S. W. Rep. 559.

⁶ *Rochester v. Chester*, 3 N. H. 349; *Peterborough v. Jeffrey*, 6 id. 462; *Whipple v. Walpole*, 10 id. 130; *Beard v. Kirk*, 11 id. 397; *Hoitt v. Moulton*, 21 id. 586.

⁷ *Bowers v. Horen*, 93 Mich. 420, 53 N. W. Rep. 535, 32 Am. St. 513, 17 L. R. A. 733; *McDonald v. Christie*, 42 Barb. 36; *Haskell v. Mitchell*, 53 Me. 468; *Vandine v. Burpee*, 13 Met. 288.

⁸ *Shaw v. Charlestown*, 2 Gray. 107; *Clark v. Baird*, 9 N. Y. 183; *Whitman v. Boston, etc. R. Co.*, 7 Allen, 313; *Kellogg v. Krauser*, 14 S. & R. 137, 16 Am. Dec. 480; *Snow v. Boston, etc. R. Co.*, 65 Me. 230; *Ohio, etc.*

surface, is not admissible.¹ The courts are not agreed whether, in cases where the amount of the recovery depends upon the difference in the value of land in its present condition, and what it would be worth under different circumstances — such as the location of a railroad or a street or a highway over it — the opinions of witnesses qualified to speak upon the subject are admissible in evidence as to what the land would be worth in its changed condition. The affirmative is maintained in an Oregon case with considerable ability and reference to numerous authorities.² There are cases elsewhere in harmony with this view.³ The opposing view is held by a majority of the New York court of appeals.⁴ Any person knowing the real estate in question and its value may testify thereto. The witness is not required to be, or to have been, engaged in buying and selling such property.⁵ Every one is supposed to have some idea of the value of such property as is in general use; as was said in one case, it is not necessary to have been a butcher or drover to prove the value of a cow.⁶ An operator in coal mines who knows the thickness of a vein of coal, its

R. Co. v. Taylor, 27 Ill. 207; La Fayette, etc. R. Co. v. Winslow, 66 Ill. 219; Kankakee & S. R. Co. v. Horan, 131 Ill. 288.

¹ Roussain v. Norton, 53 Minn. 560, 55 N. W. Rep. 747.

² Blagen v. Thompson, 23 Ore. 239, 31 Pac. Rep. 647, 18 L. R. A. 315.

³ Yost v. Conroy, 92 Ind. 464, 47 Am. Rep. 156, disapproving Hagaman v. Moore, 84 Mo. 497, and Baltimore, etc. R. Co. v. Johnson, 59 id. 480; Snow v. Boston & M. R., 65 Me. 230.

⁴ Roberts v. New York E. R. Co., 148 N. Y. 455, 28 N. E. Rep. 486, 13 L. R. A. 499, following the doctrine of earlier local cases.

⁵ Matthews v. Missouri Pacific R. Co., 142 Mo. 645, 44 S. W. Rep. 802; Cooley v. Kansas City, etc. R. Co., 149 Mo. 487, 51 S. W. Rep. 101; Gorman v. Park, 40 C. C. A. 537, 100 Fed. Rep. 553; Lafayette v. Nagle, 113 Ind. 425, 15 N. E. Rep. 1; White v.

Hermann, 51 Ill. 243, 99 Am. Dec. 543; Browne v. Moore, 32 Mich. 254.

A person who has frequently priced and bought articles similar to those whose value is in question and knows, in a general way, what their value is, may testify respecting it. Langdon v. Wintersteen, 58 Neb. 278, 78 N. W. Rep. 501.

An expert may testify, in answer to a hypothetical question, as to the value of a crop. Huber v. Beck, 6 Ind. App. 484, 32 N. E. Rep. 1025; Gulf, etc. R. Co. v. Simonton, 2 Tex. Civ. App. 558, 22 S. W. Rep. 285. And that a diseased stallion may transmit his disease. Fitzgerald v. Evans, 49 Minn. 541, 52 N. W. Rep. 143.

⁶ Parmelee v. Raymond, 43 Ill. App. 609; Ohio, etc. R. Co. v. Irvin, 27 Ill. 178; Brill v. Flagler, 23 Wend. 354; Pennsylvania, etc. R. Co. v. Bunnell, 81 Pa. 414.

convenience to transportation facilities and market, may approximately estimate the value of a lease of the land for mining purposes.¹ A farmer may give his opinion as to the value of a crop at the time it was destroyed, and state the facts upon which it was based.² To a large extent value in a business sense consists of the opinions of persons familiar with the market, and these are based upon what is said and reported by others. Hence if a person shows that his business is such that, by commercial reports or like means, he is familiar with the current market prices, he is competent to testify on the subject although he may not have actual personal knowledge of any particular sales.³

In an action to recover compensation for services, witnesses acquainted with their value in the vicinity in which they were rendered may give their opinions thereof;⁴ and so in action by a husband to recover for the negligent killing of his wife.⁵ The value of services requiring the exercise of professional or [799] artistic skill may be proved by common usage; that is, what is the usual or customary rate of compensation.⁶ Attorneys

¹ *Chambers v. Brown*, 69 Iowa, 213, 28 N. W. Rep. 561.

² *Railway Co. v. Lyman*, 57 Ark. 512, 22 S. W. Rep. 170.

³ *Hudson v. Northern Pacific R. Co.*, 92 Iowa, 231, 60 N. W. Rep. 608, 54 Am. St. 550; *Peter v. Thickstun*, 51 Mich. 589, 17 N. W. Rep. 68; *Texas Central R. Co. v. Fisher*, 18 Tex. Civ. App. 78, 43 S. W. Rep. 584; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548, 43 N. W. Rep. 476.

It is held in Massachusetts that whenever the value of any particular kind of property, which may not be presumed to be within the actual knowledge of all juries, is in issue, the testimony of witnesses acquainted with the value of similar property is admissible, although they have never seen the very property in question. *Miller v. Smith*, 112 Mass. 475; *Beecher v. Denniston*, 13 Gray, 354; *Fitchburg R. Co. v. Freeman*, 12 Gray, 401, 74 Am. Dec. 600; *Brady v.*

Brady, 8 Allen, 101; *Cornell v. Dean*, 105 Mass. 435; *Lawton v. Chase*, 108 Mass. 238. But see *Westlake v. St. Lawrence Ins. Co.*, 14 Barb. 206.

It is held in *Fairley v. Smith*, 87 N. C. 367, 42 Am. Rep. 522, that a witness cannot be permitted to testify to knowledge of the market value of a commodity in a distant city if his information is solely derived from reading the market reports in a paper published at a point remote from such city.

⁴ *Nickerson v. Spindell*, 164 Mass. 25, 41 N. E. Rep. 105; *Lewis v. Trickey*, 20 Barb. 387; *Hough v. Cook*, 69 Ill. 581; *Parker v. Parker*, 33 Ala. 459; *Kendall v. May*, 10 Allen, 59.

⁵ *Nelson v. Lake Shore, etc. R. Co.*, 104 Mich. 582, 62 N. W. Rep. 933.

⁶ *Pfeil v. Kemper*, 3 Wis. 215; *Tibbets v. Haskins*, 16 Me. 283; *Elfelt v. Smith*, 1 Minn. 125.

and solicitors are entitled to have allowed them for their professional services what they reasonably deserve, having due reference to the nature of the service, and their standing in the profession for learning, skill and proficiency; and for the purpose of aiding the jury in determining the matter it is proper to receive evidence as to the price usually charged and received for similar services by other persons of the same profession, practicing in the same court,¹ and the opinions of those in the same profession as to their value.² A witness who is an attorney, and who knows the service performed by another, is competent to testify as to its value. It is proper, in such a case, to take into consideration the amount in controversy, the legal questions involved, and the general importance of the case. But what one attorney receives is no criterion of the value of the services of another attorney in the same case in the absence of any showing that the services were similar, the skill equal, and the time spent the same.³ Proof of what was paid for professional services is no evidence of their value as against a third person.⁴

§ 447. Same subject; actual sales. Evidence of actual sales of other similar property to that in question may be shown.⁵ It is competent to prove the value of other like property by which the property in question may be compared.⁶ It

¹ *Stanton v. Embrey*, 93 U. S. 548; *Vilas v. Downer*, 21 Vt. 419.

When a lawyer is employed professionally to take entire charge of matters involving at the same time professional and non-professional services, it is not possible to draw a line and say that his whole employment is not professional. *Kelley v. Richardson*, 69 Mich. 430, 37 N. W. Rep. 514. See *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. Rep. 499.

² *Thompson v. Boyle*, 85 Pa. 477; *Williams v. Brown*, 28 Ohio St. 547; *Covey v. Campbell*, 52 Ind. 157; *Lamoure v. Carol*, 4 Denio, 370; *Hart v. Vidal*, 6 Cal. 56; *Cate v. Hutchinson*, 58 Neb. 232, 78 N. W. Rep. 500.

Opinions as to the value of an attorney's services are not to preclude

the jury from exercising their "own knowledge and ideas" on the subject. *Head v. Hargrave*, 105 U. S. 45; *Forsyth v. Doolittle*, 120 U. S. 73, 7 Sup. Ct. Rep. 408; *The Conqueror*, 166 U. S. 110, 131, 133, 17 Sup. Ct. Rep. 510.

³ *Ottawa University v. Parkinson*, 14 Kan. 159; *Same v. Welsh*, 14 Kan. 164.

⁴ *Allen v. Harris*, 113 Ga. 107, 38 S. E. Rep. 322.

⁵ *Bowdish v. Page*, 81 Hun, 170, 30 N. Y. Supp. 691; *Paine v. Boston*, 4 Allen, 168; *Gilpin v. Consequa*, 3 Wash. C. C. 184; *Truitt v. Baird*, 12 Kan. 420.

⁶ *Illinois Central R. Co. v. Le Blanc*, 74 Miss. 626, 645, 21 So. Rep. 748, quoting the text; *Blanchard v. New*

was held in an Illinois case,¹ in an action to recover damages for the breach of a contract to convey land, that the plaintiff in order to show the value of the premises in controversy might prove, not only the worth of other adjacent property at or near the date of such contract, but even the value of land of a different quality lying in the immediate vicinity, leaving [800] it to the jury to determine the difference in value.² No hard and fast rule can be laid down determining just what degree of similarity must exist in order to make proof of sales of land competent. If there is a general similarity in location, character and adaptability to use, and the sales occurred about the time the value is to be fixed, the proof is admissible, and it is for the jury to determine from all the facts surrounding such other property and sales how far these tend to show the value of the property in question.³

The market value of a commercial commodity may be determined by offers to sell, made by dealers in the ordinary course of business, as well as by actual sales; and the statements of dealers in answer to inquiries as to price are competent evidence.⁴ An offer of sale made by the owner of property, otherwise than by way of compromise, may be considered as evidence of value.⁵ The value at which a stock of goods may be sold at retail, standing alone, does not afford a basis for fixing their market value, which is what they could have been promptly sold for in bulk or in convenient lots. Between the prices at which goods may be obtained in a market and at which they may be sold at retail in the same place intervene

Jersey S. B. Co., 59 N. Y. 292; *Simmons v. Carvill*, 68 Mo. 416. But see *Gouge v. Roberts*, 53 N. Y. 616.

¹ *White v. Hermann*, 51 Ill. 243; *Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339, 49 S. W. Rep. 898.

² It is not competent for a defendant in condemnation proceedings to show what other persons have been allowed for their property in order to establish the value of his by comparison. *Springfield v. Schmook*, 68 Mo. 394.

³ *Dady v. Condit*, 104 Ill. App. 597, citing *Culbertson & Blair Packing &*

Provision Co. v. Chicago, 111 Ill. 651.

⁴ *Republican Newspaper Co. v. Northwestern Associated Press*, 2 C. C. A. 282, 51 Fed. Rep. 377; *Harrison v. Glover*, 72 N. Y. 451; *Stevens v. Springer*, 23 Mo. App. 375.

⁵ *Springfield v. Schmook*, 68 Mo. 394.

An offer to compromise a claim for the use of chattels is not to be considered in determining the fair value of their use. *Sipp v. Siegel-Cooper Co.*, 23 N. Y. Misc. 141, 50 N. Y. Supp. 678.

time, expense and profit, unknown quantities, in the absence of proof.¹ The market reports of such newspapers as are relied upon by the commercial world may be given in evidence.² The credit to be given to them depends upon extrinsic evidence; and in New York they are not admissible without proof as to the sources from which the information they purport to give is derived.³ The prices obtained for goods sold at auction may be proved as tending to show their fair actual value. The competency of such testimony does not depend upon the form, mode or particular terms of the contract of sale, though these may have a material bearing on the weight to be given it as affecting the price, and as indicating the value of the property.⁴ But prices so obtained will not be conclusive evidence as to the damages for the wrongful attachment of goods.⁵ The net proceeds of the sale of an article made at a distance from the place of its manufacture may be shown, it appearing that it was manufactured to be sold there.⁶

§ 448. Same subject; elements of value. Property concerning which no proof of value in the market can be given,

¹ *Needham Piano & Organ Co. v. Hollingsworth*, 91 Tex. 49, 40 S. W. Rep. 787.

² *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489; *Peter v. Thickstun*, 51 id. 589, 17 N. W. Rep. 68; *Fairley v. Smith*, 87 N. C. 367, 42 Am. Rep. 522; *Nash v. Classen*, 163 Ill. 409, 45 N. E. Rep. 276, 55 Ill. App. 356; *Henkle v. Smith*, 21 Ill. 238.

³ *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202.

In *Wildes v. Robinson*, 50 App. Div. 192, 63 N. Y. Supp. 811, the breach of a contract for the purchase of stock took place in New York city. It did not appear that any dealings in the stock in question were had there between the time of the making of the contract and the time fixed for its performance. It was shown that seventy-one was for bid for the stock in Philadelphia on the day the contract was made. It was held by a majority of the court that

such bid was not evidence of the value of the stock, there being no testimony to show the circumstances under which the bid was made, or whether it was made in the open market on the floor of the stock exchange under conditions warranting the conclusion that the person to whom the bid was made had the stock for sale, or that the bidder was in a situation to buy it.

⁴ *Sanford v. Peck*, 63 Conn. 486, 27 Atl. Rep. 1057; *Kent v. Whitney*, 9 Allen, 62, 85 Am. Dec. 739; *Campbell v. Woodworth*, 20 N. Y. 499; *Hutchinson v. Poyer*, 78 Mich. 340, 44 N. W. Rep. 327; *Baker v. Seavey*, 163 Mass. 522, 40 N. E. Rep. 863, 47 Am. St. 475; *Ford v. Smith*, 27 Wis. 261; *Roberts v. Dunn*, 71 Ill. 46 (execution sale).

⁵ *Carey v. Dyer*, 97 Wis. 554, 73 N. W. Rep. 29.

⁶ *French v. Piper*, 45 N. H. 439.

because it is not brought into the course of trade and is incapable of any estimate in that mode, is often the subject of legal valuation. In such cases the value is to be ascertained from such elements of value as the property represents, among which may be the cost of producing a manufactured article.¹ Where there was a breach of contract to convey a plant for the manufacture of rubber, consisting of a lot, buildings and machinery, and the plant was without a market value because like property had not been bought and sold to such an extent as to establish a price for it, and the value depended largely upon its location and condition, regard must be had to its nature, kind, original cost, earning value and condition at the time when its value is to be fixed. Evidence on these points may be supplemented by the testimony of experts familiar with the value of the property and accustomed to form judgments as to its value. The question of value is not to be determined by considering the separate elements of which the property is composed, but by taking it as a whole, where it is, regard being had for the purpose for which it was intended and for which it is to be used.²

In an action by the assignee against the assignor of a claim upon the United States, assigned to the plaintiff in payment for goods sold in California just before its annexation to the United States, and which the plaintiff had been prevented by the defendant's acts from collecting, evidence of the first cost of the goods in the United States, the expense of transporting them to California, the duties there, and the usual and proper addition for profits, and also of sales of like articles for cash during three or four months before and after the sale, and that the plaintiff within two months afterwards repurchased some of the same goods for cash at advanced rates, was held admissible in connection with other evidence of the market value of the goods at that time and place.³ In this case Dewey, J., said: "We are to remember that these sales were made in California in 1847, when the state of things was very different from that of the present time, and when the

¹ *Ruppel v. Adrian Furniture Manuf. Co.*, 96 Mich. 455, 55 N. W. Rep. 995; *Perlberger v. Grell*, 77 App. Div. 128, 78 N. Y. Supp. 1038. ² *Sloan v. Bard*, 12 App. Div. 481, 42 N. Y. Supp. 38, affirmed, 162 N. Y. Rep. 752. ³ *Eaton v. Mellus*, 7 Gray, 566.

market value of merchandise could not be settled as easily and satisfactorily as it could in New York and Boston. Under the circumstances of this case, we think the verdict should not be set aside on account of the admission of this evidence. It might have some tendency to aid in settling the market value of such property at that distant and uncertain market. . . . Such evidence as was admitted, in the present case, could only be used in aid of the other evidence in the case, or resorted to from peculiar circumstances, as in a case where no market value could be shown directly. It might be of very little weight, but we do not think that the verdict should be set aside for its admission." When the property has no market value, proof may be made of such facts as exist tending to show value or to aid the jury in estimating it. The [801] cost of manufacturing a raw article for and transporting it to market may properly be inquired into.¹ When, however, it appears that a manufactured article has an established market value, evidence as to the cost of the material and of the manufacture is irrelevant and inadmissible.² In an action for the conversion of forty of the San Francisco W. W. Co.'s bonds of \$500 each, claimed by plaintiff to have been purchased by the defendant as agent for him, which bonds did not express in what kind of money they were to be paid, and which were purchased by the defendant with his own funds at more than their face in currency, it appeared that the company received gold for its water dues; that gold continued in use in California during the period involved, and that payments and contracts were made in and on the basis of gold; that bonds of this issue were not bought and sold in the market, but that money was borrowed upon them as collateral at par in gold. The plaintiff offered to show that they were paid in gold; this evidence was rejected. The court directed a verdict for nominal damages, stating, in substance, that the legal tender acts substantially made \$100 in greenbacks worth \$100 in gold. Held error, that said acts did not affect the question as to the value of chattels in an action for their conversion; nor did they forbid the recognition of the difference

¹ *Briz-see v. Maybee*, 21 Wend. 144;
Masterton v. Mayor, 7 Hill, 61.

² *Althouse v. Alvord*, 28 Wis. 577.

between gold and currency in fixing the damages in such an action; the evidence was sufficient to require the submission of that question to the jury.¹

Witnesses qualified by knowledge may testify to the state of the market with reference to the property in question, the large or small supply, the price at which sales were made; and these are all proper subjects for the consideration of the jury.² It has been held that where there have been no actual sales of an article, a witness may give his opinion of its value.³ [802] So if there is no near market.⁴ Where a span of horses was sold with a warranty that they were all right for a livery team, and it appeared that one was with foal, evidence was offered in respect to its difference in value on that account; and the court held that, there being no market value, a witness could not be asked to give his opinion of a mare in that condition for livery purposes, and her value if not in that condition, and then give his opinion as to the difference in value.⁵ The cost of property may be shown, though the market value was higher when it was bought than when the loss occurred. The difference in the cost and the depreciation in value by use and natural causes may be established by the defendant.⁶ The pedigree of an animal which has no market value at the place in question may be shown as an aid in fixing its value.⁷ If stocks have no market value their value may be proved by showing the value of the property and business of the corporation as compared with its liabilities at the time in question.⁸

¹ *Simpkins v. Low*, 54 N. Y. 179.

² *Washington Ice Co. v. Webster*, 68 Me. 449.

³ *Simpkins v. Low*, 49 Barb. 382; *Erd v. Chicago, etc. R. Co.*, 41 Wis. 65; *Whitfield v. Whitfield*, 40 Miss. 352; *Anson v. Dwight*, 18 Iowa, 241; *Rogers v. Ackerman*, 22 Barb. 134; *Watson v. Bauer*, 4 Abb. Pr. (N. S.) 273; *Derby v. Gallup*, 5 Minn. 119; *Nellis v. McCarn*, 35 Barb. 115; *Robertson v. Knapp*, 35 N. Y. 91; *Lanning v. Chicago, etc. R. Co.*, 68 Iowa, 592, 27 N. W. Rep. 478; *St. Louis, etc. R. Co. v. Chapman*, 38 Kan. 307, 5 Am. St. 744, 16 Pac. Rep. 695.

⁴ *Burger v. Northern Pacific R. Co.*, 22 Minn. 343.

⁵ *Whitney v. Taylor*, 54 Barb. 536.

⁶ *Mouat Lumber Co. v. Wilmore*, 15 Colo. 136, 25 Pac. Rep. 556; *Matthews v. Missouri Pacific R. Co.*, 142 Mo. 645, 666, 44 S. W. Rep. 802. *Contra*, *Houston, etc. R. Co. v. Red Cross Stock Farm*, 22 Tex. Civ. App. 414, 53 S. W. Rep. 834.

⁷ *Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339, 49 S. W. Rep. 898. See § 449.

⁸ *Beatty v. Johnston*, 66 Ark. 529, 52 S. W. Rep. 129.

§ 449. **Proof of the value of dogs.** Courts generally favor the view that there is such a species of property in dogs as will support a civil action for their injury or loss.¹ Farmers who have knowledge of the characteristics and qualities of a shepherd dog, chiefly valuable for his ability to herd cattle and horses, may testify to the value of such an animal to a farmer who keeps stock. This rule is not inapplicable because the dog had no market value.² This is contrary to the view several times declared by the supreme court of New York, which limits the proof concerning value to testimony as to the particular qualities and properties of the animal.³ It is said that dogs in general have no market value, and their price is fanciful, depending on the taste of the owner; that in order to justify opinions as to their value they must be such in particular as have a market value.⁴ But in Illinois it was held in trespass for killing a dog that it could not be assumed as matter of law that dogs have no commercial value; that it was a question of fact; that an instruction was wrong that the jury should find the value of the dog from its qualities, rather than from the opinions of witnesses who placed their estimate on the loss of services of the dog for a given time; the jury have a right to consider both in fixing its value.⁵ In determining the value of a dog a jury may take into account common knowledge and observation about the habits and qualities of dogs, and evidence of pedigree may be received, though it is based on hearsay.⁶ The value of a dog for breeding purposes may be proved by the breeding and characteristics of her dam, the

¹ *Salley v. Manchester & A. R. Co.*, 54 S. C. 481, 32 S. E. Rep. 526, 71 Am. St. 810, and cases cited, and note to *Graham v. Smith*, 40 L. R. A. 503; *Johnson v. McConnell*, 80 Cal. 545, 22 Pac. Rep. 219; *State v. McDuffie*, 34 N. H. 523, 69 Am. Dec. 516. See *Sentell v. New Orleans & C. R. Co.*, 166 U. S. 698, 17 Sup. Ct. Rep. 693; *Hamby v. Samson*, 105 Iowa, 112, 67 Am. St. 285, and note, 74 N. W. Rep. 918.

² *Bowers v. Horen*, 93 Mich. 420, 53 N. W. Rep. 535, 32 Am. St. 513, 17 L. R. A. 773.

³ *Dunlap v. Snyder*, 17 Barb. 561, overruling *Brill v. Flagler*, 23 Wend. 354; *Brown v. Hoburger*, 52 Barb. 15; *Smith v. Griswold*, 15 Hun, 273.

⁴ *Brown v. Hoburger*, 52 Barb. 15. See *Cantling v. Hannibal, etc. R. Co.*, 54 Mo. 385, 14 Am. Rep. 476; *Mobile & O. R. Co. v. Holliday*, 79 Miss. 294, 30 So. Rep. 820.

⁵ *Spray v. Ammerman*, 66 Ill. 309.

⁶ *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 45 S. W. Rep. 790, 66 Am. St. 754, 40 L. R. A. 518; *Hodges v. Causey*, 77 Miss. 353, 26 So. Rep. 945.

elements constituting her value and the value of her sire and dam.¹

§ 450. **Witnesses to value may be asked grounds of opinions.** A witness who has given his opinion of value, or upon any other matter of common experience and observation, may be asked in his examination in chief to state the grounds of his opinion.² If the party calling a witness to testify as to the damages does not ask for the grounds or reasons of his opinion, and the cross-examination does not cover that ground, the appellate court will not heed an objection on that account.³

§ 451. **Physical examination of plaintiff.** A large majority of the courts which have passed upon the question hold that in a suit to recover for personal injuries the trial court may exercise its discretion by making an order requiring the plaintiff to submit to a physical examination by surgeons or physicians for the purpose of enabling them to testify concerning the nature and extent of the injuries sustained.⁴ This rule has been thus vindicated: We are aware that there are some eminent authorities to the contrary, but with all due deference to them, we cannot avoid thinking that they base their conclusion upon a fallacious and somewhat sentimental line of argument as to the inviolability and sacredness of a man's

¹ *Winchell v. National Exp. Co.*, 64 Vt. 15, 23 Atl. Rep. 728.

² *Dickinson v. Fitchburg*, 13 Gray, 546; *Hatton v. Board of Com'rs*, 55 Ind. 194; *Tate v. Missouri, etc. R. Co.*, 64 Mo. 149; *Carpenter v. Robinson*, 1 Holmes, 67; *Jones v. Merrimack R. L. Co.*, 31 N. H. 381; *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481; *Mahoney v. Ashton*, 4 Har. & McH. 63; *Goodwyn v. Goodwyn*, 20 Ga. 600; *Dickinson v. Barber*, 9 Mass. 225; *Doe v. Reagan*, 5 Blackf. 217, 33 Am. Dec. 466; *Wilson v. McClean*, 1 Cranch C. C. 465; *Bank of Columbia v. McKenny*, 3 id. 361; *Gentry v. McMinis*, 3 Dana, 382; *Morse v. Crawford*, 17 Vt. 499, 44 Am. Dec. 349; *Crawford v. Andrews*, 6 Ga. 244; *Royall v. McKenzie*, 25 Ala. 263; *Sherman v. Blodgett*, 23 Vt. 149; *Riggins v.*

Brown, 12 Ga. 271; *Dunham's Appeal*, 27 Conn. 192; *Choice v. State*, 31 Ga. 424.

³ *Razzo v. Varni*, 81 Cal. 289, 22 Pac. Rep. 848.

⁴ *Belt Electric Line Co. v. Allen*, 102 Ky. 551, 44 S. W. Rep. 89; *Wanek v. Winona*, 78 Minn. 98, 80 N. W. Rep. 851, 46 L. R. A. 448; *Demenstein v. Richardson*, 2 Pa. Dist. Rep. 825 (1893); (*contra*, *Kunsman v. Harris*, 6 Northampton Co. Rep. 230 — 1896; *Lawrence v. Keim*, 19 Phila. 351 (1887); *Atchison, etc. R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *Schroeder v. Chicago, etc. R. Co.*, 47 Iowa, 375; *White v. Milwaukee City R. Co.*, 61 Wis. 536, 21 N. W. Rep. 524; *Miami & M. Turnpike Co. v. Paily*, 37 Ohio St. 104; *Shepard v. Missouri Pacific R. Co.*, 85 Mo. 629, 55 Am.

own person, and his right to its possession and control free from all restraint or interference of others. This, rightly understood, is all true, but his right to the possession and control of his person is no more sacred than the cause of justice. When a man appeals to the state for justice, tendering an issue as to his own physical condition, he impliedly consents in advance to the doing justice to the other party, and to make any disclosure which is necessary to be made in order that justice may be done. No one claims that he can be compelled to submit to such an examination; but he must either do so or have his action dismissed.¹ If a complete examination of the plaintiff will require the administration of anæsthetics the order may be refused.² In Arkansas the defendant has a right to such examination if the expert evidence is not abundant, in which case the exercise of the court's discretion will not be reviewed.³ If a male plaintiff alleges that his injuries are permanent there is no abuse of discretion in requiring him to submit to an examination of his person by medical experts at his home.⁴ It was at first held in Texas that, if the right exists, the courts will not enforce it unless it is shown to be essential to the accomplishment of justice between the parties.⁵ In later cases there is a more distinct recognition of the right. Where the plaintiff exhibited her injured limbs to the jury and offered testimony to the effect that she would never be able to wear artificial limbs, it was error to refuse the defendant's request

Rep. 390, qualifying *Lloyd v. Railroad*, 53 Mo. 629; *Alabama, etc. R. Co. v. Hill*, 90 Ala. 71, 9 L. R. A. 442, 24 Am. St. 764, 8 So. Rep. 90, 93 Ala. 515, 30 Am. St. 61, 9 So. Rep. 722; *Owens v. Kansas City, etc. R. Co.*, 95 Mo. 169, 6 Am. St. 39, 8 S. W. Rep. 350; *Stuart v. Havens*, 17 Neb. 211, 22 N. W. Rep. 419; *Richmond & D. R. Co. v. Childress*, 82 Ga. 719, 14 Am. St. 189, 9 S. E. Rep. 602, 3 L. R. A. 808; *Ottawa v. Gilliland*, 63 Kan. 165, 65 Pac. Rep. 252, 88 Am. St. 232; *Aske v. Duluth & I. R. R. Co.*, 83 Minn. 197, 85 N. W. Rep. 1011; *Lane v. Spokane Falls & N. R. Co.*, 21 Wash. 119, 51 Pac. Rep. 367, 46 L. R. A. 153, 75 Am. St. 821; *Brown v. Chi-*

cago, etc. R. Co., — N. D. —, 95 N. W. Rep. 153.

¹ *Wanek v. Winona*, 78 Minn. 98, 80 N. W. Rep. 851, 46 L. R. A. 448; *Brown v. Chicago, etc. R. Co.*, *supra*.

² *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. Rep. 616.

³ *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584.

⁴ *Railway Co. v. Dobbins*, 60 Ark. 481, 30 S. W. Rep. 887, 31 id. 147.

⁵ *International & G. N. R. v. Underwood*, 64 Tex. 463.

The existence of the power seems to be denied in *Gulf, etc. R. Co. v. Pendery*, 14 Tex. Civ. App. 60, 36 S. W. Rep. 793.

to allow experts of its own choice to examine the plaintiff and give their opinions as to the practicability of the use of artificial limbs.¹ In Nebraska if the application is made during the trial and it is sought to have the examination made by experts called by the defendant alone, and not by those which may be mutually agreed upon or selected by the court, it may be denied.²

The Illinois supreme court denies the existence of the power to order such an examination,³ at least where it is not shown that the examination was to obtain evidence for use upon the trial, the statement being that it was desired for the purpose of ascertaining the facts. It must also be shown that there was a necessity for such examination.⁴ The existence of the right has been negatived by the New York court of appeals, the Massachusetts court, the Delaware court,⁵ and the United States supreme court, the question being considered by the latter solely from the view-point of the power of the federal courts under the federal constitution and laws.⁶ The Indiana court was in harmony with the courts last referred to in its

¹ Chicago, etc. R. Co. v. Langston, 19 Tex. Civ. App. 568, 47 S. W. Rep. 1027, 92 Tex. 709, 50 S. W. Rep. 574, 51 id. 331; Haynes v. Trenton, 108 Mo. 123, 27 S. W. Rep. 622.

² Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 20 N. W. Rep. 860; Stuart v. Havens, 17 Neb. 211, 22 N. W. Rep. 419.

³ Parker v. Enslow, 102 Ill. 272; Peoria, etc. R. Co. v. Rice, 144 Ill. 227, 33 N. E. Rep. 951.

⁴ St. Louis Bridge Co. v. Miller, 138 Ill. 465, 28 N. E. Rep. 1091.

⁵ McGuigan v. Delaware, etc. R. Co., 129 N. Y. 50, 26 Am. St. 507, 29 N. E. Rep. 235, 14 L. R. A. 466; Stack v. New York, etc. R. Co., 177 Mass. 155, 58 N. E. Rep. 686, 52 L. R. A. 328, 83 Am. St. 269; Mills v. Wilmington City R. Co., 1 Marvel, 269, 40 Atl. Rep. 1114.

Previous to the decision by the court of appeals the New York authorities were in conflict; the exist-

ence of the power was affirmed in Walsh v. Sayre, 58 How. Pr. 334 (the original case on the subject), and denied in Newman v. Third Avenue R. Co., 50 N. Y. Super. Ct. 412, and in Roberts v. Ogdensburgh R. Co., 29 Hun. 155.

A statute enacted in 1893 provides for such examinations. It has been held valid, but does not authorize an order directing an examination apart from or independent of an examination of the plaintiff as a witness before trial. Lyon v. Manhattan R. Co., 142 N. Y. 298, 37 N. E. Rep. 113, 25 L. R. A. 402; Neill v. Brooklyn E. R. Co., 13 N. Y. Misc. 403, 34 N. Y. Supp. 1144.

⁶ Union Pacific R. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. Rep. 1000; Illinois Central R. Co. v. Griffin, 25 C. C. A. 413, 80 Fed. Rep. 278 (whether the application is made before or during the trial).

first conclusion,¹ but has recently changed its position.² In the province of Ontario a statute regulates the compulsory examination of plaintiffs in personal injury actions. Prior to its enactment there was no power to order such examination.³ In Kansas it is said that inasmuch as the exercise of the power to order an examination trenches closely upon an invasion of private rights, it should be exercised with great caution, and only where it is necessary to the ends of justice. The application for the order should be timely made and be granted upon a proper showing, and the examination should be had under the control and direction of the court by persons of its selection.⁴ And in Washington that the discretion of the trial court in acting upon applications for examinations of plaintiffs is wide and will not be interfered with when the sense of delicacy of the plaintiff may be offended by the exhibition or where the testimony would be merely cumulative, or the necessities of the case do not demand it.⁵ The application may be denied if it is first made during the progress of the trial.⁶ The examination cannot be compelled by any court; the plaintiff may submit to it if he is ordered to do so; if he refuses the court may dismiss his action.⁷ If the plaintiff has been examined by physicians representing the defendant and they concur with other physicians in the opinion that he is badly injured, the discretion of the court in denying an application for a further examination will not be interfered with.⁸

§ 452. Exhibition of injured parts and means of injury. In order to show the extent of their disability or suffering plaintiffs in suits to recover for personal injuries may exhibit to the jury their wounds or injured limbs;⁹ but this will

¹ *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. Rep. 860.

² *South Bend v. Turner*, 156 Ind. 418, 60 N. E. Rep. 271, 83 Am. St. 200.

³ *Reily v. City of London*, 14 Prac. Rep. 171; *Sornberger v. Canadian Pacific R. Co.*, 24 Ont. App. 263.

⁴ *Southern Kansas R. Co. v. Michaels*, 57 Kan. 474, 46 Pac. Rep. 938; *Marler v. Springfield*, 65 Mo. App. 301.

⁵ *Smith v. Spokane*, 16 Wash. 403, 47 Pac. Rep. 888; *Graves v. Battle*

Creek, 95 Mich. 266, 54 N. W. Rep. 757, 35 Am. St. 561, 19 L. R. A. 641.

⁶ *Myrberg v. Baltimore & S. Mining & R. Co.*, 25 Wash. 364, 65 Pac. Rep. 539.

⁷ *Miami & M. Turnpike Co. v. Baily*, 37 Ohio St. 104.

⁸ *Louisville & N. R. Co. v. McClain*, 23 Ky. L. Rep. 1878, 66 S. W. Rep. 391.

⁹ *O'Neill Manuf. Co. v. Pruitt*, 110 Ga. 577, 36 S. E. Rep. 59; *Swift v. O'Neill*, 88 Ill. App. 162; *Citizens' Street R. Co. v. Willooby*, 134 Ind.

- not be permitted if a disclosure of the private part of the body is necessary.¹ In such a case examination should be made by experts and testimony given by them concerning it.² If it is claimed that an incurable disease of the hip joint and curvature of the spine were caused by the injuries a physician may exhibit the plaintiff to the jury and place him in different attitudes in order to enable them to determine the extent of his disability.³ Allowing the plaintiff to exhibit her actual condition to the jury by lying on a lounge, with her physician attending her, when her testimony was taken, and allowing her daughter to weep, are not grounds for reversing a judgment in her favor.⁴ The right to exhibit an injured limb is not to be denied the plaintiff because she was young, handsome and attractive.⁵

The Ontario court of appeal has followed the courts of the states on this subject, saying that in England there is a strange silence upon it; only one case is to be found, which is merely noted in the Times newspaper of the 15th of February, 1891, and not reported, wherein Mr. Justice Wright refused at *visi prius* to permit a wound to be shown to the jury. But the exhibition of injuries which had happened to another person, for

563, 33 N. E. Rep. 627; *Laes v. Everard's Breweries*, 61 App. Div. 431, 70 N. Y. Supp. 672; *Union Pacific R. Co. v. Botsford*, 141 U. S. 250, 255, 11 Sup. Ct. Rep. 1000; *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370; *Packet Co. v. Hobbs*, 105 Tenn. 29, 58 S. W. Rep. 278; *Jackson v. Wells*, 13 Tex. Civ. App. 275, 35 S. W. Rep. 528; *Carrico v. West Virginia, etc. R. Co.*, 39 W. Va. 86, 19 S. E. Rep. 571, 24 L. R. A. 50; *Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. Rep. 892; *Graves v. Battle Creek*, 95 Mich. 266, 51 N. W. Rep. 757, 19 L. R. A. 641, 35 Am. St. 561; *King v. State*, 100 Ala. 851, 14 So. Rep. 878; *Hall v. Manson*, 99 Iowa, 698, 34 L. R. A. 297, 68 N. W. Rep. 922; *Schroeder v. Chicago, etc. R. Co.*, 47 Iowa, 375, 382; *Barker v. Perry*, 67 id. 146, 25 N. W. Rep. 109; *Osborne v. Detroit*, 32 Fed. Rep. 36; *Jordan v. Bowen*, 46

N. Y. Super. Ct. 355; *Hiller v. Sharon Springs*, 28 Hun, 344; *Hatfield v. St. Paul & D. R. Co.*, 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. Rep. 176; *Faire v. Manderscheid*, — Iowa, —, 90 N. W. Rep. 76 (exhibition of husband's injuries in suit by wife under civil damage law); *Perry v. Metropolitan Street R. Co.*, 68 App. Div. 351, 74 N. Y. Supp. 1; *Orscheln v. Scott*, 90 Mo. App. 352, 365.

¹ See § 451.

² *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582.

³ *Citizens' Street R. Co. v. Willooby*, 131 Ind. 563, 33 N. E. Rep. 627.

⁴ *Selleck v. Jamesville*, 100 Wis. 157, 75 N. W. Rep. 975, 41 L. R. A. 563, 69 Am. St. 906; *Sherwood v. Sioux Falls*, 10 S. D. 405, 73 N. W. Rep. 913.

⁵ *Omhka Street R. Co. v. Emminger*, 57 Neb. 240, 77 N. W. Rep. 675.

the purpose of contradicting evidence given on behalf of the plaintiff in an action for bodily injuries, was held improper unless their nature was shown, and even then the reviewing court doubted whether it would be otherwise, "for the breaking and healing of one man's leg cannot afford much evidential light upon the breaking and healing of another man's, *i. e.* the plaintiff's, which is the real subject of investigation." In this case the plaintiff was permitted to show the injured part for the purpose of having it examined by a jury, the court directing that no conclusion was to be drawn from its appearance.¹ In an action to recover damages for malpractice the plaintiff was allowed to exhibit his leg, apparently for another purpose than that the jury might see it, quite unconnected with the medical evidence of its condition, which was undisputed; the jury were not warned not to draw any inference of negligence from its appearance. It seemed to the court that this was a course which the defendant might well complain of, and that it was calculated to prejudice him extremely with the jury. "The difference between a deliberate and studied exhibition of this kind, and the casual and necessary view which a jury must have of parts of the body always exposed to view, hardly needs to be emphasized."²

In an action by a father to recover damages resulting from an injury to his child from the discharge of a pistol there was no error in permitting the physician who operated on the child to exhibit to the jury an eye which was removed as the result of the injury, the bullet which inflicted the injury, and a piece of bone which was removed in extracting the bullet.³ Though the rule permits the exhibition of an amputated foot, it will not be given effect when the legitimate purpose for which it may be done is slight, and the strong tendency is to work improper and illegitimate results.⁴ A court is not bound to make a personal inspection of the plaintiff in order to determine a dispute between the opposing medical experts.⁵ If an injury to the kidneys is claimed to have been sustained by

¹ Sornberger v. Canadian Pacific R. Co., 24 Ont. App. 263.

² Laughlin v. Harvey, 24 Ont. App. 428.

³ Seltzer v. Saxton, 71 Ill. App. 229.

⁴ Rost v. Brooklyn Heights R. Co., 10 App. Div. 477, 41 N. Y. Supp. 1069.

⁵ French v. Brooklyn Heights R. Co., 57 App. Div. 204, 68 N. Y. Supp. 287.

the plaintiff he may be required to produce a specimen of his urine in court for examination and analysis.¹ The existence of the power to compel the plaintiff to exhibit the injured part of his body to the jury has been denied in Delaware.²

§ 453. **Expressions of sufferer.** Subject to limitations, the natural utterances and expressions made by an injured person, either to his attending physicians or others, are proper matters for proof whenever the physical or mental condition of such person is a pertinent subject of inquiry.³ But declarations of the party injured, made some time after the injury, to the effect that he suffers, if not made to a physician for professional attendance cannot be proven.⁴ The general rule does not extend to the mere narration of past symptoms or descriptive statements which furnish no evidence of the existence of suffering

¹ *Cleveland, etc. R. Co. v. Huddleston*, 151 Ind. 540, 46 N. E. Rep. 678, 36 L. R. A. 681.

² *Mills v. Wilmington City R. Co.*, 1 Marvel, 269, 40 Atl. Rep. 1114. See § 451.

³ *Broyles v. Prisock*, 97 Ga. 643, 25 S. E. Rep. 389; *West Chicago Street R. Co. v. Carr*, 170 Ill. 478, 483, 48 N. E. Rep. 992; *Island Coal Co. v. Risher*, 13 Ind. App. 98, 40 N. E. Rep. 158; *Huntington v. Burke*, 21 Ind. App. 655, 52 N. E. Rep. 415 (including declarations of existing pain made long after the injury, which was claimed to be permanent); *Lacas v. Detroit City R. Co.*, 92 Mich. 412, 52 N. W. Rep. 745; *Will v. Mendon*, 108 Mich. 251, 66 N. W. Rep. 58; *Williams v. Great Northern R. Co.*, 68 Minn. 55, 70 N. W. Rep. 860; *Edlund v. St. Paul City R. Co.*, 78 Minn. 434, 81 N. W. Rep. 211; *Omaha Street R. Co. v. Emminger*, 57 Neb. 240, 77 N. W. Rep. 675; *Link v. Sheldon*, 136 N. Y. 1, 32 N. E. Rep. 696; *McCready v. Staten Island Electric R. Co.*, 51 App. Div. 338, 64 N. Y. Supp. 996; *Bennett v. Northern Pacific R. Co.*, 2 N. D. 112, 49 N. W. Rep. 400, 13 L. R. A. 465; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. Rep. 287 (complaints made to physicians are not inadmis-

sible because they were consulted with a view to their becoming witnesses in the suit brought to recover for the injuries sustained; but in Wisconsin it is otherwise if the physician to whom the complaints were made examined the plaintiff solely for the purpose of testifying as an expert, *Abbot v. Heath*, 84 Wis. 314, 54 N. W. Rep. 574; *Cicero, etc. Street R. Co. v. Priest*, 190 Ill. 592, 60 N. E. Rep. 814; *Northern Pacific R. Co. v. Urlin*, 158 U. S. 271, 15 Sup. Ct. Rep. 840; *Western U. Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. 148, 7 So. Rep. 419; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138, 52 Am. Rep. 653, 1 N. E. Rep. 364; *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. Rep. 298; *Bridge v. Oshkosh*, 71 Wis. 363, 37 N. W. Rep. 409; *Bacon v. Charlton*, 7 Cush. 586; *Hatch v. Fuller*, 131 Mass. 574; *Insurance Co. v. Mosley*, 8 Wall. 397, 405; *Martin v. Sherwood*, 74 Conn. 475, 51 Atl. Rep. 526; *State v. Dart*, 29 Conn. 153, 76 Am. Dec. 596.

⁴ *Roche v. Brooklyn City & N. R. Co.*, 105 N. Y. 291, 11 N. E. Rep. 630, 59 Am. Rep. 506; *Athlanta Street R. Co. v. Walker*, 93 Ga. 462, 21 S. E. Rep. 48; *Donohue v. Brooklyn, etc. R. Co.*, 53 App. Div. 348, 65 N. Y. Supp. 634.

except the assertion of the party.¹ Neither is it to be extended so as to include statements which are not part of the *res gestæ*, or are not made to a physician during treatment, or upon an examination prior to and without reference to the bringing of an action to recover damages for the injury complained of, unless the examination should be made at the instance of the defendant with a view to the trial. Hence, where a physician who made an examination shortly before the trial was asked whether the plaintiff then suffered, his answer that she told him she did was mere hearsay.² This is scarcely harmonizable with the rule in Massachusetts, in which the attending physician testified that the plaintiff had told him he could not get his arm up. This testimony was held to be properly admitted. "The statement made by the plaintiff purported to be a description of his symptoms at the time it was made, and not a narration of something that was past, and it may fairly be inferred that it was made for the purpose of medical advice and treatment. At any rate, it was only a day or two before, or possibly during, the trial. It does not appear that such is not the case."³ This case has been quoted from with approval and its rule applied by the supreme court of the United States.⁴

§ 454. **Photographs.** Stereoscopic views and photographs of damaged premises and injured persons, if taken soon after the injury complained of occurred, and properly verified as to their correctness, are admissible to show their condition,⁵ and

¹ Williams v. Great Northern R. Co., 68 Minn. 55, 70 N. W. Rep. 860; Edlund v. St. Paul City R. Co., 78 Minn. 434, 81 N. W. Rep. 214; Keller v. Gilman, 93 Wis. 9, 66 N. W. Rep. 800; Martin v. Sherwood, 74 Conn. 475, 51 Atl. Rep. 526.

² West Chicago Street R. Co. v. Carr, 170 Ill. 478, 48 N. E. Rep. 992.

³ Fleming v. Springfield, 154 Mass. 529, 29 N. E. Rep. 910, 26 Am. St. 268. See Martin v. Sherwood. *supra*.

⁴ Northern Pacific R. Co. v. Urlin, 158 U. S. 271, 15 Sup. Ct. Rep. 840.

⁵ Chicago & A. R. Co. v. Myers, 86 Ill. App. 401; People's Gas Light & Coke Co. v. Amphlett, 93 id. 194; Dorsey v. Habersack, 84 Md. 117, 35 Atl.

Rep. 96; Alberti v. New York, etc. R. Co., 118 N. Y. 77, 23 N. E. Rep. 35, 6 L. R. A. 765; Cooper v. St. Paul City R. Co., 54 Minn. 379, 56 N. W. Rep. 42; Machine Co. v. Compress Co., 105 Tenn. 187, 58 S. W. Rep. 270; German Theological School v. Dubuque, 64 Iowa, 736, 17 N. W. Rep. 153; Cozzens v. Higgins, 1 Abb. App. Dec. 451; Reddin v. Gates, 52 Iowa, 210, 2 N. W. Rep. 1089.

Verification is essential, and is a question for the court. Goldsboro v. Central R. Co., 60 N. J. L. 49, 37 Atl. Rep. 433; Blair v. Pelham, 118 Mass. 420; Baustian v. Young, 152 Mo. 317, 53 S. W. Rep. 926. It should include care and accuracy in taking the pho-

also to illustrate a defect in a highway.¹ Photographic negatives taken by the Roentgen process and showing the shape and size of a broken bone at different times during the course of its treatment, or the condition of the internal tissues of the body, are competent as evidence in an action for malpractice, and in actions to recover for personal injuries generally.² A plaintiff will not be required to submit his neck to be photographed by the use of the Roentgen or X-rays, in order to ascertain the nature of his injuries, unless the application is seasonably made, and it is shown that the person by whom it was proposed the photograph should be taken had the requisite skill to use the rays properly.³ In an action to recover for the death of a child a photograph taken two years prior thereto, the child then being five years old, is admissible to show its physical development at the time of death, and the probabilities of future growth and development.⁴ Photographs are inadmissible if the original can be exhibited to the jury, unless they are used to aid in identifying some writing or in detecting a forgery. It has been held, with some hesitation, that a photograph of an injured limb, the plaintiff being in court, was not improperly allowed to be taken to the jury room, the condition of the limb being described substantially as shown by

tograph offered, and its relevancy to the issue. Error in permitting reference to a photograph which has not been properly verified is cured by a subsequent verification made on its being formally introduced in evidence. *Beardslee v. Columbia*, 188 Pa. 496, 68 Am. St. 883, 41 Atl. Rep. 617. It need not be made by the photographer; it may be made by any one competent to speak from personal observation. *McGar v. Bristol*, 71 Conn. 652, 42 Atl. Rep. 1000.

¹ *Baustian v. Young*, 152 Mo. 317, 53 S. W. Rep. 921; *Lake Erie & W. R. Co. v. Wilson*, 189 Ill. 89, 59 N. E. Rep. 573; *Blair v. Pelham*, 118 Mass. 420; *Barker v. Perry*, 67 Iowa, 146, 25 N. W. Rep. 160.

A photograph of the place of an accident in a highway is admissible

although not taken until after changes have been made in the highway if proof of the nature of the changes between the time of the accident and the time of photographing be made. *Beardslee v. Columbia*, 188 Pa. 496, 41 Atl. Rep. 617, 68 Am. St. 883.

² *Tish v. Welker*, 5 Ohio Dec. 725; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. Rep. 445; *De Forge v. New York*, etc. R. Co., 178 Mass. 59, 59 N. E. Rep. 669; *Manch v. Hartford*, 112 Wis. 40, 87 N. W. Rep. 816; *Jameson v. Weld*, 93 Me. 345, 45 Atl. Rep. 299; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. Rep. 445; *Geneva v. Burnett*, — Neb. —, 91 N. W. Rep. 275.

³ *Wittenberg v. Onsgard*, 78 Minn. 342, 81 N. W. Rep. 14, 47 L. R. A. 141.

⁴ *Taylor et al. R. Co. v. Warner*, 88 Tex. 642, 32 S. W. Rep. 868.

the photograph, and no request being made to permit a view of the original.¹ This ruling was followed by another to the effect that there must be a substantial, legitimate reason for the use of photographs in order to show the degree of physical disablement. If they are not substantially necessary or instructive to show material facts or conditions, and are of such a character as to arouse sympathy or indignation, or divert the minds of the jury to improper or irrelevant considerations, they should be excluded.² It is "grossly improper" and a "defilement of the proceedings in a court of justice" to receive in evidence photographs showing rear views of the person of the plaintiff, a young female, nude from below the shoulders to mid-thigh.³

§ 455. **Life and annuity tables.** Standard life and annuity tables are generally admissible in evidence to show the expectancy of life where there is a permanent injury completely destroying the earning power of the party injured, and to prove the probable duration of life. They are not to be accepted as forming a legal basis for a calculation, but as evidence to be considered in connection with all the other evidence upon the question.⁴ In Georgia such tables are not admissible in an

¹ *Baxter v. Chicago, etc. R. Co.*, 104 Wis. 307, 80 N. W. Rep. 644.

² *Selleck v. Janesville*, 104 Wis. 570, 80 N. W. Rep. 944, 76 Am. St. 892, 47 L. R. A. 691.

³ *Guhl v. Whitcomb*, 109 Wis. 69, 85 N. W. Rep. 142.

⁴ *Huntington v. Burke*, 21 Ind. App. 655, 52 N. E. Rep. 415; *Allen v. Ames College R. Co.*, 106 Iowa, 602, 76 N. W. Rep. 848; *Greer v. Louisville & N. R. Co.*, 94 Ky. 169, 21 S. W. Rep. 649, 42 Am. St. 345; *Rooney v. New York, etc. R. Co.*, 173 Mass. 223, 53 N. E. Rep. 435 (indicating that the value of such tables in cases of personal injuries is not large); *Harrison v. Sutter Street R. Co.*, 116 Cal. 156, 47 Pac. Rep. 1019; *Nelson v. Lake Shore, etc. R. Co.*, 104 Mich. 582, 62 N. W. Rep. 993; *Friend v. Ingersoll*, 39 Neb. 717, 58 N. W. Rep. 281; *Camden & A. R. Co. v. Williams*, 61 N. J.

L. 646, 40 Atl. Rep. 634; *Steinbrunner v. Pittsburgh, etc. R. Co.*, 146 Pa. 504, 28 Am. St. 806, 23 Atl. Rep. 239 (a case which is said in the New Jersey case cited to contain a very satisfactory exposition of the legitimate use of the Carlisle tables as applied to actions for injuries resulting in death); *Morrison v. McAtee*, 23 Ore. 530, 32 Pac. Rep. 400; *Knapp v. Sioux City & P. R. Co.*, 71 Iowa, 41, 32 N. W. Rep. 18, overruling *Simonson v. Chicago, etc. R. Co.*, 49 Iowa, 87; *Texas M. R. Co. v. Douglass*, 69 Tex. 694, 7 S. W. Rep. 77; *Lincoln v. Smith*, 28 Neb. 762, 45 N. W. Rep. 41; *Berg v. Chicago, etc. R. Co.*, 50 Wis. 427, 7 N. W. Rep. 347; *Mulcairus v. Janesville*, 67 Wis. 24, 29 N. W. Rep. 565; *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. Rep. 298; *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. Rep. 1; *Sauter v. New York Cen-*

action to recover for permanent personal injury unless evidence has been received as to the capacity of the plaintiff to earn money.¹ And in Pennsylvania annuity tables are not admissible in actions for personal injuries, because based on the average anticipation of death, without taking account of capacity to work, indolence, vicious habits, or a tendency thereto, or diminution of ability to earn.² The rule is otherwise in Wisconsin.³ In Michigan mortality tables are not admissible in an action for personal injuries unless these are of a permanent character.⁴ Neither are they admissible in an action to recover for the breach of a contract of employment, the term of which was during the continuance of the satisfactoriness of the service.⁵

SECTION 5.

VERDICT AND JUDGMENT.

§ 456. Deliberations of the jury; quotient verdicts. [803]

So far as the amount of the verdict depends upon opinion the jurors are to determine it upon their own judgment. They should proceed upon the description of the subject as they find it from the testimony, and avail themselves of such aid as is afforded by the opinions of witnesses allowed to be given them. They are not obliged, however, to yield their own judgment, and should not conform their verdict to such opinions. Their finding may be more or less in amount than that stated by any witness.⁶

tral R. Co., 66 N. Y. 50, 23 Am. Rep. 18; Central R. v. Crosby, 74 Ga. 737, 58 Am. Rep. 463; *Hinn v. Michigan Central R. Co.*, 78 Mich. 513, 44 N. W. Rep. 502, 7 L. R. A. 500; *Cooper v. Lake Shore, etc. R. Co.*, 66 Mich. 261, 11 Am. St. 482, 33 N. W. Rep. 306; *Galveston, etc. R. Co. v. Johnson*, 24 Tex. Civ. App. 180, 58 S. W. Rep. 622. See § 1251.

In *Shippen's Appeal*, 80 Pa. 391, it was ruled that the Carlisle tables were not to be relied upon in estimating the value of an estate by the curtesy; each case must be determined by its own circumstances. They are only admissible when the age of the person whose rights are

in question is within the computation contained in them. *Rajnowski v. Detroit, etc. R. Co.*, 74 Mich. 20, 41 N. W. Rep. 819.

¹ *Macon, etc. R. Co. v. Moore*, 99 Ga. 229, 25 S. E. Rep. 460.

² *Kerrigan v. Pennsylvania R. Co.*, 194 Pa. 98, 44 Atl. Rep. 1069.

³ *Crouse v. Chicago, etc. R. Co.*, 102 Wis. 196, 78 N. W. Rep. 446, 778.

⁴ *Leach v. Detroit Electric R.*, 125 Mich. 373, 84 N. W. Rep. 316; *Poster v. Bellaire*, 127 Mich. 13, 86 N. W. Rep. 383.

⁵ *Sax v. Detroit, etc. R. Co.*, 125 Mich. 252, 84 N. W. Rep. 314.

⁶ *Thompson v. De Weese Dye Ditch & Reservoir Co.*, 25 Colo. 244,

They will not vitiate their verdict by taking an arithmetical average of their several estimates as an experiment to ascertain their present judgments, or as a basis of their further consideration of the case.¹ But it will be a violation of their [804] duty and afford cause for setting aside their verdict if they agree before taking such average to adopt it as their verdict, and determine the amount accordingly,² or arrive at it by any game or process of chance.³ When a verdict is arrived at by such means there is not a concurrence of views by that intelligent discussion and consideration of the merits of the case which the law enjoins. Every verdict should be the result of reflection, and not the effect of chance or lot. Jurors being

53 Pac. Rep. 507; Consolidated Ice Machine Co. v. Trenton Hygeian Ice Co., 57 Fed. Rep. 898; Western & A. R. Co. v. Brown, 58 Ga. 534; Harvey v. Boswell, 65 id. 550; Brewer v. Tyrringham, 12 Pick. 547.

¹ Ferguson v. Moore, 98 Tenn. 342, 39 S. W. Rep. 341; Luft v. Lingane, 17 R. I. 420, 22 Atl. Rep. 942; Columbus v. Ogletree, 102 Ga. 293, 29 S. E. Rep. 749; Ponca v. Crawford, 23 Neb. 662, 8 Am. St. 144, 37 N. W. Rep. 609; Parshall v. Minneapolis, etc. R. Co., 35 Fed. Rep. 649; McMurdock v. Kimberlin, 23 Mo. App. 523; Willey v. Belfast, 61 Me. 569; Hunt v. Elliott, 77 Cal. 588, 20 Pac. Rep. 132; Kinsley v. Morse, 40 Kan. 588, 20 Pac. Rep. 217; Deppe v. Chicago, etc. R. Co., 38 Iowa, 592; Barton v. Holmes, 16 id. 252; St. Louis, etc. R. Co. v. Myrtle, 51 Ind. 566; Guard v. Risk, 11 id. 156; Kreider's Estate, 18 Pa. 374; White v. White, 5 Rawle, 61; Harvey v. Rickett, 15 Johns. 87; Grinnell v. Phillips, 1 Mass. 530; Dorn v. Fenno, 12 Pick. 521; Dunn v. Hall, 8 Blackf. 32; Pekin v. Winkel, 77 Ill. 56; Hendrickson v. Kingsbury, 21 Iowa, 379; Davis v. Pryor, 3 Ind. Ty. 396, 58 S. W. Rep. 660.

²Id.; Haight v. Hoyt, 50 Conn. 583; East Tennessee, etc. R. Co. v. Winters, 85 Tenn. 240, 1 S. W. Rep.

790; Illinois Central R. Co. v. Able, 59 Ill. 131; Parkham v. Harney, 6 Sm. & M. 55; Smith v. Chatham, 3 Caines, 57; Boynton v. Trumbull, 45 N. H. 408; Manix v. Malony, 7 Iowa, 81; Barton v. Holmes, 16 id. 252; Thompson v. Perkins, 26 id. 486; Thomas v. Dickinson, 12 N. Y. 364; Roberts v. Failis, 1 Cow. 238; St. Martin v. Desnoyer, 1 Minn. 156, 61 Am. Dec. 494; Forbes v. Howard, 4 R. I. 364; Schanler v. Porter, 7 Iowa, 482; Ellege v. Todd, 1 Humph. 43, 34 Am. Dec. 616; Wilson v. Berryman, 5 Cal. 44, 63 Am. Dec. 78; Moses v. Central Park, etc. R. Co., 3 N. Y. Misc. 322, 23 N. Y. Supp. 23; Wright v. Union Pacific R. Co., 22 Utah, 338, 62 Pac. Rep. 317; Ottawa v. Gilliland, 63 Kan. 165, 65 Pac. Rep. 252; Lambourne v. Halfin, 23 Utah, 489; Dixon v. Pluns, 98 Cal. 384, 33 Pac. Rep. 268, 20 L. R. A. 698; Flood v. McClure, 32 Pac. Rep. 254 (Idaho); Pawnee Ditch & Imp. Co. v. Adams, 1 Colo. App. 250, 28 Pac. Rep. 662.

³Mitchell v. Ehle, 10 Wend. 595; Ruble v. McDonald, 7 Iowa, 90; Thompson v. Perkins, 26 id. 486; Donner v. Palmer, 23 Cal. 40; Birchard v. Booth, 4 Wis. 67; Mellish v. Arnold, Bunb. 51; Hale v. Cove, 1 Str. 642.

sworn to determine according to evidence, suitors have a right to expect that they will examine and decide according to the best of their ability and discernment.¹ A quotient verdict is not invalid if, upon a poll of the jury each juror answered that it was his verdict; such assent makes the verdict.²

Whether the affidavits of jurors may be read to show that a verdict has been agreed to in such an irregular way is not settled. In England there are conflicting decisions.³ In this country affidavits are rejected,—not in all but in a majority of the states;⁴ the decisions have fluctuated in several states,

¹Per Livingston, J., in *Smith v. Chatham*, 3 Caines, 57. See *Wiegand v. Fee Brothers Co.*, 73 App. Div. 139, 76 N. Y. Supp. 872.

It was ruled in a late case (1893) that "it does not necessarily follow that where a jury reaches its verdict by adopting the average amount which is revealed by taking the amount fixed by each juror and dividing the aggregate sum by twelve, it is for that reason entirely invalid. Unless the result is manifestly wrong and unjust the court is not bound to interfere. *Cowperthwaite v. Jones*, 2 Dall. 55." *Cleland v. Carlisle*, 186 Pa. 110, 40 Atl. Rep. 288.

²*Dana v. Tucker*, 4 Johns. 487; *Wilson v. Berryman*, 5 Cal. 44, 63 Am. Dec. 78; *Bennett v. Baker*, 1 Humph. 399, 34 Am. Dec. 655; *Willey v. Belfast*, 61 Me. 569; *Moses v. Central Park, etc. R. Co.*, 3 N. Y. Misc. 322, 23 N. Y. Supp. 23.

In *Roy v. Goings*, 112 Ill. 657, the jury in answer to the court's inquiry said their verdict was the result of addition and division. After being reproached for their conduct they were sent out again. On returning their verdict was in plaintiff's favor for the same sum as before. On being polled each juror said the verdict was his. It was presumed that the admonition of the court was observed by the jury and the verdict was sustained.

³*Phillips v. Fowler*, Barnes, 441; *Mellish v. Arnold*, Bunb. 51; *Prior v. Powers*, 1 Keb. 811; *Vaise v. Delaval*, 1 T. R. 11; *Jackson v. Williamson*, 2 id. 281; *Rex v. Woodfall*, 5 Burr. 2661; *Aylett v. Jewel*, 2 W. Bl. 1299; *Clark v. Stevenson*, id. 803; *Straker v. Graham*, 4 M. & W. 721; *Burgess v. Langley*, 5 M. & G. 722; *Addison v. Williamson*, 5 Jurist, 466; *Owen v. Warburton*, 1 B. & P. N. R. 326. See, also, as to general subject of admitting or rejecting affidavits of jurors, *Milsom v. Hayward*, 9 Price, 134; *Hindle v. Birch*, 1 Moore, 455; *Metcalf v. Dean*, Cro. Eliz. 189; *Vicary v. Farthing*, id. 411; *Heyler v. Hall*, Palm. 325; *Harvey v. Hewitt*, 8 Dowl. P. C. 598; *Norman v. Beaumont*, Willes, 484; *Cogan v. Edden*, 1 Burr. 383; *Rex v. Simmons*, Sayre, 34.

⁴*Dalrymple v. Williams*, 63 N. Y. 361, 20 Am. Rep. 544; *Moses v. Central Park, etc. R. Co.*, 3 N. Y. Misc. 322, 23 N. Y. Supp. 23; *State v. Gage*, 52 Mo. App. 464; *State v. Fox*, 79 Mo. 109; *Phillips v. Seales Mound*, 195 Ill. 353, 363, 63 N. E. Rep. 180, and local cases cited; *Missouri, etc. R. Co. v. Hawk*, 69 S. W. Rep. 1037 (Tex. Ct. of Civil Appeals); *Ulrick v. Dakota Loan & Trust Co.*, 2 S. D. 285, 49 N. W. Rep. 1054; *Murphy v. Murphy*, 1 S. D. 316, 17 N. W. Rep. 142; *Luft v. Lingane*, 17 R. I. 420, 22 Atl. Rep. 942; *Davis v. Pryor*, 3 Ind. Ty. 326, 58

[805] and, when compared, are not referable to consistent principles.¹ In Iowa, after some fluctuation, the court lay down this as the true rule: "that affidavits of jurors may be received for the purpose of avoiding a verdict to show any matter occurring during the trial, or in the jury room, which does not essentially inhere in the verdict; as that a juror was improperly approached by a party, his agent or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of the jurors; that the verdict was determined by aggregation and average, or by lot or game of chance, or other artifice or improper manner; but that such affidavit, to avoid the verdict, may not be received to show any matter which does essentially inhere in the verdict itself; as that the juror did not assent to it; that he misunderstood the instructions of the court, the statements of the witnesses, or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors; or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast."² This rule seems to be now settled in that state by being repeatedly approved and restated in subsequent cases. It is also the rule in Kan-

S. W. Rep. 660; *McMurray v. Bassnett*, 19 Fla. 609, 627; *Reed v. Thompson*, 88 Ill. 245; *Chesapeake & O. R. Co. v. Patton*, 9 W. Va. 648; *Stanley v. Sutherland*, 54 Ind. 339; *Lucas v. Cannon*, 13 Bush, 750; *Roy v. Goings*, 112 Ill. 656; *Johnson v. Allen*, 100 N. C. 131, 5 S. E. Rep. 666; *Dana v. Tucker*, 4 Johns. 487; *Meade v. Smith*, 16 Conn. 346; *State v. Freeman*, 5 id. 348; *Allison v. People*, 45 Ill. 37; *State v. McLeod*, 1 Hawks. 344; *O'Barr v. Alexander*, 37 Ga. 195; *Brownell v. McEwen*, 5 Denio, 367; *People v. Common Pleas*, 1 Wend. 297; *Knowlton v. McMahon*, 13 Minn. 386, 97 Am. Dec. 236; *Cluggage v. Swan*, 4 Bin. 150, 5 Am. Dec. 400; *Willing v. Swazey*, 1 Browne. 123; *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. 473, note; *Bladen v. Cockey*, 1 Har. & McHen. 230.

¹ *Smith v. Chatham*, 3 Cal. 56;

Warner v. Robinson, 1 Port. 194, 26 Am. Dec. 359; *Crawford v. State*, 2 Yerg. 60; *Cochran v. Street*, 1 Wash. (Va.) 79; *Little v. Larabee*, 2 Me. 37, 11 Am. Dec. 43; *Howard v. Cobb*, 3 Day. 309; *United States v. Freis*, 3 Dall. 515, note; *Bradley's Lessees v. Bradley*, 4 Dall. 112; *Bucknam v. Greenleaf*, 48 Me. 394; *Tenney v. Evans*, 13 N. H. 462, 40 Am. Dec. 166; *State v. Hascall*, 6 N. H. 352; *Ferrill v. Simpson*, 8 Pick. 359; *Grinnell v. Phillips*, 1 Mass. 530; *Woodward v. Leavitt*, 107 id. 453, 9 Am. Rep. 49; *Price v. Warren*, 1 Hen. & M. 385; *Commonwealth v. Drew*, 4 Mass. 391; *Suttrel v. Dry*, 1 Murphy, 94; *Cochran v. State*, 7 Humph. 544; *Luster v. State*, 11 id. 169; *Hudson v. State*, 9 Yerg. 408.

² *Wright v. Illinois, etc. Tel. Co.*, 20 Iowa, 195.

sas¹ and Tennessee,² and by statute in California, that affidavits of jurors may be read to show that the verdict was arrived at by "a resort to the determination of chance."³ The rule excluding jurors' affidavits extends to cases in which they are offered to show mistake on the part of the jurors in respect to the merits of the action, or irregularity or misconduct, or that there was a misconception of the effect of the verdict.⁴ There are some exceptions which will be noticed hereafter.⁵ Such affidavits are competent to support verdicts.⁶ Juries are not bound to itemize their verdicts according to the elements of damage proved.⁷

§ 457. **Rendering and amending verdicts.** The jury retire from the presence of the court for consideration of their verdict to be given; and it is subject to their consideration [806] until it has been reported to and accepted by the court, actually or constructively recorded, affirmed by them in open court, and they have separated and thus become accessible to the parties.⁸ Thus, in one case,⁹ by a misconception of legal terms, the jury had returned a verdict the reverse of what they intended, and it was affirmed by them in open court; but they

¹ Johnson v. Husband, 22 Kan. 277.

² Crawford v. State, 2 Yerg. 60; Cochran v. State, 7 Humph. 544; Hudson v. State, 9 Yerg. 408; East Tennessee, etc. R. Co. v. Winters, 85 Tenn. 240.

³ Hoare v. Hindley, 49 Cal. 274.

⁴ Dalrymple v. Williams, 63 N. Y. 361, 20 Am. Rep. 544, citing Clum v. Smith, 5 Hill, 560; Ex parte Caykendall, 6 Cow. 53; Jackson v. Williamson, 2 T. R. 281; Vaise v. Delaval, 1 id. 11; Davis v. Taylor, 2 Chitty, 268.

⁵ §§ 457, 458.

Jurors' affidavits are admissible to show occurrences during the trial outside the jury room. *Peppercorn v. Black River Falls*, 89 Wis. 38, 61 N. W. Rep. 79.

⁶ *Dana v. Tucker*, 4 Johns. 487; *O'Brien v. Merchants' F. Ins. Co.*, 38 N. Y. Super. Ct. 482; *Moore v. New York E. R. Co.*, 24 Abb. New Cas. 77; *McMurdock v. Kimberlin*, 23 Mo.

App. 523; *Downer v. Baxter*, 30 Vt. 467; *Columbus v. Ogletree*, 102 Ga. 293, 301, 29 S. E. Rep. 749.

⁷ *Ohio & M. R. Co. v. Judy*, 120 Ind. 397, 22 N. E. Rep. 252; *Union Pacific R. Co. v. Dunden*, 37 Kan. 1, 14 Pac. Rep. 501.

⁸ *Kreibohm v. Yancey*, 154 Mo. 67, 55 S. W. Rep. 260; *Warner v. New York Central R. Co.*, 52 N. Y. 437, 11 Am. Rep. 724; *Rogan v. Mullins*, 22 App. Div. 117, 47 N. Y. Supp. 920; *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. Rep. 714, 16 id. 770; *Cole v. Laws*, 104 N. C. 654, 10 S. E. Rep. 172; *Pepper v. Philadelphia*, 114 Pa. 96, 110, 6 Atl. Rep. 899; *Nickelson v. Smith*, 15 Ore. 200, 14 Pac. Rep. 40; *Root v. Sherwood*, 6 Johns. 68, 5 Am. Dec. 191; *Blackley v. Sheldon*, 7 Johns. 32; *Goodwin v. Appleton*, 22 Me. 453; *Lawrence v. Stearns*, 11 Pick. 501.

⁹ *Ward v. Bailey*, 23 Me. 316.

had not separated or left their seats, though the writ in the next case had been read to them, when, the error being discovered, the presiding judge explained the terms which had been misunderstood, and delivered the papers to the jury again. When a verdict has thus been rendered the duties of the jury have been fully performed and their power exhausted; they cannot afterwards be recalled to alter or amend it.¹ Any recommendation by the jury for a change of their verdict after they have rendered it and separated is inoperative; and any alteration of it made upon such recommendation is invalid.² A verdict was brought into court in writing for the defendant, handed to the clerk, who read it as a verdict for the plaintiff; as so read it was affirmed by the jury, and ordered to be recorded; and thereupon the jury were discharged. Afterwards the wrong reading having been suggested, and it appearing by the written verdict and the affidavit of the jurors that they intended to find for the defendant, the judge ordered the verdict for the defendant to be recorded. This was held erroneous; because the verdict as found and written had not been affirmed in open court, and the order was set aside.³ In another case a jury, under instructions from the court, found for the plaintiff on both counts of his declaration, and assessed separate damages on each. Thereupon the court instructed them that the plaintiff was not entitled to recover on the second count and ordered them to find for the defendant, which [807] they accordingly did. On the case being brought into the court of last resort on exceptions it was held that the court had no authority to amend the verdict so as to make it conform to the first finding although the first instruction to the jury was right and the last wrong.⁴

The parties may waive the affirmation of the verdict before the separation of the jury after they have agreed. This is fre-

¹ *Snell v. Bangor Nav. Co.*, 30 Me. 337; *Walter v. Jenkins*, 16 S. & R. 414, 16 Am. Dec. 585; *Sargent v. State Bank*, 11 Ohio, 472; *Sasser v. State*, 13 id. 453; *Rigg v. Cook*, 9 Ill. 336, 46 Am. Dec. 462; *Miller v. Hoc*, 1 Fla. 189; *Martin v. Morelock*, 32 Ill. 485; *Richards v. Page*, 81 Me. 563, 18 Atl. Rep. 289.

² *Id.*; *Shelton v. O'Brien*, 76 Ga. 820; *Parker v. Lake Shore, etc. R. Co.*, 93 Mich. 607, 53 N. W. Rep. 834; *Dyer v. Combs*, 65 Mo. App. 148.

³ *Bucknam v. Greenleaf*, 48 Me. 394.

⁴ *Roberts v. Rockbottom Co.*, 7 Met. 46.

quently done where it is anticipated that the jury will agree upon a verdict during an intermission of the court; they are then directed to reduce it to writing, seal it up, and deliver it to their foreman or the clerk of the court.¹ The jury must appear and affirm their verdict after the court convenes; it is not their verdict before; in other words, the functions of the jury continue until they have rendered their verdict in court, affirmed it and been discharged.² A jury rendered a verdict in writing which had been sealed, and after which they had separated, for the sum of "sixteen and seventy-four dollars." The clerk read it to them \$1,674, and each affirmed it as read. The court say: "Under our practice this last answer by each juror made the verdict. Neither giving an assent in the jury room, nor the signing of a writing there, nor the delivery of it to the clerk, absolutely bound the conscience of any juror in this case; all these are revocable acts; until he gave an affirmative answer to this last question by the clerk, there was space for change of opinion and an opportunity to recall any previous act or word."³ In a late case in Maine a jury were allowed to seal up their verdict after the adjournment of the court for the day, and then to separate for the night. In the morning it was opened and affirmed by eleven, by consent, the twelfth juror being absent by leave after this consent was obtained. [808] The verdict, as affirmed, was for \$9.31. A few minutes after its affirmation, the eleven jurors having retained their seats, they made known to the court that they intended to give a verdict for \$74.31, being \$65 sued for, and \$9.31 interest, and that, by mistake, only the latter sum was inserted in the blank. The defendant's counsel would not consent to the correction. After awaiting the return of the twelfth juror, and finding that he confirmed the statement of his fellows, the court

¹ In practice this course is generally assented to by the parties; consent is probably not necessary. *Sutcliffe v. Gilbert*, 8 Ohio, 405; *Sargent v. State*, 11 id. 472; *State v. Eagle*, 13 id. 490; *Green v. Bliss*, 12 How. Pr. 428; *Chapman v. Coffin*, 14 Gray, 454; *Pritchard v. Hennessy*, 1 id. 294; *Commonwealth v. Carrington*, 116 Mass. 37; *Brown v. Dean*, 123 id. 251;

Commonwealth v. Dorus, 108 id. 488; *Winslow v. Draper*, 8 Pick. 170.

² *Bunn v. Hoyt*, 3 Johns. 255; *Douglass v. Tousey*, 2 Wend. 352; *Morgan v. Bell*, 41 Kan. 345, 21 Pac. Rep. 255.

³ *Griffin v. Larned*, 111 Ill. 438; *Watertown Ecclesiastical Society's Appeal*, 46 Conn. 230; *Ederlen v. Thompson*, 2 Har. & Gill, 11.

allowed the jury to retire and bring in a new verdict for the sum of \$74.31. This was held to be error, and a new trial was granted. The court say: "Where the error has been committed by the jury, either by returning a verdict for the wrong party or for a larger or smaller sum than they intended, and by the amendment proposed the verdict would be reversed, or the damages increased or diminished, and the substantial rights of the parties thus changed, when the verdict has been affirmed in open court, and the jury separated, and become accessible to the parties, the only remedy for such a mistake is by setting aside the verdict and granting a new trial." But where the finding of the jury, or the record of it, is defective or erroneous in matter of form, having no connection with the merits of the case, nor affecting the rights of the parties, the court may make the correction.¹ Two recent New York cases extend the rule as to the power of the court over verdicts after the jury has been discharged. In one of them² the foreman mistakenly announced the verdict to be different from what had been agreed to. His statement was recorded by the court. Immediately thereafter and after the jury was discharged the court corrected the error so that the verdict conformed to the action of the jury. Affidavits of the jurors were read to show the mistake. In the other case the action was upon a contract wholly free from all elements of unliquidated damages. The plaintiff, if entitled to a verdict, had a right to a sum certain and *conceded*. The court so charged and stated the precise amount. A verdict was found for the plaintiff and the jury agreed upon the sum stated by the court as the damages, but, being uncertain as to the exact figures, they did not include it or any amount in the verdict, which, pursuant to a stipulation, was returned sealed; the jury were excused from appearing on its being opened. Three days later affidavits of the jurors were presented to show that they all agreed upon a verdict for the

¹ Weston v. Gilmore, 63 Me. 493; Little v. Larrabee, 2 id. 37, 11 Am. Dec. 43; Woodruff v. Webb, 32 Ark. 612; Rockfeller v. Donnelly, 8 Cow. 623, 652; Beekman v. Bemas, 7 id. 29; Petrie v. Hannay, 3 T. R. 659; Ed-
dowes v. Hopkins, 1 Doug. 376; Feize

v. Thompson, 1 Taunt. 121; Ernest v. Brown, 4 Bing. N. C. 162; Queen v. Fall, 10 L. J. (Q. B.) 145; Cunningham v. Ware, Cro. Jac. 239.

² Dalrymple v. Williams, 63 N. Y. 361, 20 Am. Rep. 544.

full amount, and an amendment was made accordingly. This practice was sustained.¹ A case quite similar in its facts, except as to the jurors' affidavits, has recently been otherwise decided in Maryland.²

§ 458. *Same subject.* At a subsequent term an amendment of a general verdict was allowed by the judge's minutes, where there were several counts for the same cause of action, one of which was bad, so as to take the verdict on the good counts only.³ Where the jury returned a verdict in an action of trover that "the defendant did promise in manner and form as the plaintiff has declared against him," with an assessment of damages, the court at a subsequent term, and after a motion for a new trial, corrected the verdict on the plaintiff's motion by striking out "did promise," and inserting [809] "is guilty," and it was held right.⁴ So, in Vermont, where a jury in an action of *assumpsit* rendered a verdict that the defendant is guilty, the court, after their discharge, permitted the verdict to be amended by striking out the words "is guilty," and inserting "did promise."⁵

If a jury return a verdict which is not such as the issue requires to be found, the court may send them back to reconsider it with appropriate instructions, at any time before the verdict has been recorded and they discharged.⁶ Before a verdict has been recorded the jury may be required to reconsider it, if there appears to be a mistake; and may be sent out for that purpose or to perfect their finding.⁷ But if the verdict, when returned,

¹ *Hodgkins v. Mead*, 119 N. Y. 166, 23 N. E. Rep. 559; *Redmond v. Weismann*, 77 Cal. 423, 20 Pac. Rep. 544.

² *Gaither v. Wilmer*, 71 Md. 361, 18 Atl. Rep. 590, 5 L. R. A. 756.

³ *Barnard v. Whiting*, 7 Mass. 358.

⁴ *Hoey v. Candage*, 61 Me. 257.

⁵ *Foster v. Caldwell's Estate*, 18 Vt. 176.

⁶ *State v. Clementson*, 69 Wis. 628, 35 N. W. Rep. 56; *Hatch v. Attrill*, 118 N. Y. 383, 23 N. E. Rep. 549; *Johnson v. Oakes*, 80 Cal. 722, 6 S. E. Rep. 274; *Higginbotham v. Clayton*, 80 Ala. 194; *Strobridge Lith. Co. v. Randall*, 78 Mich. 195, 41 N. W. Rep.

134; *Goodwin v. Appleton*, 22 Me. 453.

In *Woodruff v. Richardson*, 20 Conn. 238, the jury brought in a verdict for \$1,100 as damages for slander; the amount was thought by the judge to be too high, and, after expressing his views, sent the jury out to consider the case again, the result of which was a verdict of \$800. This was retained.

⁷ *Brown v. Dean*, 123 Mass. 254; *Root v. Sherwood*, 6 Johns. 68, 5 Am. Dec. 191; *Wolfson v. Eyster*, 7 Watts. 38; *Blackley v. Sheldon*, 7 Johns. 37; *Chapman v. Coffin*, 14 Gray, 434.

settles the rights of the parties, and will sustain a judgment, it is improper for the judge to send the jury out again for further consideration.¹ It may be doubted if this view is not altogether too conservative. The public interest requires that the rights of litigants shall be adjusted at a minimum of expense, and that litigation shall be terminated whenever substantial justice can be administered. The delay and expense attendant upon the retrial of actions may often be avoided by insisting upon a verdict which is in accordance with the substantial rights of the parties. The practice followed in the cases next noticed is more in accord with justice than the rule declared by those last cited. Where the plaintiff was entitled to substantial damages or nothing and a verdict in his favor for six cents was returned, it was proper to call the jury's attention to the inconsistency and request them to reconsider their verdict, which was done; a verdict for substantial damages was sustained.² In another case the jury in a slander suit assessed the sum of one dollar and costs in favor of the plaintiff; the court properly refused to receive it, and sent the jury back after instructing them that their province was to award damages only, that the law disposed of the costs, and that if their verdict should not exceed five dollars the costs would go against the plaintiff. A verdict in his favor for five dollars and ten cents was sustained.³ If the plaintiff is entitled to interest as damages and the jury have not awarded it, the court may direct that it be added.⁴

It is in the discretion of the trial judge to interrogate the jury on their bringing in a verdict to ascertain upon what principle they have found it, when there is reason to suspect they have made some mistake.⁵ Upon objection to a verdict

Warner v. New York Central R. Co., 52 N. Y. 437, 11 Am. Rep. 724; Mason v. Massa, 122 Mass. 477; Pritchard v. Hennessey, 1 Gray, 294; Sutliff v. Gilbert, 8 Ohio, 405; Chapman v. Salfisberg, 104 Ill. App. 445.

¹Sutliff v. Gilbert, *supra*; Marguard v. Wheeler, 52 Cal. 445. See Black v. Griggs, 74 Conn. 582, 51 Atl. Rep. 523, for the practice under a statute giving the court power to

require not more than three considerations of a verdict.

²Rogan v. Mullins, 22 App. Div. 117, 47 N. Y. Supp. 920.

³Fox v. Boyd, 104 Tenn. 357, 58 S. W. Rep. 221.

⁴Rafel v. McDermott, 30 N. Y. Misc. 208, 62 N. Y. Supp. 245.

⁵Dearborn v. Newhall, 63 N. H. 301; Norris v. Haverhill, 65 id. 89, 18 Atl. Rep. 85; Jackson v. Dickenson,

because it was obscure, uncertain and contradictory, the judge put to the jury certain questions intended to remove the uncertainty. In accordance with the answers of the foreman in regard to the intention of the jury, and with the assent of all his fellows, the verdict was amended by inserting words to effectuate such intention. Such practice was approved.¹

The court will not alter a verdict unless it appears on its face that the alteration is according to the intention of the jury.² It has no authority to supply substantial omissions in a verdict, nor to reconcile incongruities; but when it is informally expressed the court may and should mould it into form and give it legal effect.³ Where the verdict should have included interest with the value of the property, as the damages sustained to the time of trial, instead of finding separately the value of the property and the interest thereon, without calculation, it was proper for the court to put the verdict in proper form by making the calculation from the *data* it furnished.⁴

§ 459. **Excessive or insufficient verdict.** If there is [§10] a legal measure of damages which the jury have deviated from, by finding either less or more than the plaintiff is entitled to by a preponderance of the evidence, the trial court, in the exercise of judicial discretion, will entertain a motion for a new trial on behalf of the party injured by the finding.⁵ So if the jury assess damages not warranted by the declaration, the verdict will be set aside, and the court may do it *ex officio*.⁶ Where there is not a legal measure of damages, and where they are unliquidated, and the amount thereof is referred to the dis-

15 Johns. 309, 8 Am. Dec. 236. See *Anderson v. Green*, 46 Ga. 361.

¹ *Lovejoy v. Whitcomb*, 174 Mass. 586, 55 N. E. Rep. 322; *Mason v. Massa*, 122 Mass. 477, 480; *Brown v. Dean*, 123 Mass. 254, 266.

² *Spencer v. Gates*, 1 H. Bl. 78.

³ *Stewart v. Fitch*, 31 N. J. L. 17; *Delaware, etc. R. Co. v. Toffey*, 38 id. 525; *Woodruff v. Webb*, 32 Ark. 612; *Hawks v. Crofton*, 2 Burr. 698; *Foster v. Jackson*, Hob. 52; *Phillips v. Kent*, 23 N. J. L. 155; *Thompson v. Button*, 14 Johns. 84; *Hodges v. Raymond*, 9 Mass. 316; *Burhans v. Tib-*

bitts, 7 How. Pr. 21; *Jones v. Kennedy*, 11 Pick. 125; *Clarke v. Lamb*, 6 Pick. 512; *Porter v. Rummery*, 10 Mass. 64; *Wilderman v. Sandusky*, 15 Ill. 59; *Hamm v. Culvey*, 84 Ill. 56.

⁴ *Baltimore & O. R. Co. v. Dougherty*, 7 D. C. App. Cas. 378.

⁵ *Walker v. Smith*, 1 Wash. C. C. 152; *McDonald v. Walker*, 40 N. Y. 551; *Nutter v. Junction R. Co.*, 13 Ind. 479; *Berry v. Vreeland*, 21 N. J. L. 183.

⁶ *Stewart v. Tevri*, 7 T. R. Mon. 109; *Hall v. Hall*, 42 Ind. 585.

cretion of the jury, the court will not, ordinarily, interfere with the verdict. It is the peculiar province of the jury to decide such cases under appropriate instructions from the court; and the law does not recognize in the latter the power to substitute its own judgment for that of the jury.¹ Although the verdict may be considerably more or less than in the judgment of the court it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice or gross mistake; or in other words, that it is the result of accident or perverted judgment, and not of cool and impartial deliberation. When the verdict is thus excessive or deficient the trial court, in its discretion, will interpose and set it aside.² But this will not be done at the instance of the de-

¹ *Chicago v. Smith*, 48 Ill. 107; *Bourke v. Bulow*, 1 Bay, 49; *Waters v. Bristol*, 26 Conn. 398; *North v. Cates*, 2 Bibb, 591; *Terre Haute, etc. R. Co. v. Vanetta*, 21 Ill. 188, 74 Am. Dec. 96; *Collins v. Albany, etc. R. Co.*, 12 Barb. 492; *Illinois Central R. Co. v. Robinson*, 58 Ill. App. 181; *Illinois Central R. Co. v. Davenport*, 75 id. 579, 584, quoting the text; *Board of Commissioners v. Sappenfield*, 10 Ind. App. 609, 38 N. E. Rep. 358; *Lee v. Southern Pacific R. Co.*, 101 Cal. 118, 35 Pac. Rep. 572; *Dowd v. Westinghouse Air Brake Co.*, 132 Mo. 579, 34 S. W. Rep. 493; *Brown v. Union R. Co.*, 51 Mo. App. 192; *Lucier v. Larose*, 66 N. H. 141, 20 Atl. Rep. 249; *McGowan v. Interstate Consolidated Street R. Co.*, 20 R. I. 264, 38 Atl. Rep. 497; *Turner v. Stevens*, 8 Utah, 75, 30 Pac. Rep. 24; *Thirkfield v. Mountain View Cemetery Ass'n*, 12 Utah, 76, 41 Pac. Rep. 564; *Speck v. Gray*, 14 Wash. 589, 45 Pac. Rep. 143, quoting the text; *Trice v. Chesapeake & O. R. Co.*, 40 W. Va. 271, 21 S. E. Rep. 1022; *Donovan v. Chicago & N. R. Co.*, 93 Wis. 373, 67 N. W. Rep. 721; *Silber v. Larkin*, 94 Wis. 9, 68 N. W. Rep. 406; *McKeon v. Chicago, etc. R. Co.*, 94 Wis. 477, 69 N. W. Rep. 175,

35 L. R. A. 252; *Smith v. Pittsburgh & W. R. Co.*, 90 Fed. Rep. 783; *Hasie v. Alabama & V. R. Co.*, 79 Miss. 581, 31 So. Rep. 199; *Hill v. Alabama & V. R. Co.*, 79 Miss. 587, 31 So. Rep. 198; *Litchfield v. Whitenack*, 78 Ill. App. 364, quoting the text.

² *Dunbar v. Cowger*, 68 Ark. 444, 59 S. W. Rep. 951; *Hamer v. White*, 110 Ga. 300, 34 S. E. Rep. 1001; *Hackett v. Pratt*, 52 Ill. App. 346; *Richardson v. Birmingham Cotton Manuf. Co.*, 116 Ala. 381, 22 So. Rep. 478; *Georgia Southern & F. R. Co. v. Jones*, 90 Ga. 292, 15 S. E. Rep. 824; *Drumm v. Cessnum*, 58 Kan. 331, 49 Pac. Rep. 78; *Atchison v. Plunkett*, 61 Kan. 297, 59 Pac. Rep. 646; *Sturgeon v. Sturgeon*, 4 Ind. App. 232, 30 N. E. Rep. 805; *Lee v. Knapp*, 137 Mo. 385, 38 S. W. Rep. 1107; *Chouquette v. Southern Electric R. Co.*, 152 Mo. 257, 53 S. W. Rep. 897; *Wilson v. Morgan*, 58 N. J. L. 426, 34 Atl. Rep. 752; *Miller v. Delaware, etc. R. Co.*, 58 N. J. L. 428, 33 Atl. Rep. 950; *Brown v. Foster*, 1 App. Div. 578, 37 N. Y. Supp. 502; *Benton v. Collins*, 125 N. C. 83, 34 S. E. Rep. 242, 47 L. R. A. 33; *Kumli v. Southern Pacific Co.*, 21 Ore. 505, 28 Pac. Rep. 637; *McNeil v. Lyons*, 20 R. I. 672,

fendant on the ground that the damages awarded are insufficient.¹ If a portion of the sum awarded is remitted in the trial court the appellate court will consider the full amount in determining whether the verdict was excessive.² It is said³ that

40 Atl. Rep. 831; May v. Hahn, 22 Tex. Civ. App. 365, 54 S. W. Rep. 416; Nading v. Denison & P. R. Co., 22 Tex. Civ. App. 173, 54 S. W. Rep. 412; Katz v. Brooklyn Heights R. Co., 35 N. Y. Misc. 302, 71 N. Y. Supp. 744; Bell v. Morse, 48 Kan. 601, 29 Pac. Rep. 1086; Barry v. Pennsylvania R. Co., 65 N. J. L. 407, 47 Atl. Rep. 464; Goodall v. Thurman, 1 Head, 209; Coleman v. Southwick, 9 Johns. 44; Walker v. Smith, 1 Wash. C. C. 152; Duncan v. Finnyhorn, Sneed, 262; M. K. & T. R. Co. v. Weaver, 16 Kan. 456; Simpson v. Pitman, 13 Ohio. 365; Farish v. Reigle, 11 Gratt. 697; Quigley v. Central Pacific R. Co., 11 Nev. 350, 21 Am. Rep. 757; Aldrich v. Palmer, 24 Cal. 513; Shartle v. Minneapolis, 17 Minn. 308; Russell v. Dennison, 45 Cal. 337; Wells v. Sanger, 21 Mo. 354; Terre Haute, etc. R. Co. v. Vanetta, 21 Ill. 188, 74 Am. Dec. 96; Beaulieu v. Parsons, 2 Minn. 37; Waters v. Bristol, 26 Conn. 398; Boyers v. Pratt, 1 Humph. 90; Clapp v. Hudson River R. Co., 19 Barb. 461; Moore v. Burchfield, 1 Heisk. 203; Union Pacific R. Co. v. Hand, 7 Kan. 350; Chicago, etc. R. Co. v. Peacock, 48 Ill. 253; North v. Cates, 2 Bibb, 591; Doblin v. Murphy, 3 Sandf. 19; Sherry v. Frecking, 4 Duer, 452; Guard v. Risk, 11 Ind. 156; Harris v. Rupel, 14 Ind. 209; Tater v. Mullen, 23 Ind. 562; Alexander v. Thomas, 25 Ind. 268; Birchard v. Booth, 4 Wis. 67; Bierbauer v. New York, etc. R. Co., 15 Hun, 559; Bass v. Chicago, etc. R. Co., 42 Wis. 654, 24 Am. Rep. 437; Plath v. Braunsdorff, 40 Wis. 107; Davis v. Central R. Co., 60 Ga. 329; Cammins v. Crawford, 88 Ill. 312, 30 Am. Rep. 358; Solen v. Virginia City, etc. R. Co., 13 Nev. 106; Illinois Central R. Co. v. Parks, 88 Ill. 373; Hammond v. Mukwa, 40 Wis. 35; Nashville, etc. R. Co. v. Smith, 6 Heisk. 174; Goodno v. Oshkosh, 28 Wis. 300; Nettles v. Harrison, 2 McCord, 230; Armitage v. Haley, 4 Q. B. 917; Price v. Severn, 7 Bing. 402; Tinney v. New Jersey Steamboat Co., 5 Lans. 507; Goins v. Western R. Co., 59 Ga. 426; Chicago, etc. R. Co. v. Hughes, 87 Ill. 94; Chicago, etc. R. Co. v. Payzant, 87 Ill. 125; Union Pacific R. Co. v. House, 1 Wyo. 27; Blunt v. Little, 3 Mason, 102; Whipple v. Cumberland Manuf. Co., 2 Story, 661; Wolford v. Lyon Gravel Gold Mining Co., 63 Cal. 483; Denver v. Dunsmore, 7 Colo. 328; Sanderson v. Frazier, 8 id. 79, 51 Am. Rep. 544; Haight v. Hoyt, 50 Conn. 583; Larson v. Grand Forks, 3 Dak. 307, 19 N. W. Rep. 414; McMurray v. Bassett, 18 Fla. 609; Central R. v. Roach, 70 Ga. 431; Paul v. Leyenberger, 17 Ill. App. 107; Fairgrieve v. Moberly, 29 Mo. App. 111; Watson v. Harmon, 85 Mo. 443; International, etc. R. Co. v. Telephone & Tel. Co., 69 Tex. 277, 5 Am. St. 45, 5 S. W. Rep. 517; Cottrell v. Cramer, 59 Wis. 231, 18 N. W. Rep. 12; Whitney v.

¹ Reid v. Houston, 20 Ill. App. 48; Wolf v. Goodhue F. Ins. Co., 43 Barb. 490; Corcoran v. Harran, 55 Wis. 120, 12 N. W. Rep. 468.

² Unterberger v. Scharif, 51 Mo. App. 102.

³ Benton v. Collins, 125 N. C. 83, 93, 34 S. E. Rep. 242, 47 L. R. A. 33, the first case in the state in which a new trial was granted because of the insufficiency of the damages.

the first English case in which the recovery of unliquidated damages was sought and in which the verdict was set aside was decided in 1879. The verdict was for 7,000*l.*, and was set aside, not because of misdirection by the judge, but because it appeared, upon the facts proved, that the jury omitted to take into consideration some of the elements of damage properly involved in the plaintiff's claim.¹

[811] In cases where there is no legal standard of damages, if the appellate court does not find error in the admission or rejection of evidence or in the instructions, the objection that the amount awarded by the jury is excessive or insufficient is not generally available.² If, however, on the nature of the case, or on a proper return of all the testimony, the point can be raised in the appellate court, as under the practice in many states it may, it clearly appears that the damages found are excessive, the judgment will be reversed on that ground.³ If

Milwaukee, 65 Wis. 409, 27 N. W. Rep. 39; *Clear v. Fox*, 26 Fed. Rep. 90; *Henderson v. Louisville R. Co.*, 24 Ky. L. Rep. 394, 68 S. W. Rep. 645.

The fact that a verdict for \$2,865.30 was \$105 in excess of the sum recoverable does not show passion or prejudice. *Omaha F. Ins. Co. v. Thompson*, 50 Neb. 580, 70 N. W. Rep. 30.

The fact that two prior verdicts were for \$3,000 each does not indicate that a verdict for \$3,500 was influenced by passion or prejudice. *Fitzgerald v. New York, etc. R. Co.*, 37 App. Div. 127, 55 N. Y. Supp. 1124.

¹ *Phillips v. South Western R. Co.*, 4 Q. B. Div. 406; *Burrows v. London General Omnibus Co.*, 10 L. T. Rep. 298.

² *Meeks v. St. Paul*, 64 Minn. 220, 66 N. W. Rep. 966; *Nelson v. West Duluth*, 55 Minn. 497, 57 N. W. Rep. 149; *Franklin v. Fischer*, 51 Mo. App. 345; *Nelson v. Oregon R. & N. Co.*, 13 Ore. 141, 9 Pac. Rep. 321; *Pritchard v. Hewitt*, 91 Mo. 547, 60 Am. Rep. 265, 4 S. W. Rep. 437; *Lancaster v. Providence & S. S. S. Co.*, 26 Fed. Rep. 233; *Brushaber v. Stegemann*,

22 Mich. 266; *Neal v. Singleton*, 26 Ark. 491.

³ *Atlanta Consolidated Street R. Co. v. Beauchamp*, 93 Ga. 6, 19 S. E. Rep. 24; *Buena Vista Co. v. McCandlish*, 92 Va. 297, 23 S. E. Rep. 718; *Baker v. Madison*, 62 Wis. 137, 22 N. W. Rep. 141, 583; *McLimans v. Lancaster*, 63 Wis. 596, 23 N. W. Rep. 689; *Cuff v. Dorland*, 57 N. Y. 560; *Metcalf v. Baker*, id. 662; *Hayden v. Florence Sewing Machine Co.*, 54 id. 221; *Stickney v. Bronson*, 5 Minn. 215; *Burdick v. Weeden*, 9 R. I. 139; *Wilkins v. Gilmore*, 2 Humph. 140; *Johnson v. Von Kettler*, 66 Ill. 63; *Chicago, etc. R. Co. v. McAra*, 52 Ill. 296; *Decatur v. Fisher*, 53 Ill. 407; *Cassell v. Hays*, 51 Ill. 261; *Chicago v. Kelly*, 69 Ill. 475; *Cochrane v. Tuttle*, 75 Ill. 361; *Goetz v. Ambs*, 22 Mo. 170; *Woodson v. Scott*, 20 Mo. 272; *Barth v. Merritt*, 20 Mo. 567; *Ellsworth v. Central R. Co.*, 24 N. J. L. 93; *Patten v. Chicago, etc. R. Co.*, 32 Wis. 524; *Metz v. Second Avenue R. Co.*, 2 Robert. 356; *Union Pacific R. Co. v. Milliken*, 8 Kan. 647; *Jacksonville v. Lambert*, 62 Ill. 519; *Chicago v.*

a second verdict is for nearly the same sum as one which has been set aside as excessive, it will also be set aside, although the question of the defendant's liability will not be reopened.¹ If the damages awarded are so small that it is doubtful if they can be regarded as substantial, no new trial will be allowed that they may be reduced.² In some jurisdictions the appellate court may reverse in part, and render such judgment as the court below ought to have rendered. There, if the damages are excessive, the court may reverse altogether, or reduce the amount of the judgment, affirming it for a lesser sum where the requisite *data* are furnished by the record.³ [812] The objection of excessive damages found may, in many cases, be removed by the plaintiff remitting the excess. This may be done in the trial and also in the appellate court. If the jury have decided, upon the testimony submitted to them, several items or elements of damage, and on review one or more of them are held to be improperly included, a remission of so much as was thus improperly allowed, when the amount can be ascertained, will remove the objection of such excess.⁴

Jones, 66 Ill. 349; Chicago, etc. R. Co. v. Garvy, 58 Ill. 83; Chicago v. Langlass, 66 Ill. 361; Pulman Palace Car Co. v. Reed, 75 Ill. 125, 20 Am. Rep. 232; Huftalin v. Mesner, 78 Ill. 55, 20 Am. Rep. 259; Dearlove v. Herrington, 70 Ill. 251; Newton v. Locklin, 77 Ill. 103; Walker v. Martin, 52 Ill. 347; Ross v. Ross, 5 B. Mon. 20; Colburn v. Neal, 4 Dana, 121.

¹ McKay v. New England Dredging Co., 93 Me. 201, 44 Atl. Rep. 614.

² Watson v. New Milford, 72 Conn. 561, 45 Atl. Rep. 167, 77 Am. St. 345. See § 11.

³ Robertson v. Allen, 36 Ark. 553; Chesapeake, etc. R. Co. v. Higgins, 85 Tenn. 620; Sterrett v. Creed, 2 Ohio, 442; Fields v. Moul, 15 Abb. Pr. 6; Cohea v. State, 34 Miss. 179; Overall v. Babson, 2 Yerg. 71; Mooney v. Hudson River R. Co., 1 Sweeny, 325; Baker v. Madison, 62 Wis. 137, 22 N. W. Rep. 141, 593 (overruling Potter v. Chicago, etc. R. Co., 22 Wis. 615);

McLimans v. Lancaster, 63 Wis. 596, 23 N. W. Rep. 689; Galveston, etc. R. Co. v. Johnson, 24 Tex. Civ. App. 180, 58 S. W. Rep. 622.

⁴ Augusta R. Co. v. Glover, 92 Ga. 132, 18 S. E. Rep. 406; Craven v. Walker, 101 Ga. 845, 29 S. E. Rep. 152; North Chicago Street R. Co. v. Shreve, 70 Ill. App. 666; Chicago, etc. R. Co. v. Clevenger, 77 id. 186; McNulta v. Hendele, 92 id. 273; Newbury v. Getchel & M. Lumber Manuf. Co., 100 Iowa, 441, 69 N. W. Rep. 743, 62 Am. St. 582; Drumm v. Cessnum, 58 Kan. 331, 49 Pac. Rep. 78; Atchison, etc. R. Co. v. Richards, 58 Kan. 344, 49 Pac. Rep. 436; Atchison v. Plunkett, 61 Kan. 297, 59 Pac. Rep. 646; Delzur v. B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. Rep. 948, 44 L. R. A. 500; Trow v. White Bear, 78 Minn. 432, 80 N. W. Rep. 1117; Fremont, etc. R. Co. v. French, 48 Neb. 638, 67 N. W. Rep. 372; Regier v. Shreck, 47 Neb. 667, 66 N. W. Rep.

The reviewing court's power to reduce a judgment is not affected because the trial court directed the *remittitur* of part of the sum awarded by the jury.¹ But where the erroneous part so allowed cannot be ascertained, and it is impossible to tell what the jury acted upon, or how they made up their verdict under the charge of the court, so as to correct the error, and arrive at the amount they should have given, justice between the parties cannot be done by a *remittitur*.² This rule includes

618; *Wainwright v. Satterfield*, 52 Neb. 403, 72 N. W. Rep. 359; *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 245, 37 Pac. Rep. 297, 26 L. R. A. 425; *Denison v. Lewis*, 5 D. C. App. Cas. 328; *Cleveland, etc. R. Co. v. Beckett*, 11 Ind. App. 547, 39 N. E. Rep. 429; *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. Rep. 696; *Lambert v. Craig*, 12 Pick. 199; *King v. Howard*, 1 Cush. 137; *Bank of Kentucky v. Ashley*, 2 Pet. 327; *Hodges v. Hodges*, 5 Met. 205; *Sanborn v. Emerson*, 12 N. H. 57; *Trischet v. Hamilton Mut. Ins. Co.*, 14 Gray, 456; *Pierce v. Wood*, 23 N. H. 519; *Willard v. Stevens*, 24 id. 271; *Odlin v. Gove*, 41 id. 465, 77 Am. Dec. 773; *Cross v. Wilkin*, 43 N. H. 332; *Cram v. Hadley*, 48 id. 191; *Evertson v. Sawyer*, 2 Wend. 507; *Howard v. Grover*, 28 Me. 97; *Spackman v. Byers*, 6 S. & R. 385; *Atwood v. Gillespie*, 4 Mo. 423; *Pendleton Street R. Co. v. Rahmann*, 22 Ohio St. 446; *Hury v. Watson*, 4 T. R. 659, note; *Toledo, etc. R. Co. v. Beals*, 50 Ill. 150; *Kavanaugh v. Janesville*, 24 Wis. 618; *Bigelow v. Doolittle*, 36 Me. 115; *Strong v. Hooe*, 41 Wis. 659; *Johnson v. Johnson*, 104 Ky. 714, 47 S. W. Rep. 883; *Chitty v. St. Louis, etc. R. Co.* 166 Mo. 435, 65 S. W. Rep. 959; *Chicago Title & Trust Co. v. O'Marr*, 25 Mont. 242, 64 Pac. Rep. 506, citing the text.

If the action is for a joint tort a *remittitur* cannot be conditioned for different sums in favor of the several defendants according to the proofs

against them. *Chils v. Gronlund*, 41 Fed. Rep. 505.

Consent given in open court to the reduction of the amount of the verdict and the noting thereof by the clerk in the journal entry of the judgment is enough to bind all the parties. If the plaintiff receives the sum for which judgment is entered and acknowledges its receipt in full satisfaction thereof, he cannot obtain a second judgment for the full amount of the verdict on the ground that the court had no power to disturb the verdict. *Lewis v. Wilson*, 151 U. S. 551, 14 Sup. Ct. Rep. 419.

By voluntarily writing off part of a judgment in his favor the plaintiff abandons his claim to the sum remitted, and cannot recover it. *Hodson v. Union Pacific R. Co.*, 14 Utah, 402, 47 Pac. Rep. 859, 60 Am. St. 902.

¹ *De Puy v. Kann*, 32 App. Div. 638, 53 N. Y. Supp. 1103; *Stemmerman v. Nassau Electric R. Co.*, 36 App. Div. 218, 56 N. Y. Supp. 730.

² *St. Louis, etc. R. Co. v. Waren*, 65 Ark. 619, 48 S. W. Rep. 222; *Brunswick Light, etc. Co. v. Gale*, 91 Ga. 813, 18 S. E. Rep. 11; *Florida Central & P. R. Co. v. Burney*, 98 Ga. 1, 26 S. E. Rep. 730; *West Chicago Street R. Co. v. Johnson*, 69 Ill. App. 146; *Chicago & E. R. Co. v. Binkowski*, 72 id. 22; *West Chicago Street R. Co. v. Krueger*, 68 id. 450; *Lowenthal v. Streng*, 90 Ill. 74; *Chicago, etc. R. Co. v. Cleminger*, 77 id. 186; *Pennsylvania Co. v. Greso*,

verdicts so grossly excessive as to indicate by their very amounts that they are the result of passion or prejudice, as well as those in which error in the proceedings has tended to produce an improper verdict.¹

A plaintiff who has recovered a verdict or judgment which, as rendered, is clearly erroneous, and seeks to avoid a reversal by striking out a part, must satisfy the court, either by material in the record or by fair presumption, that this can be done without injustice to the defendant. If he cannot do this, the defendant is entitled to have the verdict set aside or the judgment reversed.² In an action for two tracts of land, the judgment of the trial court was given for the plaintiff for both tracts, and for damages. On appeal the judgment as to one tract was affirmed, and reversed as to the other. The court held that, as there were no *data* in the record for the apportionment of the damages, the entire judgment should be [§13] reversed unless all the damages were remitted.³ Where the findings on the question of damages are not sustained by the evidence, the court may require the plaintiff to remit the damages or submit to a new trial.⁴ In an action for slander the trial court erred in excluding evidence offered in mitigation. The plaintiff was allowed to retain the verdict only on condition that he would consent to have it amended to one for nominal damages.⁵ A jury rendered a verdict for the full

79 id. 127; Nicholson v. O'Donald, id. 195; Lenzen v. Miller, 51 Neb. 855, 71 N. W. Rep. 715; Missouri, etc. R. Co. v. Belew, 22 Tex. Civ. App. 264, 54 S. W. Rep. 1079; Wright v. Southern Pacific R. Co., 14 Utah, 383, 399, 46 Pac. Rep. 374; Oldfather v. Zent, 14 Ind. App. 89, 41 N. E. Rep. 555; Pavey v. American Ins. Co., 56 Wis. 221, 3 N. W. Rep. 925; Smith v. Dukes, 5 Minn. 373. Compare Baxter v. Chicago & N. R. Co., 104 Wis. 307, 80 N. W. Rep. 614, quoted from in the text of § 460.

¹ Id.

² O. & A. R. Co. v. Fulvey, 17 Gratt. 366.

If the jury are erroneously charged that they may award exemplary

damages a *remittitur* will not be permitted. Railway v. Hall, 53 Ark. 7, 13 S. W. Rep. 138.

³ Hodapp v. Sharp, 40 Cal. 69; Hartford Deposit Co. v. Calkins, 186 Ill. 104, 57 N. E. Rep. 863.

⁴ Carpentier v. Gardiner, 29 Cal. 160; Murray v. Buell, 74 Wis. 14, 41 N. W. Rep. 1010; Corcoran v. Harran, 55 Wis. 120, 12 N. W. Rep. 468; Doolin v. Omnibus Cable Co., 125 Cal. 141, 57 Pac. Rep. 774; Thomas v. Gates, 126 Cal. 1, 58 Pac. Rep. 315.

A *remittitur* will not be required where the verdict is only twelve cents in excess of the sum sued for. Cameron v. Hart, 57 Mo. App. 112.

⁵ Clark v. Brown, 116 Mass. 504.

amount of the plaintiff's claim, notwithstanding he had received a horse, wagon and sundry articles of clothing of considerable value which should have been deducted. Because the amount which should be allowed for this property was not ascertained, the objection of excess could not be removed by a *remittitur*.¹

§ 460. **Same subject.** In those cases in which there is no legal measure of damages, or they are unliquidated; where courts only interfere with verdicts when there is such an excess of damages as indicates that the jury has committed an error of a serious nature, the plaintiff may have the benefit of remitting a part, so that, if the amount is not still excessive, a new trial will not be granted.² In many instances in cases of this nature the court, on finding the damages too large, have suggested the amount of reduction and thus given the plaintiff a guide as to the sum to be remitted. Oakley, C. J., said: "We have considered it and find no objection on principle to reducing the verdict to an amount such as, if the jury had found it as damages, we would not interfere with their conclusion. That is, in effect, for the court to say to the plaintiff, if you will enter a *remittitur* so as to reduce the verdict to such a sum as we think would not have been unreasonable, if it had been found by the jury, we will not set it aside." The verdict was \$1,500, and the court gave the plaintiff the option to remit \$1,000 and take judgment for the residue.³ Accord-

¹ Lambert v. Craig, 12 Pick. 199.

² Upham v. Dickinson, 50 Ill. 97; Louisville, etc. R. Co. v. Hodge, 6 Bush, 141; Johnson v. Von Kettler, 66 Ill. 63; Collins v. Council Bluffs, 35 Iowa, 432; Duffy v. Dubuque, 63 id. 171, 50 Am. Rep. 743.

³ Dublin v. Murphy, 3 Sandf. 19; Johnston v. Morrow, 60 Mo. 339; Collins v. Albany, etc. R. Co., 12 Barb. 492; Hegeman v. Western R. Co., 16 Barb. 353, 13 N. Y. 9; Whitehead v. Kennedy, 69 id. 462, 470; Spicer v. Chicago, etc. R. Co., 29 Wis. 580; Patten v. Chicago, etc. R. Co., 32 id. 524; Lombard v. Chicago, etc. R. Co., 47 Iowa, 494; Murray v. Hudson

River R. Co., 47 Barb. 196; Bierbauer v. New York, etc. R. Co., 15 Hun. 559; Eliot v. Allen, 1 C. B. 18; Holmes v. Jones, 121 N. Y. 461, 24 N. E. Rep. 701; Pensacola Gas Co. v. Pebley, 25 Fla. 381, 5 So. Rep. 593; Van Winter v. Henry County, 61 Iowa, 684, 17 N. W. Rep. 94; Broquet v. Tripp, 36 Kan. 700, 14 Pac. Rep. 227; Reddon v. Union Pacific R. Co., 5 Utah, 344, 15 Pac. Rep. 262; Corcoran v. Harran, 55 Wis. 120, 12 N. W. Rep. 468; Baker v. Madison, 62 Wis. 137, 22 N. W. Rep. 141, 583; Massey v. Toronto Printing Co., 11 Ont. 362; Belt v. Lawes, 12 Q. B. Div. 356; Union Pacific R. Co. v. Mitchell, 56 Kan. 324, 43 Pac. Rep.

ing to some courts there is an apparent or real departure [§14] from sound principle in this practice. The court concludes that the jury committed a serious mistake because they found such excessive damages; and yet allows their finding, covering the major propositions of the case upon which damages are consequent, to stand. Why should a verdict be in part retained under such circumstances? Where their estimate of damages is rejected and another substituted, is the latter a verdict?¹ One answer, among the many given to the questions put by some courts, is that in case of personal injuries which are serious the sum which will compensate therefor is a matter concerning which jurors will differ largely, and the fact that the sum found is larger than the court thinks just does not establish that the jury were actuated by prejudice or passion. The law forbids a judge giving sanction to a verdict he deems unjust, but it does not require that he refuse to add his judgment, soberness and experience to the decision of the jury, and, so doing, to award a result more equitable than either setting aside or wholly affirming a verdict.²

The supreme court of Georgia strenuously contends that in suits to recover for personal injuries it is not competent for the court to say that the verdict shall stand for any definite sum

244; *Nicholds v. Crystal Plate Glass Co.*, 126 Mo. 55, 28 S. W. Rep. 991; *Bee Pub. Co. v. World Pub. Co.*, 59 Neb. 713, 32 N. W. Rep. 28; *McKenna v. North Hudson R. Co.*, 64 N. J. L. 106, 65 Atl. 1 Rep. 776; *Still v. Nassau Electric R. Co.*, 32 App. Div. 276, 52 N. Y. Supp. 975; *Young v. Cowden*, 98 Tenn. 577, 40 S. W. Rep. 1088; *Telegraph Co. v. Frith*, 105 Tenn. 167, 58 S. W. Rep. 118; *Hazard Powder Co. v. Volger*, 7 C. C. A. 130, 58 Fed. Rep. 152; *Fraser v. London Street R. Co.*, 29 Ont. 411; *Sloane v. Southern California R. Co.*, 111 Cal. 668, 44 Pac. Rep. 329, 32 L. R. A. 193.

A defendant cannot be required to accept an offer of a *remittitur* of the excess of the damages as a finality and so as to bar him of his right to a review of other proceedings in the

trial. *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. Rep. 880.

¹See *Luson v. Smith*, 1 Nev. & Man. 304; *Sherry v. Frecking*, 4 Duer, 452; *Koeltz v. Blackman*, 46 Mo. 320.

If the amount awarded by the jury as damages is grossly excessive and is not supported by any interpretation which can be given the evidence a *remittitur* will not be allowed. *Doty v. Steinberg*, 25 Mo. App. 328, following *Koeltz v. Blackman*, *supra*. See *Sherman v. Commercial Printing Co.*, 29 Mo. App. 31; *International, etc. R. Co. v. Wilkes*, 68 Tex. 617, 2 Am. St. 515, 5 S. W. Rep. 491; *Parsons & P. R. Co. v. Montgomery*, 46 Kan. 120, 26 Pac. Rep. 403.

²*Goldie v. Werner*, 59 Ill. App. 297; *McNulta v. Henckels*, 92 Id. 273.

less than it designates.¹ The rule in that state is that where general damages have been recovered for a personal tort, if they be so excessive as to lead the court to suspect bias or prejudice, the judge has no power to require a portion of the damages written off, and thereupon refuse a new trial; but it is otherwise where the damages claimed are special, and from the testimony can with some accuracy be computed in dollars and cents, as in cases of tortious homicides,² and also in actions on contracts.³ In Kentucky the trial court cannot, in an action to recover for personal injuries, require the plaintiff, in order to avoid a new trial, to accept judgment for less than the verdict awards; and if such judgment is accepted under protest it will be reversed either upon the defendant's appeal or upon cross-appeal.⁴ The Texas courts denied the power to require a *remittitur* in actions to recover damages for torts, but the rule has been changed by statute, and the power of the legislature to make the change has been sustained.⁵ The same view of the main question seems to be favored in West Virginia.⁶ This is the view in Missouri as to the supreme court,⁷ but not as to the trial courts. It is said in a recent case: Whenever the verdict does not upon its face appear to be the result of passion or prejudice, it is wholly within the province of the jury; but when it does so appear, then it ought to be set aside. We have no scales by which we can determine what portion is just, and the result of reason, based upon the evidence, and what part is poisoned with prejudice and passion. We do not think it within our province to assess the damages. When we set aside any part of the verdict we destroy its integrity, and we have no right to set ourselves up as triers of facts, and render another and different verdict. The only logical course in such cases is to let the verdict stand or set it

¹ Savannah, etc. R. v. Harper, 70 Ga. 119; Carlisle v. Callahan, 78 id. 320, 2 S. E. Rep. 751; Central Georgia R. Co. v. Perkerson, 112 Ga. 923, 38 S. E. Rep. 365.

² Savannah, etc. R. Co. v. Godkin, 104 Ga. 655, 30 S. E. Rep. 378.

³ Thornton v. George, 103 Ga. 9, 33 S. E. Rep. 633, 69 Am. St. 187.

⁴ Louisville & N. R. Co. v. Earl's Adm'r, 94 Ky. 368, 22 S. W. Rep. 607.

⁵ Texas, etc. R. Co. v. Syfan, 91 Tex. 562, 44 S. W. Rep. 1064.

⁶ Vinal v. Core, 18 W. Va. 1, 60, approving Nudd v. Wells, 11 Wis. 415.

⁷ Chitty v. St. Louis, etc. R. Co., 166 Mo. 435, 445, 65 S. W. Rep. 959, indicating the fluctuation of local opinion on the question.

aside as an entirety.¹ It was formerly the rule in Wisconsin, where the excess of the judgment was not readily severable from the rest and clearly ascertainable from the record, that the appellate court would not substitute its judgment for that of the jury and allow the plaintiff to remit accordingly, and then affirm the judgment.² But the opposite view has been, probably, carried further in that state than in any other unless it be Tennessee. The opinion of Justice Marshall in a recent case reviews the more important cases in Wisconsin, and seemingly extends the doctrine. The case referred to, as stated in the headnotes prepared by that justice, holds that where a judgment in favor of a plaintiff in a personal injury action is right as regards the legal liability of the defendant, but reversible because of the reception of irrelevant evidence tending to prejudice the jury and increase the amount of their verdict, and because compensation was allowed for a disability which does not in fact exist, the court may properly permit the plaintiff, at his election, to avoid a new trial by taking judgment for such sum as will, in the judgment of the court, do justice to the defendant. In naming a sum for which the plaintiff may take judgment in the circumstances above indicated, the right of the defendant to a jury trial is not invaded if the amount be placed as low as in all reasonable probability the jury found by their verdict, independent of the prejudicial elements. That is, the court in such a case should not undertake to say what sum of money will measure the plaintiff's loss, but what sum the jury said, by their verdict, stripped of its prejudicial elements, and giving the defendant the benefit of reasonable probabilities in respect to the amount of the recovery, will measure such loss.³ The first case in which the question arose in Minnesota considered it in a conservative manner;⁴ but later ones have made a considerable

¹ *Gurley v. Missouri Pacific R. Co.*, 104 Mo. 211, 233, 16 S. W. Rep. 11; *Chitty v. St. Louis, etc. R. Co.*, 148 Mo. 64, 49 S. W. Rep. 868.

The power of the trial court to order a *remittitur* is recognized in Missouri, but the better practice, it is said, is to sustain or set aside the verdict as a whole. *Unterberger v. Scharff*, 51 Mo. App. 102.

² *Potter v. Chicago & N. R. Co.*, 29 Wis. 615.

³ *Baxter v. Chicago & N. R. Co.*, 104 Wis. 307, 80 N. W. Rep. 644. Compare *McCann v. Ullman*, 109 Wis. 574, 85 N. W. Rep. 493.

⁴ *Craig v. Cook*, 28 Minn. 288, 9 N. W. Rep. 712.

advance. The statutes of that state provide for a new trial where excessive damages have been awarded under the influence of passion and prejudice, and contain no exception under which the trial court may correct the error of the jury by reducing the verdict. It is conceded that a strict following of the statute requires a new trial whenever such a verdict is returned. But the practice of correcting the error by reducing the damages to what the trial court deems fair, not only in cases where it is found that the jury was actuated by motives other than passion or prejudice, but in cases where there was no other apparent cause, is too firmly established to be departed from. Where there is such a degree of passion and prejudice as to make it clear to the court that it permeated the entire case and influenced the jury upon questions other than damages, no attempt will be made to correct the verdict by a reduction of damages, but an unconditional new trial will be granted.¹ The doctrine is carried further in Tennessee. In a case in which the trial judge suggested a *remittitur* of nearly one-half the verdict, it was contended that the excessive award was the result of passion, prejudice, corruption or caprice, and that the whole verdict should, therefore, be set aside. The appellate court said that, conceding this to be true, and that the trial judge refused to approve the verdict because it was true, the verdict was valid until set aside. If it is reduced by the trial judge to such an amount as makes it a proper verdict on the facts, and this is assented to by the plaintiff, it is purged of its taint, and judgment may be rendered for such reasonable amount without the necessity of another trial. This line of argument, the court admits, has no application if there should not have been any verdict for the plaintiff.²

The tendency of the late decisions, except as has been otherwise indicated, is in the direction of unqualified support for the practice which allows the appellate and trial courts, in cases in which excessive damages have been awarded, and in which the plaintiff is entitled to substantial damages, to indicate the excess and give him the option to remit it and take judgment for

¹Trow v. White Bear, 78 Minn. Rep. 359; Bee Pub. Co. v. World Pub. Co., 80 N. W. Rep. 1117; Wainwright Co., 59 Neb. 713, 82 N. W. Rep. 28.

v. Satterfield, 52 Neb. 403, 72 N. W. ²Telegraph Co. v. Frith, 105 Tenn. 167, 58 S. W. Rep. 118.

the residue or be awarded a new trial. This is held not to be an invasion of the province of the jury or of the rights of the defendant.¹ In Louisiana if the verdict is clearly less than it should be the supreme court will render judgment for such sum as the evidence indicates to be proper.² In a recent English case³ in which the general question was for the first time passed upon by a court of appeal, it was argued that the power to reduce the verdict without the consent of both parties to the action could not exist without the power to increase it without such consent, which, counsel said, would be an absurd conclusion, because then the court would in that case be giving damages which a jury had not given. The answer was made by Brett, M. R.: "I am, however, by no means prepared to say that the court might not refuse a new trial if a defendant would agree that the damages should be larger. Suppose a case in which a new trial should be moved for on behalf of the plaintiff on the ground that the amount of damages which the jury had given was obviously unreasonably too small. I am far from saying that the court would not have power in favor of the defendant and in his interest to say that the damages given are too small, but if the defendant will agree to their being increased to such a sum as may be stated, a new trial shall be refused."

In the trial court, after a motion for a new trial has been granted on the ground of excessive damages, it is held, in Indiana, to be too late to avoid the objection by remitting the excess;⁴ and in Kentucky, that it is too late after judgment;

¹ *Missouri Pacific R. Co. v. Dwyer*, 36 Kan. 58, 12 Pac. Rep. 352; *Baker v. Madison*, 62 Wis. 137, 22 N. W. Rep. 141, 583; *Union v. Durkes*, 33 N. J. L. 21; *Belknap v. Boston & M. R.*, 49 N. H. 358; *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. Rep. 458; *Hopkins v. Orr*, 124 U. S. 510, 8 Sup. Ct. Rep. 590; *Kennon v. Gihner*, 131 U. S. 22, 9 Sup. Ct. Rep. 696; *Pratt v. Pioneer Press Co.*, 35 Minn. 251, 28 N. W. Rep. 708; *Hutchins v. St. Paul, etc. R. Co.*, 41 Minn. 5, 46 N. W. Rep. 79; *Belt v. Lawes*, 12 C. B. Div. 356; *Baxter v. Chicago & N. R. Co.*, 104 Wis. 307, 80

N. W. Rep. 644, citing the text; *Chitty v. St. Louis, etc. R. Co.*, 166 Mo. 435, 65 S. W. Rep. 959, and the cases cited to this section, and the propositions of the preceding section which bear upon the subject.

² *Sullivan v. Shreveport & P. R. Co.*, 39 La. Ann. 800, 4 Am. St. 239, 2 So. Rep. 586; *Caldwell v. Vicksburg, etc. R. Co.*, 41 La. Ann. 624, 6 So. Rep. 217; *Turnblow v. Wimberly*, 106 La. 259, 30 So. Rep. 747.

³ *Belt v. Lawes*, 12 Q. B. Div. 356 (1884).

⁴ *Hill v. Newminn*, 47 Ind. 187.

at all events, after the close of the term.¹ The remission, to have effect, should be made during the term, and while the judgment is under the control of the court.² The appellate court will not listen to an objection from the defendant based on the fact that the plaintiff has voluntarily remitted in the trial court a portion of the damages awarded by the jury.³ And it is doubtless the rule that the party who has so remitted will not be heard to claim that the amount which remains is in-

¹ Bealle v. Schoal, 1 A. K. Marsh. 475; Holeman v. Coleman, id. 297; James v. Wilson, 7 Tex. 230.

In *Planters' Bank v. Union Bank*, 16 Wall. 483, 497, Strong, J., said: "It is further assigned for error by the defendants that the court allowed the plaintiffs to withdraw a *remittitur* entered by them of part of the verdict obtained on a former trial of the case. The only objection made in the court below to the allowance was that the *remittitur* was an acknowledgment of record that the amount remitted was not due. There had been a former trial, in which the plaintiffs had obtained judgment for \$113,296.01, with five per cent. interest from November 25, 1863. This was a larger amount of interest than the petition of the plaintiffs had claimed, and they entered on the judgment a *remittitur* of the excess, expressly reserving their right to the balance of the judgment. Subsequently a new trial was granted, and it is now contended that the *remittitur* had the effect of a *retraxit*. As it was entered after judgment, such perhaps would be the effect if the judgment itself had not been set aside and a new trial had not been granted. *Bowden v. Horne*, 7 Bing. 716. But such cannot be its operation now. If it takes effect at all, it must in its entirety, and the plaintiffs must hold their first judgment for the balance unremitted. As their judgment no longer exists,

there is no reason for holding that the remission of a part of it is equivalent to an adjudication against them."

² *Robertson v. Allen*, 36 Ark. 553; *Russell v. Hubbard*, 59 Ill. 335; *Rowan v. People*, 18 Ill. 159; *Buckles v. Northern Bank of Kentucky*, 63 Ill. 263; *Fury v. Stone*, 2 Dall. 184.

In *Crockett v. Calvert*, 8 Ind. 127, a jury in a justice's court found a verdict of \$100 in favor of the plaintiff, and judgment was rendered thereon; but before the entry on the justice's docket was signed and sealed by him the plaintiff entered a *remittitur* of \$25 of the judgment. The defendant appealed, and the appellate court rendered judgment for \$80; held, a reduction of the judgment so as to carry costs; because the *remittitur* should have been of \$25 of the *verdict* and judgment taken for the remainder.

After an order reversing a judgment had been made in one of the Illinois appellate courts the plaintiff had such order set aside and entered a *remittitur* of one-half of the judgment, whereupon such court entered judgment for the balance. This action was sustained. *North Chicago Street R. Co. v. Wrixon*, 150 Ill. 532, 37 N. E. Rep. 895.

³ *Central R. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463; *Savannah, etc. R. Co. v. Godkin*, 104 Ga. 655, 659, 30 S. E. Rep. 373, 69 Am. St. 187.

sufficient. The offer to remit will not be effective unless it specifies the sum. The plaintiff cannot require the court to substitute its judgment for the verdict upon a question of fact. Hence where the offer was to remit such part of the sum awarded as the court deemed to be fair, there was no error in granting a new trial.¹

Where it appears that at least nominal damages should [§15] have been given, but the jury have found a verdict for the defendant, then whether the court will grant a new trial will depend on whether any other right than that to such damages is involved in the question. If not a new trial will not be granted;² but if a judgment for the plaintiff would entitle him to costs or is necessary to vindicate any right drawn in question a new trial will be granted if the jury have erroneously found for the defendant when they should have found nominal damages for the plaintiff.³ The rule that a new trial will not be granted in favor of a plaintiff who at most is entitled to nominal damages applies only to cases where the trivial nature of the claim is clear and unquestionable.⁴ The smallness of the damages is no objection to a new trial when the verdict is manifestly contrary to the evidence and the judge's charge to the jury.⁵ If a case is submitted to a court upon an agreed statement of facts in which the damages are not fixed, or an assessment provided for, the judgment, if for the plaintiff, will be for nominal damages only.

§ 461. Verdicts must be certain. It may be stated as a reasonable and general rule that a verdict, though informal,

¹ *Richardson v. Birmingham Cotton Manuf. Co.*, 116 Ala. 381, 29 So. Rep. 478. *ton*, 12 id. 256; *Hucker v. Blake*, 17 id. 97. See § 11.

² *Ely v. Parsons*, 55 Conn. 83, 10 Atl. Rep. 499; *Eaton v. Lyman*, 30 Wis. 41; *Laubenheimer v. Mann*, 19 id. 519; *Hibbard v. Western U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *Jones v. King*, 33 Wis. 422; *Chase v. Bassett*, 15 Abb. Pr. (N. S.) 293; *Elwell v. Bradham*, 2 Speers, 141; *Sherwood v. Gibson*, 5 Up. Can. Q. R. 295; *Smith v. Weed Sewing Machine Co.*, 26 Ohio St. 562; *Mahoney v. Robbins*, 49 Ind. 116; *Hudspeth v. Allen*, 26 id. 167; *Patton v. Hamil-*

ton, 12 id. 256; *Hucker v. Blake*, 17 id. 97. See § 11.
³ *McCarty v. Leggett*, 3 Ill. 134; *High v. Johnson*, 28 Wis. 72; *Rosenbaum v. McThomas*, 34 Ind. 331. See § 11.

⁴ *McCarty v. Leggett*, *supra*; *Plumleigh v. Dawson*, 6 Ill. 541, 41 Am. Dec. 199; *Teal v. Russell*, 3 Ill. 319.

⁵ *Brooklyn v. Sequa, Tay.* (N.C.) 263; *Addington v. Western & A. R. Co.*, 93 Ga. 566, 20 S. E. Rep. 71; *Ray v. Jefferson*, 9 Ky. L. Rep. 602, 5 S. W. Rep. 867; *Welles v. Schroeder*, 67 Conn. 257, 34 Atl. Rep. 1051.

is good if the court can understand it. It is to have a reasonable intendment, and to receive a reasonable construction, and is not to be avoided unless from necessity. If rendered upon substantial issues of fact it is not to be disregarded because [S16] of mere technical defects.¹ A verdict, besides being responsive to the issues, should find with certainty the amount of damages the jury intend to award to the successful party in money.² It is safest and most prudent to specify the exact amount.³ It will, however, be deemed certain if it can be rendered so by reference to the facts established by the record or found by the jury. If the jury find all the necessary *data*, so that by mere arithmetical calculation the amount can be determined, the verdict is certain and will [S17] support a judgment for the amount so ascertained.⁴ If

¹ *Daniels v. McGinnis*, 97 Ind. 549; *Clark v. Clark*, 132 Ind. 25, 31 N. E. Rep. 461.

² *Mayor v. Calhoun*, 103 Ga. 675, 30 S. E. Rep. 434; *Louisville & N. R. Co. v. Hartwell*, 99 Ky. 436, 36 S. W. Rep. 183; *Shell v. Sanders*, 46 Ga. 469.

A verdict in favor of the plaintiff for nominal damages, no sum being named, is void. *Sellers v. Mann*, 113 Ga. 643, 39 S. E. Rep. 11.

³ *Darden v. Mathews*, 22 Tex. 320.

⁴ *Lebanon v. Twiford*, 13 Ind. App. 384, 41 N. E. Rep. 844; *Evans Co. v. Reeves*, 6 Tex. Civ. App. 254, 26 S. W. Rep. 219; *New Orleans, etc. R. Co. v. Schneider*, 8 C. C. A. 571, 60 Fed. Rep. 210; *Phillips v. Behn*, 19 Ga. 298; *Beckwith v. Carleton*, 14 Ga. 691; *Burton v. Anderson*, 1 Tex. 93; *James v. Wilson*, 7 id. 230; *Mays v. Lewis*, 4 id. 38; *Sacrest v. Jones*, 30 id. 596; *Miller v. Shackleford*, 4 Dana, 271; *McGregor v. Armill*, 2 Iowa, 30; *Gibson v. Lewis*, 27 Mo. 532; *Gaff v. Hutchinson*, 38 Ind. 341; *Fries v. Mack*, 33 Ohio St. 52; *Jackson v. Jackson*, 47 Ga. 99; *Brannin v. Fo-rees*, 12 B. Mon. 506.

In *Darden v. Mathews*, 22 Tex. 320, the action was on a note and this was the verdict: "We, the jury, find

for the plaintiff a judgment for the amount due on said note, with legal interest, less the sum of \$51, and the interest on the same from January, 1856." The court held that the day of the verdict is fixed by the record; the legal interest defined by the statute and the uncertainty of "January, 1856," was to be resolved most strongly against the party claiming under the verdict; that the ascertainment of the amount was a mere mathematical calculation and could be rendered certain if "said note" refers to the note in the petition. *Roberts, J.*, said: "The object of a verdict is to announce to the court the judgment of the jury as to how far the facts established by the evidence conform to those which are alleged and put in issue by the pleadings. As the facts thus declared constitute the basis of a judgment (which is but the legal consequence of the facts thus found), it follows that the verdict must either affirm or negative such of the disputed facts as will, in connection with those admitted, if any, support a legal judgment. A special verdict reiterates the facts alleged, of which the jury have had proof, in such manner as to indicate their judg-

the verdict does not find the facts upon which the calculation of damages depends according to the issue, nor the amount of damages themselves, it is fatally defective. Thus in an action for the conversion of personal property the jury found for the

ment upon them. A general verdict is defined to be a 'finding by the jury in the terms of the issue or issues submitted to them; and it is, wholly or in part, for the plaintiff or defendant.' 2 Tidd's Pr. 869. In its most general form it is, 'We, the jury, find for the plaintiff.' That is, they find the issue, the material facts in dispute, as presented in the pleadings, in favor of the plaintiff. It is only by understanding this general expression in connection with, and as a response to, the issue as formed by the pleadings that it can be held to amount to any declaration of facts. The jury, therefore, must be presumed to have expressed their finding with reference to the facts in the pleadings, unless they also state something which shows that such was not their intention. As, for instance, where the jury found for the plaintiff 'the amount of the note adduced,' it was held that the verdict was bad, because by the word 'adduced' they plainly showed that they had reference, not to the facts alleged, but to the facts in evidence. *Smith v. Johnson*, 8 Tex. 418. There is no such expression in this case to prevent the usual presumption from being indulged. This general verdict, 'We, the jury, find for the plaintiff,' will often be sufficient. In such cases its import would be that all the material facts alleged by the plaintiff that were put in issue are established. It is difficult to see, on principle, why this general verdict would not be all that was necessary in an action upon a note where the general issue alone was pleaded and where there were no payments, offsets or other facts established, changing the

amount to be recovered and making it different from that claimed in the petition. All the facts as to the amount promised, time of payment, etc., must be specifically set forth just as they are in the note; and interest, whether stipulated in the note or not, follows as a legal consequence. Hart. Dig., arts. 1606-8.

"In the English courts a different practice has prevailed, which renders it necessary for the jury to find interest; because they treated interest not as a legal consequence but as damages, to be allowed or not, according to the discretion of the jury. 2 Tidd's Pr. 873. In actions sounding in damages, and in actions where damages may be recovered incidentally, and in all actions of whatsoever character where dates, amounts and the like are not usually intended or understood to be stated accurately, and need not be proved as stated, there should not only be the general finding for the plaintiff, but also a special finding as to the amount. So, too, as in this case, where payments, offsets or other matter is pleaded and established, which reduces the amount of recovery below the amount claimed in the petition, the amount of the reduction should, in some way, be indicated by a special finding." But see *Educational Association, etc. v. Hitchcock*, 4 Kan. 36; *Parker v. Fisher*, 39 Ill. 164.

Dozier v. Jarman, 30 Mo. 216, is an instance of the strict construction of a verdict; and probably is more strict than is warranted by the authorities generally. It was an action to recover damages for a wrongful sale caused to be made by the defendant. The jury found a verdict against him

[S18] plaintiff, and instead of assessing his damages determined the *value* of the property "*to be* \$6,308." It was held uncertain because on the language the court could not assume that the jury intended to fix the value at the time of the conversion.¹ If the declaration does not state precisely the plaintiff's demand a verdict for the amount claimed, not stating it, will be insufficient. In such a case the *data* for computing the amount is not in the record.² A verdict is insufficient to sustain a judgment if it cannot be made certain as to amount without looking out of the record to the evidence given on the trial.³

for \$5,253, with interest from the day of sale. After discharge of the jury the court caused the interest to be computed and included it in the judgment on the verdict. The court say: "The action is one sounding in damages, and the amount of damages was specifically found by the jury, upon which interest, *eo nomine*, was given in addition. Interest is recoverable, as a matter of law, either by reason of an express contract to pay it, or because it is recoverable as damages which the party is legally bound to pay for the detention of money or property improperly withheld; and where it is imposed to punish negligent, tortious or fraudulent conduct it rests in the pleasure of the jury and is given as damages. Sedg. on Dam. The general rule undoubtedly is that interest is not recoverable on unliquidated damages or for an uncertain demand; and whenever it is allowable, as in trover or trespass, for converting or taking goods—in which the measure of damages is in general the value of the property at the time of the taking or conversion, with interest—the interest is not recoverable as such in addition to the damages assessed by the jury. but must enter into the estimate of and be found as part of the damage itself."

A verdict in an action for use and occupation which assesses damages at a named sum and legal interest is void for uncertainty and will not support a judgment unless the words "and legal interest" be rejected as surplusage. *Meeker v. Gardella*, 1 Wash. 139, 23 Pac. Rep. 837. See *Western Mill & Lumber Co. v. Blanchard*, 1 Wash. 230, 23 Pac. Rep. 839.

¹ *Knickerbocker & Nevada Silver Mining Co. v. Hall*, 3 Nev. 194.

² *Neville v. Northcutt*, 7 Cold. 294; *Gerhab v. White*, 40 N. J. L. 242.

³ *Fries v. Mack*, 33 Ohio St. 52; *Mays v. Lewis*, 4 Tex. 33; *Claiborne v. Tanner*, 18 Tex. 68; *Fromme v. Jones*, 13 Iowa, 474; *Smith v. Tucker*, 25 Tex. 594.

In *Fries v. Mack*, *supra*, the action was brought on a judgment. This was the verdict: "We, the jury, do find for the plaintiff \$7,000 and interest from the *maturity* of the seven notes of \$1,000 each, given February 2, 1860, up to March 2, 1874." The question was as to adding interest to the \$7,000. The court say: "The action is not brought upon promissory notes; nor were any such notes referred to in the pleadings; and the verdict neither gives copies of them nor states the times at which they are respectively payable. Was it, then, within the province of

If the verdict goes beyond the issue raised by the [§19] pleadings, and passes upon an extraneous fact, or contains any redundant statement, such finding or statement may be rejected as surplusage, and will not vitiate the verdict if it is otherwise sufficient,¹ unless the addition clearly shows that the jury reasoned incorrectly or from false premises.²

§ 462. General verdict on several counts. If there is a distinct and separate cause of action stated in each of several

the court to identify the notes referred to by the jury, and ascertain the times when they severally matured, by reference to the evidence offered on the trial? We are constrained to answer this question in the negative. The facts found by the court (in thus identifying the notes, computing the interest thereon and entering judgment accordingly) formed no part of the record, and were found only from the memory or minutes of the judge who tried the case. Without a knowledge of these facts no one could tell from the verdict, considered *per se*, or in connection with the record, from what time the jury intended the computation of interest to commence. The court found from the facts outside of the record that the jury intended by their verdict to refer to certain notes which had been offered in evidence upon the trial. Perhaps they did so intend, though the verdict does not say so. The facts found in regard to it are neither expressed nor necessarily implied in its language. . . . The judgment should follow as a logical sequence from the issues of fact declared by the pleadings and the findings of the jury thereon. If the judgment is warranted by the pleadings and verdict it should be sustained; but if it has no such basis it cannot be supported." *Wells v. Cox*, 1 Daly, 515, must be doubted on the test of the foregoing case, which undoubtedly lays down the correct rule. On the trial the court charged the jury

that if their finding was in favor of the plaintiff the amount due him was \$616.29. The jury found for the plaintiff "for the whole amount claimed and interest." After discharge of the jury the court, on motion, supported by the court's memory of its charge and affidavits of the intention of the jury, corrected the verdict by inserting the sum stated in the charge.

¹ *Marguard v. Wheeler*, 52 Cal. 445; *Watson v. San Francisco, etc. R. Co.*, 50 Cal. 523; *Patochi v. Central Pacific R. Co.*, 52 Cal. 90; *Dunlap v. Hayden*, 29 Ind. 303; *Ranney v. Bader*, 48 Mo. 539.

Where a jury returned a verdict for plaintiff "for \$51.60, subject to an offset of \$26.80, if said offset had not already been paid; but if it had been paid, then for \$51.60 without offset," held proper to render judgment for \$51.60, and to reject the balance as surplusage. The court say: "It in no way appears from the verdict whether it ('offset') had been paid or not, and therefore it is the same as if the verdict said nothing about it." Surplusage does not vitiate. *Hawkins v. House*, 65 N. C. 614; *Wills v. Garland*, 2 Va. Cas. 471; *Wendham v. Williams*, 27 Miss. 315; *Patterson v. United States*, 2 Wheat. 222; *Duane v. Simmons*, 4 Yeates, 441; *Longacre v. State*, 3 Miss. (2 How.) 637; *Gover v. Turner*, 28 Md. 600; *Baker v. Callender*, 6 Mass. 303.

² *Gregory v. Frothingham*, 1 Nev. 254.

counts, one of which is defective, and a general verdict given upon evidence applicable to all, it cannot be known that the [§20] verdict is not based in part on the bad count.¹ For this reason it is the rule that where a general verdict is given upon several counts, and one of them is not good, the judgment will be arrested or reversed on error.² But where it appears that there was but one cause of action stated, or, what comes to the same result, that all the evidence was applicable to the good counts, the verdict may be amended so as to apply only to them.³

A similar question arises where in a single count a demand is declared to the whole of which the plaintiff is not entitled, or where two or more breaches of a contract are assigned one of which is insufficient to sustain a claim for damages. On such a count a general verdict cannot be sustained.⁴ Where it

¹ *Eddowes v. Hopkins*, 1 Doug. 377; *Holt v. Scholefield*, 6 T. R. 691; *Empson v. Griffin*, 11 A. & E. 186.

In *Kline v. Wood*, 9 S. & R. 294, it was held that if a general verdict is given, and some of the counts are for matters without the jurisdiction of the court, the verdict is bad for the whole.

² *Harker v. Orr*, 10 Watts, 245; *Paul v. Harden*, 9 S. & R. 23; *Union Turnpike Road Co. v. Jenkins*, 1 Caines, 381; *Highland Turnpike Co. v. McKean*, 11 Johns. 98; *Dutchess Cotton Manufactory v. Davis*, 14 id. 238, 7 Am. Dec. 459; *Stevenson v. Newman*, 13 C. B. 285; *Trevor v. Wall*, 1 T. R. 151; *Hancock v. Haywood*, 3 id. 433; *Grant v. Astle*, 2 Doug. 723; *Holt v. Scholefield*, 6 T. R. 691; *Sheen v. Rickie*, 5 M. & W. 175; *Chadwick v. Trower*, 6 Bing. N. C. 1.

³ *Union Turnpike Road Co. v. Jenkins*, *supra*; *Aldrich v. Lyman*, 6 R. I. 98; *Cooper v. Bissell*, 15 Johns. 318; *Grant v. Astle*, 2 Doug. 723; *Stafford v. Green*, 1 Johns. 505; *Sayre v. Jewett*, 12 Wend. 135; *Norris v. Durham*, 9 Cow. 151; *Barnard v. Whit-*

ing, 7 Mass. 358; *Barnes v. Hurd*, 11 id. 57; *Patten v. Gurney*, 17 id. 182, 9 Am. Dec. 141; *Smith v. Cleveland*, 6 Met. 332; *Perry v. Boileau*, 10 S. & R. 208; *Smith v. Latour*, 18 Pa. 243; *Cornwall v. Gould*, 4 Pick. 444; *Baker v. Sanderson*, 3 id. 348; *West v. Platt*, 127 Mass. 367; *Emblin v. Dartnell*, 12 M. & W. 830.

In *Clarke v. Lamb*, 6 Pick. 512, 8 id. 415, it was held that when there are two or more issues, and the verdict is perfect as to some but silent as to others, it is amendable, if by the certificate of the judge it shall appear that there was no other matter in trial except what is embraced in the issues on which the verdict is sufficient; and correction may be made even pending a writ of error. *Petrie v. Hannay*, 3 T. R. 659; *Jones v. Kennedy*, 11 Pick. 125.

⁴ *Leach v. Thomas*, 2 M. & W. 427; *Sherry v. Frecking*, 4 Duer. 452; *Gordon v. Kennedy*, 2 Bin. 287; *Paley v. Osborne*, 10 Coke, 130b; *Lloyd v. Morris*, Willes, 443; *Talbot v. Herndon*, 4 J. J. Marsh. 553; *Van Rensselaer v. Platner*, 2 Johns. Cas. 17.

is positively and expressly averred that the plaintiff has sustained damage from a cause subsequent to the commencement of the action, or previous to the accrual of his right of action, and the jury give entire damages, judgment will be arrested; but where the cause of action is properly laid, and the other matter either comes under a *scilicet*, or is void, insensible or impossible, and, therefore, it cannot be intended that the jury ever had it under their consideration, the [821] plaintiff will be entitled to his judgment.¹

Where part of the special damage laid in the declaration did not fall strictly within the covenant alleged to be broken, it was held to be presumed, after verdict, that the jury were directed at the trial not to take that part into consideration.² In the opinion of the court there is a difference between an affirmative allegation of facts which would exclude a part of the damages declared for, and the absence of an averment necessary to make out title to a part. If a claim of damages is made up of good and bad items, and there is a general verdict for the plaintiff, it will be intended on a motion in arrest of judgment that the verdict was given only for the good ones.³

¹ Williams' note to *Hamilton v. Vere*, 2 Saund. 171b; *Secklemore v. Thistleton*, 6 M. & S. 9; *Gordon v. Kennedy*, 2 Bin. 287.

² *Campbell v. Lewis*, 2 B. & Ald. 392.

³ *Edwards v. Reynolds, Hill & Denio*, 53; *Lawrie v. Dyeball*, 8 B. & C. 70; *Kitchenman v. Skeel*, 3 Ex. 49; *Steele v. Western Inland Lock Nav. Co.*, 2 Johns. 283.

The case of *Sheen v. Rickie*, 5 M. & W. 175, does not appear to be consistent with the foregoing cases. Trover was brought for the conversion of chattels and *fixtures*. The court, by construction of the declaration, relieved it of the objection that suit was brought for fixtures annexed; but gave opinion of the effect of a general verdict in favor of the plaintiff, had the property indicated by the word "fixtures" been technically such. Parke, B., said: "If it

distinctly appeared on the face of the declaration that part of the cause of action was such as could not be recovered in trover, I should be strongly disposed to agree in the objection. The case would be easily distinguished from that which has been put, of an action for words, some of which are not actionable; there the court would presume that the non-actionable words were not intended to constitute the cause of action, but were used merely as matter of aggravation, or of explanation; although where the words were spoken at different times, and some of them were not actionable, the judgment would be arrested. The law is so laid down in the case of *Penson v. Gooday*, Cro. Chr. 327. If, therefore, it had been clear that this declaration contained two distinct causes of action for one of which trover could not be maintained, then, as general dam-

In Connecticut, Ohio, South Carolina, and by statute in several other states, if there is one good count in the declaration a general verdict which is responsive to the issue on it is [822] good, and not vitiated by there being another count which is bad.¹ Where there are several counts or causes of action a verdict may be taken separately on each; and that is a prudent course. Then, if either is bad, the objection may prevail without prejudice to the verdict on the good counts.² If the verdict is general and the declaration contains more than one count, the jury may be asked to inform the court upon which count they based their finding.³

§ 463. **Where there are several parties.** Where there are several plaintiffs it is not competent for the jury to find against one and in favor of another.⁴ Every action at law must be maintained in favor of all the plaintiffs, or it will fail as to all. A verdict in a tort action against three defendants is good though it makes no mention of one in default.⁵ And it is good if entitled in the name of the plaintiff against one of the defendants by name, the others being designated as "*et al.*" as against all shown by the record to be defendants,⁶ and a general finding in favor of the plaintiff is good, no defendant being named.⁷ It has already been stated that where there are several defendants, and there is a default as to one, and an issue as to others, there is but one assessment of damages as to

ages have been assessed upon the whole declaration, there must be either an arrest of judgment or a *venire de novo*." *Griffiths v. Lewis*, 8 Q. B. 841; *Alfred v. Farrow*, id. 854.

¹ *Walcott v. Coleman*, 2 Conn. 324; *Smith v. Hawkins*, 6 id. 444; *Graves v. Waller*, 19 id. 90; *Johnson v. Mulen*, 12 Ohio, 10; *Chisom v. School Directors*, 19 id. 289; *Pratt v. Thomas*, 2 Hill (S. C.), 654; *Taylor v. Sturginger*, 2 Mills' Const. 367; *Neal v. Lewis*, 2 Bay, 204; *Neilson v. Emerson*, id. 439; *Anderson v. Simple*, 7 Ill. 455; *Frankfort Bridge Co. v. Williams*, 9 Dana, 403, 35 Am. Dec. 155; *Scott v. Peebles*, 2 Sm. & M. 546; *Cowdren v. Gardner*, 1 J. J. Marsh.

589; *Peoria, etc. Ins. Co. v. Whitehill*, 25 Ill. 466; *Newell v. Downs*, 8 Blackf. 523. See *Hudson v. Matthews*, Morris, 94.

² *Hayter v. Moat*, 2 M. & W. 56; *Mooney v. Kennett*, 19 Mo. 551, 61 Am. Dec. 576; *Clark v. Hannibal*, etc. R. Co., 36 Mo. 202.

³ *Cross v. Grant*, 62 N. H. 675, 13 Am. St. 607.

⁴ *Buckhannan v. Gamble*, Ga. Dec. 156.

⁵ *Golden Gate Mill & M. Co. v. Joshua Hendy Machine Works*, 82 Cal. 184, 23 Pac. Rep. 45.

⁶ *Knox v. Gregorious*, 43 Kan. 26, 22 Pac. Rep. 981.

⁷ *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. Rep. 354.

all. Under the old practice the jury were called as well to try the issue as to inquire of the damages.¹ In actions *ex contractu*, if those who plead succeed otherwise than upon grounds of personal discharge, at most only nominal damages can be given against the defaulted party.²

In tort actions a verdict in favor of one defendant does [823] not generally affect the plaintiff's right of action against the co-defendants; one may be found to be liable and another or the others may not have incurred any liability. So where one defendant is defaulted and others defend, there may be an assessment of damages against the former, though the parties who plead are found not liable or are otherwise discharged. Thus, in an early case, trespass was brought against six defendants, three of whom suffered judgment by default; the others pleaded not guilty. On the trial, it appearing by the evidence that the trespass was committed after the action was brought, the three who pleaded were acquitted; but damages were assessed against the others.³ So if they plead different pleas, one may be found guilty and the others acquitted.⁴ If sued separately, recovery may be had against each. A judgment against one cannot be pleaded in bar of a recovery against another, unless it has been satisfied.⁵ But where the action is against several, and one is defaulted, and the others plead such a defense that on a verdict in their favor the record will show that the plaintiff had no cause of action against any of the defendants, he will not be entitled to judgment against the parties in

¹ Tidd's Pr. 802, 803; 1 Burr. Pr. 372; Hart v. De Lord, 17 Johns. 270; Cudderback v. Fanely, 2 Wend. 624; Van Schaick v. Trotter, 6 Cow. 599; Sluyter v. Smith, 2 Bosw. 573; Catlin v. Latson, 4 Abb. Pr. 248.

² Gerrish v. Cummings, 4 Cush. 391; Ferguson v. State Bank, 11 Ark. 512; Bruton v. Gregory, 8 Ark. 177.

In Williams v. McFall, 2 S. & R. 280, *assumpsit* was brought against two upon a joint contract. One of the defendants confessed judgment for a certain sum, and the other pleaded the general issue, went to trial, and a verdict passed against him for a

smaller sum. It was held that judgment could not be entered on the verdict, nor for such defendant, but that the judgment confessed would stand against the party who confessed it. The entry of judgment, or the confession, precluded the entry of another judgment against the other defendants; for two judgments final could not be entered in the same action on a joint claim.

³ Jones v. Harris, 2 Str. 1108.

⁴ Mayler v. Ayliffe, Cro. Jac. 134.

⁵ McGee v. Overby, 12 Ark. 104; Ammonett v. Harris, 1 Hen. & Munf. 488.

default; and it will be the same as to one found guilty on a different plea.¹

In a joint action against several for trespass or other tort, if all are found guilty, entire or joint damages must be assessed against them.² All the legal consequences of being jointly guilty must necessarily follow, of which one is that each is liable for all the damages which the plaintiff has sustained, without regard to different degrees or shades of guilt.³ The jury are to estimate the damages against all the defendants, if guilty, according to the amount which they think the most [824] culpable of them should pay.⁴ It is irregular, in such a case, on finding those jointly charged jointly guilty to assess damages against them separately even though they severed in [825] pleading.⁵ Notwithstanding this rule, juries have frequently severed the damages, aiming, no doubt, to apportion

¹ *Mayler v. Ayliffe*, *supra*; *Biggs v. Hair v. Little*, 28 Ala. 236; *Beal v. Benger*, 2 Ld. Raym. 1372; *Biggs v. Finch*, 11 N. Y. 128.
Greinfeld, 1 Str. 610.

² *Currier v. Swan*, 63 Me. 323; *Westfield Gas & Milling Co. v. Abernathy*, 8 Ind. App. 73, 35 N. E. Rep. 399; *Dawson v. McClelland*, [1899] 2 Irish, 486; *Halsey v. Woodruff*, 9 Pick. 555; *Fuller v. Chamberlain*, 11 Met. 503; *Jones v. Grimmer*, 4 W. Va. 104; *Crawford v. Morris*, 5 Gratt. 90; *Bohan v. Taylor*, 6 Cow. 313; *Wakeley v. Hart*, 6 Bin. 316; *Bostwick v. Lewis*, 1 Day, 34; *Mitchell v. Millbank*, 6 T. R. 199; *Hill v. Goodchild*, 5 Burr. 2790.

³ *Halsey v. Woodruff*, *supra*; *Railroad v. Jones*, 100 Tenn. 512, 45 S. W. Rep. 681, citing the text.

The rule is not changed by a statute authorizing several verdicts and judgments against one or more plaintiffs, or for or against one or more defendants, so as to conform to the rights of the parties. *Railroad v. Jones*, *supra*.

⁴ *Warren v. Westrup*, 44 Minn. 237, 46 N. W. Rep. 347, 20 Am. St. 578, citing the text; *Clark v. Bales*, 15 Ark. 452; *Hardy v. Broadus*, 35 Tex. 666; *Crawford v. Morris*, *supra*;

In *Clark v. Newsam*, 1 Ex. 131, it was held that where two persons were jointly sued for false imprisonment, one of whom had acted from improper motives, the damages ought not to be assessed with reference to the act and the motives of the most guilty, or the most innocent, party: but the true criterion of damages is the whole injury which the plaintiff has sustained from the joint act. Compare *Hair v. Little*, *supra*.

⁵ *Callison v. Lemons*, 2 Port. 145; *O'Shea v. Kirker*, 8 Abb. Pr. 69; *St. Louis, etc. R. Co. v. South*, 43 Ill. 176, 92 Am. Dec. 103; *Weakly v. Royer*, 3 Watts, 460; *Tyrrell v. Lockhart*, 3 Blackf. 136; *Palmer v. Crosby*, 1 id. 139; *Ridge v. Wilson*, id. 409; *Mitchell v. Millbank*, 6 T. R. 199; *Bohan v. Taylor*, 6 Cow. 313; *Wakely v. Hart*, 6 Bin. 316.

In *Hill v. Goodchild*, 5 Burr. 2790, Lord Mansfield said: "We hold that as the trespass is jointly charged upon both defendants, and the verdict has found them both jointly guilty, the jury could not

them according to the culpability of the respective defendants; and in South Carolina juries are permitted, in their discretion, to do so;¹ elsewhere it is irregular; but the irregularity may be cured by the plaintiff entering a *nolle prosequi* as to all the

afterward assess several damages. We do not think that the present case calls for an opinion upon those cases where the defendants are charged jointly and severally, where the defendants plead severally, or where the defendants are found guilty of several parts of the same trespass, or at a different time; or where a joint action is brought for two several trespasses, and the damages found severally, as being severally guilty. We don't meddle with any of these cases; there is a variety of opinions in the books relating to them."

The report of Heydon's Case, 11 Coke, 5a, states that a great question was moved and depended for divers terms, how and against whom, and for what damages, judgment should be entered. And at last upon consideration had of the precedents, and of our books, it was resolved *per totam curiam*: 1. That when in trespass against divers defendants, they plead not guilty, on several pleas, and the jury find for the plaintiff in all, the jurors cannot assess several damages against the defendants, because all is one trespass, and made joint by the plaintiff, by his writ and declaration; and although one of them is more malicious, and *de facto* doth more and greater wrong than the others, yet all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present. . . . In trespass against two, if the jury find

one at one time, and the other at another time, there several damages may be taxed; but if the plaintiff himself confesses that they committed the trespass severally, there the writ shall abate; and so there is a difference between finding by verdict and confession of the party. Also there is a difference betwixt an express confession and not gain-saying.

"2. In trespass against two, where one comes and appears, etc., against whom the plaintiff declares *simul cum*, etc., who pleads and is found guilty by the inquest to damages, and afterwards the other comes and pleads and is found guilty, the defendant who pleaded last shall be charged with the damages taxed by the former inquest; for the trespass which the plaintiff has made joint by his writ and declaration, and done at one time, cannot be severed by the jury, if the jury find the trespass to be done by all at one and the same time, as the plaintiff hath supposed. Against which it was objected that it might be mischievous to the defendant who last pleads; for excessive damages, by consent between the plaintiff and the first defendant, may be found, with which the second defendant shall be charged; and he shall have no remedy to relieve himself by attain, inasmuch as he is a mere stranger to the issue, upon the trial whereof the damages were assessed. But it was resolved that in such case he should

¹ *Bevin v. Linguard*, 1 Brev. 503, 2 Am. Dec. 681; *White v. McNelly*, 1 Bay, 11; *Boon v. Horn*, 3 Strobl. 159. Such apportionment does not dimin-

ish the merit or amount of the plaintiff's recovery. The aggregate of all the damages found is the damage of the plaintiff.

defendants but one, and taking judgment against him only; and he may elect to enter judgment for the best damages;¹ or, [826] according to some cases, the plaintiff may elect to enter judgment, *de melioribus damnis*, against all the defendants found jointly guilty.² Where the verdict was against three of the defendants, being silent as to the others, and no motion was made in arrest of judgment, those against whom the verdict was rendered being content to allow the entry of judgment against them, it was said that every intendment must be made in support of the verdict and the judgment; that it might well be presumed that the defendants not included in the verdict of guilty were intended not to be found guilty,³ or that, on the plaintiff taking judgment against those found guilty, he, by implication and intendment, discharged the other defendants by way of *nolle prosequi*, which could be entered as well after as before verdict, and even after judgment.⁴

In actions against several, damages against all can be assessed

have attain; for although he is a stranger to the issue, yet, because by the law he is privy to the charge, he shall have attain. . . .

"4. In the case at bar, for as much as in judgment of law the several juries gave a verdict all at one and the same time, the plaintiff may have election to have judgment *de melioribus damnis*, by any of the inquests, and it shall bind all; but *fiat nisi unica executio*. . . .

"5. Where, in trespass, the defendants plead several pleas, all triable by one and the same jury, and both the issues are found for the plaintiff, the jury cannot sever the damages; and if they do, the whole verdict is vicious."

In *Player v. Warn*, Cro. Car. 54, it was held in an action of trover against two that the jury might find the defendants severally guilty as to part of the property and not guilty as to the residue.

In *Turner v. McCarthy*, 4 E. D. Smith, 250, it was held this could not be done where it appears that the injury resulted from the joint act of

both defendants. The case with a perhaps concedes that if it appeared that each defendant was liable for part of the injury, there might be an apportionment of damages (citing *Austen v. Willward*, Cro. Eliz. 860; *Heydon's Case*, *supra*); but not where the whole injury was jointly done. *Holly v. Mix*, 3 Wend. 350, 20 Am. Dec. 702.

¹ 1 Saund. 207; *Bulkley v. Smith*, 1 Duer. 643; *Crawford v. Morris*, 5 Gratt. 90; *Allen v. Craig*, 13 N. J. L. 294; *Holly v. Mix*, 3 Wend. 350, 20 Am. Dec. 702; *Bohan v. Taylor*, 6 Cow. 313; *Minor v. Mechanics' Bank*, 1 Pet. 46, 74.

² *Heydon's Case*, 11 Coke, 5a; *Rochester v. Anderson*, 1 Bibb. 439; *O'Shea v. Kirker*, 8 Abb. Pr. 69; *Bulkley v. Smith*, 1 Duer. 643. But see *Davis v. Chance*, 2 Yerg. 94.

³ See *Gulf, etc. R. Co. v. James*, 73 Tex. 12, 10 S. W. Rep. 744, 15 Am. St. 743; *Lockwood v. Bartlett*, 7 N. Y. Supp. 481.

⁴ *Washington Gas Light Co. v. Lansden*, 9 D. C. App. Cas. 503.

only for acts committed by all jointly; and the rule is the same although all have been defaulted by agreement.¹ Separate acts, not committed with a common purpose or design, and without concert, will not authorize a joint recovery.² If it be proved that only one was concerned, the plaintiff may recover against him as if he only had been sued. Persons who have not conspired together, or united in committing the wrong, should not be joined in the same action as defendants.³

§ 464. Double and treble damages. When such penal damages are allowed by statute, and are specially claimed in the declaration, as they must be,⁴ it is appropriate, and according to the general practice, for the jury, if they find the defendant guilty, to find single damages in terms; then the court, on motion, will direct judgment for the increased damages provided for.⁵ But if the statute contains no express or implied directions on the subject, it is immaterial whether the court or the jury doubles or trebles the damages.⁶

To authorize judgment for such statutory damages, a verdict should be found for the plaintiff, separately, upon a count framed under the statute. When the declaration contains several counts, some for common-law causes, and others upon a statute giving double or treble damages, and a general verdict is found, a judgment for only single damages can be rendered; for it cannot be judicially known but that the verdict includes damages for all the causes stated in the declaration.⁷ In New York if the verdict does not state whether it is for single or treble damages, the presumption will be that it is for the latter.⁸

¹ Folger v. Fields, 12 Cush. 93.

² Leidig v. Bucher, 74 Pa. 65.

³ Id. See § 140 *et seq.*

⁴ Royse v. May, 93 Pa. 454; Rees v. Enrick, 6 S. & R. 286; Chipman v. Emeric, 5 Cal. 239; Palmer v. York Bank, 18 Me. 166, 36 Am. Dec. 710.

⁵ Rousey v. Wood, 57 Mo. App. 650; Robbins v. Farwell, 193 Pa. 37, 44 Atl. Rep. 260; Eccles v. Union Pacific Coal Co., 15 Utah, 14, 48 Pac. Rep. 148; Cross v. United States, 1 Gall. 26; Quimby v. Carter, 20 Me. 218; Beckman v. Chalmers, 1 Cow. 581; Swift v. Applebone, 23 Mich. 252;

Warren v. Doolittle, 5 Cow. 678;

Livingston v. Platner, 1 Cow. 175.

⁶ Quimby v. Carter, 20 Me. 218; Memphis, etc. R. Co. v. Carley, 39 Ark. 246.

⁷ Ewing v. Leaton, 17 Mo. 465; Lebeaume v. Woolfolk, 18 id. 514; Lowe v. Harrison, 8 id. 350; Shrewsbury v. Bawthitz, 57 id. 414; Thayer v. Sherlock, 4 Mich. 173; Osborn v. Lovell, 36 id. 246; Benton v. Dale, 1 Cow. 160.

⁸ Prigntz v. McTiernan, 18 N. Y. Misc. 651, 43 N. Y. Supp. 974; Livingston v. Platner, 1 Cow. 175.

[S27] § 465. **Judgment.** The judgment is the legal conclusion upon the facts established by the pleadings and verdict.¹ If there is no plea, and the subject of the action is of such a nature that, the declaration being confessed, the amount of the recovery can be ascertained by mere computation and the record affords the *data* for determining the amount for which judgment may be rendered, then the assessment may be made by the clerk — unless the practice is otherwise by statute; in other cases, as we have seen, a jury must be called. If witnesses have to be examined, and the damages are unliquidated, a failure to answer the declaration does not authorize the entry of final judgment in some states,² while in others it does.³ Where a case is tried by a jury, and they return a verdict for the plaintiff, but without any finding of damages, the court may amend it in this respect by adding nominal damages, as it is a legal consequence of the finding, and enter judgment accordingly; and this correction is necessary to give the plaintiff a judgment for costs.⁴

¹ *Lamphear v. Buckingham*, 33 Conn. 237.

² *Martin v. Price*, Minor, 68; *Phillips v. Malone*, id. 110; *Beam v. Hayden*, 5 Bush, 426; *Kenum v. Henderson*, 6 Ala. 132; *Arrington v. Mobile*, etc. R. Co., 30 Miss. 470; *Clarke v. Seaton*, 18 B. Mon. 226; *Shirley v. Landram*, 3 Bush, 552.

Ballard v. Purcell, 1 Nev. 342, was decided under a code which provided the manner of entering a judgment by default in two different classes of actions: first, where the action is on a contract for the recovery of money or damages only, and there is a failure to answer, when it is made the duty of the clerk to enter the default, and immediately thereafter to enter a judgment; in the second class, default is entered in the same manner, but the plaintiff must apply to the court for the relief demanded in his complaint; and it is also provided that if the taking of an account, or the proof of any fact, be necessary to enable the court to give judgment,

the court may take the account, or hear the proof, or may in its discretion order a reference or a jury trial for that purpose. It was held, if the suit be for unliquidated damages, they must be shown by proof in one of these modes.

By the code of Kentucky, allegations of value or amount of damages cannot be taken as true by failure to answer. *Daniel v. Judy*, 14 B. Mon. 393; *Clarke v. Seaton*, 18 id. 226.

³ § 416.

⁴ *Von Schoening v. Buchanan*, 14 Abb. Pr. 185; *Pickens v. Hayden*, 2 Stew. 10; *Stevens v. Briggs*, 14 Vt. 44, 39 Am. Dec. 209; *Loomis v. Tyler*, 4 Day, 141; *Thomas v. Commonwealth*, 3 J. J. Marsh. 121.

The omission of the word "dollars" in a verdict for plaintiff in *assumpsit* does not affect the validity of the judgment rendered thereon though no amendment was made. *Hopkins v. Orr*, 124 U. S. 520, 8 Sup. Ct. Rep. 590.

§ 466. Judgment must follow verdict.¹ The verdict [§28] is good if it contains the *data* for ascertaining the amount with certainty by calculation. The judgment is warranted by the verdict when rendered for the amount so ascertained.² Thus, where the suit was on a note for \$100, and the jury returned a verdict "for the plaintiff for the amount of the note, \$100," and a judgment was rendered for \$105.66, principal debt and interest, the court, holding that the interest followed the debt as an incident, affirmed the judgment.³ When the verdict is excessive, and the excess is remitted, the judgment is properly rendered for the residue.⁴ If a verdict exceed the penalty of a bond the court may enter judgment for the proper amount.⁵ Where the jury have assessed the damages for a tort at an entire sum no court of law, upon a motion for a new trial because the amount awarded is excessive and for the insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury. If this is done either party may complain of the judgment.⁶ If the statute prescribes the rule of damages and upon the admitted facts the court might properly have directed a verdict for a certain sum, it may increase the amount included therein, the finding being in disregard of the instructions.⁷

¹ Colonization Society v. Reed, 25 Tex. Sup. 343; Diedrich v. Northwestern R. Co., 47 Wis. 662, 3 N. W. Rep. 749; Mitchell v. Giessendorf, 44 Ind. 358; Reid v. Dunklin, 5 Ala. 205; Martin v. Commonwealth, 6 J. J. Marsh. 549.

² See § 464; Dawson v. Shirk, 102 Ind. 184, 1 N. E. Rep. 292.

³ Fisk v. Holden, 17 Tex. 408. See West v. Milwaukee, etc. R. Co., 56 Wis. 318, 14 N. W. Rep. 292.

Under a statute which provides that "when, by the verdict, either party is entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of the recovery," the court has no

power to add interest to the amount named in the verdict. Hallum v. Dickinson, 47 Ark. 120, 14 S. W. Rep. 477.

⁴ Linder v. Monroe, 33 Ill. 388.

⁵ Cohea v. State, 34 Miss. 179.

⁶ Kennon v. Gilmer, 131 U. S. 22, 29, 9 Sup. Ct. Rep. 696; Brown v. McLeish, 71 Iowa, 381, 32 N. W. Rep. 385.

⁷ Schweitzer v. Connor, 57 Wis. 177, 14 N. W. Rep. 922. It was held in Rafferty v. Missouri R. Co., 15 Mo. App. 559, that a judgment cannot be rendered upon a verdict which awards a less sum as damages than the statute fixes.

§ 467. **Judgment must be certain.** The judgment must be certain and must state the amount adjudged in the lawful money of the forum. The entry ought to contain in itself such precision and certainty as to enable the clerk to issue execution by inspection of it without reference to other entries.¹ A verdict in *assumpsit* was found in favor of the plaintiff for \$90 with interest from a day stated; a judgment was entered on it for \$90 with interest from the same day. This judgment was reversed and then entered up for the aggregate amount, the verdict being good. The judgment was uncertain. "The date," say the court, "from which interest is to be calculated is given by the verdict, but the time to which it was to run cannot be ascertained without reference to the whole record; it would run till the rendition of the judgment, from which time the principal and interest, as a gross amount of damages, would carry interest. The rendition of the judgment is the act of the court, and a defect in the judgment cannot be amended by the clerk in issuing execution."² The judgment need not specify the amount of interest due the plaintiff if it awards interest from a day designated.³

¹ *Boyken v. State*, 3 Yerg. 426; *Harmon v. Childress*, id. 327; *Peet v. Whitmore*, 14 La. Ann. 408; *Spiva v. Williams*, 20 Tex. 442; *Roberts v. Landram*, id. 471; *Early v. Moore*, 4 Munf. 262; *Berry v. Anderson*, 2 How. (Miss.) 649; *Claughton v. Black*, 24 Miss. 185; *Downing v. Dean*, 3 J. J. Marsh. 378; *Mitchell v. Gibson*, 14 Ark. 224; *Bartlett v. Blanton*, 4 J. J. Marsh. 426; *Bartle v. Plane*, 68 Iowa, 227, 26 N. W. Rep. 88; *Battell v. Lowery*, 46 Iowa, 49.

² *Tankersley v. Silburn*, Minor, 185.

A judgment cannot be rendered to draw interest prior to its rendition. *Simmons v. Garrett*, *McCahon*, 82.

The judgment entry in *Barnett v. Caruth*, 22 Tex. 173, 73 Am. Dec. 255, recited the trial and set out the verdict: "We, the jury, find for the plaintiffs one thousand two hundred and nineteen 55-100 dollars princi-

pal; and the further sum of one hundred and seventy-seven 89-100 dollars interest; making in the aggregate \$1,347.44." After the recitals the entry contained judgment: "It is ordered, adjudged and decreed by the court that the plaintiffs do recover of the defendant for their debt, damages and costs." etc. This judgment was held erroneous for being uncertain as to the amount of recovery. See *Martin v. Commonwealth*, 6 J. J. Marsh. 549; *Hann v. Gosling*, 9 N. J. L. 248; *Blane v. Sansum*, 2 Call, 495; *Codwise v. Taylor*, 4 Sneed, 346; *Brown v. Horless*, 22 Tex. 645.

A more liberal rule was laid down in Pennsylvania, in *Lewis v. Smith*, 2 S. & R. 142. The judgment in that case is thus referred to and maintained by *Tilghman, C. J.*: "The judgment was entered in the way

³ *Dinsmore v. Anstill*, Minor, 89.

In rendering judgments for money, and all judgments [829] for debts or damages must be so rendered, and in lawful currency,¹ the denominations of the money must be specified.² A judgment for an amount expressed in barren figures, as "for four hundred and sixty-one $\frac{2}{3}$ damages," is a nullity; it does not express a sum of money.³ Expressing the amount in figures [830] is not, probably, an infraction of the statutes requiring judicial proceedings to be recorded in the English language,⁴ but it is deemed too unsafe, and therefore has been held not to be tolerated.⁵ In New Jersey, such proceedings being required to be recorded "in words at length," stating the amount of a judgment in figures has been held to be good cause for reversal.⁶ Costs become a part of the judgment when

very usual in this court in actions on the case: that is to say, the prothonotary entered in the docket *judgment*, without mentioning for what sum. Inconveniences frequently arise from our loose practice: but the practice of every court is justly said to be the law of the court; and we should produce much greater evils than those we wished to prevent should we attempt now to destroy past judgments because they were not entered in a manner so accurate as they might have been. . . . I take it, that where judgments are confessed, if the plaintiff's demand is of the nature of a debt, which may be ascertained by calculation, whether it arise on a note or other writing, or on an account, it is sufficient to enter *judgment generally*. The judgment is supposed to be for the amount laid in the declaration, and the execution issues accordingly. But the plaintiff indorses on the execution the amount of the actual debt, and if the defendant complains that injustice has been done the court are always ready to give immediate and liberal relief on motion."

¹ Duerson v. Bellows, 1 Blackf. 217; Maynard v. Newman, 1 Nev. 271;

Sibert v. Kelly, 6 T. B. Mon. 669; Whetstone v. Colley, 36 Ill. 328; Stockton v. Scobie, 1 J. J. Marsh. 6; Carson v. Pearl, 4 id. 92; Griffith v. Miller, 6 id. 329; Randolph v. Metcalf, 6 Cold. 400; Erlanger v. Avegno, 24 La. Ann. 77; Buchegger v. Schultz, 13 Mich. 420; Henderson v. McPike, 35 Mo. 255; Bank of Prince Edward Island v. Trumbull, 53 Barb. 459; Mitchell v. Henderson, 63 N. C. 643; Chamberlin v. Vance, 51 Cal. 75; Munter v. Rogers, 50 Ala. 283.

² Carr v. Anderson, 24 Miss. 188.

³ Carpenter v. Sherfy, 71 Ill. 427; Lawrence v. Fast, 20 Ill. 338, 71 Am. Dec. 274; Pittsburg, etc. R. Co. v. Chicago, 53 Ill. 80; Randolph v. Metcalf, 6 Cold. 400. See Tidd v. Rines, 26 Minn. 201, 2 N. W. Rep. 497; Gutzwiller v. Crowe, 32 Minn. 70, 19 N. W. Rep. 314.

⁴ Fullerton v. Kelliher, 48 Mo. 512; Tankersley v. Silburn, Mmor, 185.

⁵ Linder v. Monroe, 33 Ill. 388.

The use of figures, preceded by the dollar mark, has been held sufficient. Davis v. McCary, 100 Ala. 545, 19 So. Rep. 665.

⁶ Cole v. Petty, 2 N. J. L. 60; Walter v. Vanderhoof, id. 73; Smith v. Miller, 8 id. 175, 14 Am. Dec. 418.

taxed; hence, where a judgment is for a certain sum, with costs and charges herein expended, taxed at ——— dollars and ——— cents, it is not so uncertain as to amount, after the costs are taxed, as to prevent suit on it.¹

SECTION 6.

RESTITUTION AFTER REVERSAL OF JUDGMENT.

§ 468. **How made.** When it happens that a judgment is collected or paid pending a writ of error, appeal, or *certiorari*, the defendant is entitled, on its reversal, to restitution of what he has lost by the erroneous judgment. If money has been collected or received upon a judgment valid at the time and binding between the parties, and that judgment is subsequently reversed, it may be recovered, although payment may not have been coerced by actual duress.² It may be recovered by suit.³ Other common-law remedies are cumulative.⁴ A court of equity is possessed of power to order the restitution of money collected under its decree after a reversal thereof, if the decree of reversal extends to a dismissal of the bill for want of equity. Such restitution may be ordered by rule.⁵ The court which rendered the erroneous judgment may cause restitution to be made, and the appellate court after reversing it, if informed by the record or otherwise that the judgment has been collected, may require restitution to be made by process from the court below, and enforce compliance by *mandamus*.⁶ The mode of proceeding to procure such restitution must be regulated according to circumstances. Sometimes it is done by a writ of restitution without a *scire facias*, when the record shows that the money has been paid, and there is a certainty as to what has been lost. In other cases a *scire facias* may be necessary to ascertain what is to be restored.⁷

¹ *Schroeder v. Boyce*, 127 Mich. 33, 86 N. W. Rep. 387. Compare *Noyes v. Newmarch*, 1 Allen, 51; *Case v. Plato*, 54 Iowa, 64, 6 N. W. Rep. 128.

² *Lott v. Swezey*, 29 Barb. 87.

³ *Id.*; *Sturgis v. Allis*, 10 Wend. 354; *Clark v. Pinney*, 6 Cow. 297; *Green v. Stone*, 1 Har. & J. 405; *Langley v. Warner*, 3 N. Y. 327; *Mc-*

Cracken v. Paul, 65 Ark. 553, 47 S. W. Rep. 854, 67 Am. St. 948.

⁴ *Id.*

⁵ *Morgan v. Hart*, 9 B. Mon. 79.

⁶ *Ex parte Morris*, 9 Wall. 605; *Hall v. Emmons*, 11 Abb. Pr. (N.S.) 435.

⁷ *Id.*; 2 Salk. 588; *Tidd's Pr.* 1033; *Hunt v. Westervelt*, 4 E. D. Smith. 225.

§ 469. **Liability of third parties; restitution of property, and compensation for loss of its use.** What is done under the execution pursuant to its precept is valid, and, so far [§31] as strangers and third persons are concerned, final.¹ Where the property taken under the erroneous judgment, in the absence of a *supersedeas* bond on an appeal, has, by voluntary sale, or by seizure and sale under process, passed to innocent purchasers pending the appeal; or where money collected under such judgment is received by one in a fiduciary character, as by an administrator, and he has, pursuant to an order of court, paid it over to another, the summary remedy provided by the statute for ordering restitution cannot properly be administered; and the party must pursue a different remedy by which all necessary parties may be brought before the court.² The court can by such summary remedy reach what is still in the possession of the adversary party.³ If suit is brought against

In *Safford v. Stevens*, 2 Wend. 158, a judgment of nonsuit, rendered in the common pleas, was reversed with costs, and a new trial granted. The record of the supreme court contained a suggestion that the plaintiff had obtained satisfaction of the judgment for costs in the common pleas, whereby the defendant had lost \$73.83, "as was suggested, shown to, and manifestly appeared" to the court; whereupon the court awarded restitution. In the court of errors, referring to this practice, the chancellor said: "It was undoubtedly the former practice to award restitution on the reversal of the judgment, only where it appeared by the return of the execution that the damages or costs erroneously awarded by the court below had been actually levied and paid over. And if the fact did not appear upon the record, the party was put to his *scire facit* inquiry to ascertain the fact, upon the return of which restitution was awarded. But I believe the modern practice has been to apply to the court on

affidavit for leave to suggest the fact on the record, and upon which the judgment of restitution is awarded. I see no objection to this course, as the court would undoubtedly permit the defendant to traverse the suggestion, if there was any doubt of its truth." See *Sheridan v. Mann*, 5 How. Pr. 201; *Arrow-smith v. Van Arsdale*, 21 N. J. L. 471.

In New Jersey the amount to be restored is settled by an assessment signed by one of the judges. *Id.*; *Harm v. McCormick*, 4 N. J. L. 109; *Randolph v. Bayles*, 2 *id.* 52; *McChesney v. Rogers*, 8 *id.* 272.

The practice is now very generally regulated by statute.

¹ *Langley v. Warner*, 3 N. Y. 327; *South Fork Canal Co. v. Gordon*, 2 Abb. (U. S.) 479; *Bank of United States v. Bank of Washington*, 6 Pet. 8. See *Reynolds v. Hosmer*, 45 Cal. 616.

² *Polk County v. Syphen*, 17 Iowa, 358, 85 Am. Dec. 568. See *Hay v. Bennett*, 153 Ill. 271, 38 N. E. Rep. 645.

³ *Lovell v. German Reformed Church*, 12 Barb. 67.

an officer who has sold property to satisfy a judgment, afterwards reversed, and who still holds the proceeds, the recovery or restitution will be limited to the amount realized; but where the action is against the person who occasioned the injury re-[832] covery may be had for the whole damage the injured party has sustained by reason of the erroneous judgment and execution,—he may recover the full value of property sold;⁴ such value to be estimated as of the time the sale was made, with interest, or if the property was wrongfully placed in the hands of a receiver prior to sale, reasonable rents may be recovered up to the time the purchaser obtained possession, with interest from that time and the usual costs.⁵ Upon this point the authorities are not agreed, the general and better opinion tending to the view that the judgment defendant is only entitled to so much as the plaintiff has realized upon the execution. This doctrine has been thus expressed: After a reversal the plaintiff is bound to make restitution, but he cannot be treated as a wrong-doer for causing execution to issue, and the defendant's property to be levied on and sold. The judgment protects him while it remains in force. It may seem a hardship to the defendant in such a judgment that under it his property may be sold for greatly less than its value, and his right of restitution be limited to what came into the hands of the plaintiff. But such hardship, when it occurs, will generally, if not always, be the result of his own acts. If by failing to appeal, or to obtain a *supersedeas* on an appeal, he permits the judgment to remain in force and enforceable, he can hardly complain that the other party proceeds to enforce it. To entitle the plaintiff to restitution, it must appear that the

⁴ Reynolds v. Hosmer, 45 Cal. 616; Bac. Abr., tit. Execution; Thompson v. Thompson, 1 N. J. L. 159; Grayson v. Lilly, 7 T. B. Mon. 6.

⁵ Hays v. Griffith, 85 Ky. 375, 3 S. W. Rep. 431, 11 id. 306.

Where, pending an appeal, real estate was sold on execution to the judgment plaintiff, and the judgment was reduced by allowing a credit, the plaintiff could not be compelled to keep the property at the sum bid and pay the defendant

the difference between the amount of the bid and the reduced judgment. Munson v. Plummer, 58 Iowa, 736, 13 N. W. Rep. 71.

And where stocks sold under a judgment deteriorated in value the plaintiff was not bound to account for their value at the time of the sale, nor to retain them at the price bid. Fort Madison Lumber Co. v. Batavian Bank, 77 Iowa, 393, 43 N. W. Rep. 331.

money has been paid to the plaintiff.¹ In California no recovery can be had, in the action for restitution, of attorney's fees for defending the original action and obtaining a reversal of the judgment rendered therein.² The assignee of an erroneous judgment who procures an execution under it and becomes a purchaser of the property pursuant to a sale is not a stranger to the proceedings and cannot claim protection as a *bona fide* purchaser.³ But creditors who do nothing more than file their claims against their debtor after judgment has been rendered against him in a suit instituted by other creditors are not liable for the damages resulting from such erroneous judgment, nor can they be compelled to restore the sum received by them in satisfaction of their claims. The defendant's remedy is solely against those who were parties to the original proceeding.⁴ If a sale is made to satisfy the claims of different creditors and the judgment is reversed as to only one of them, the judgment defendant cannot recover the value of the property, but only the sum realized by the plaintiff whose judgment is reversed.⁵

Restitution may be had of land sold under a decree of foreclosure to the plaintiff pending an appeal after reversal,⁶ and in such case the restoration will include an accounting for rents and profits, less the value of improvements and additions.⁷ It includes the right to costs which the party should have recovered when the erroneous judgment was rendered. Thus after a judgment in favor of a plaintiff had been affirmed by a county court and reversed by the supreme court, it was held that restitution entitled the defendant to the costs of defending before the justice and of prosecuting the appeal before the

¹ Per Gilfillan, C. J., in *Peck v. McLean*, 36 Minn. 228, 1 Am. St. 665, 30 N. W. Rep. 759, citing *Gay v. Smith*, 38 N. H. 171; *Bickerstaff v. Dellinger*, 1 Murphy, 272; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449; *Eyre v. Woodfine*, Cro. Jac. 278; *McGuire v. Ely*, Wright, 520; *Lovett v. German Reformed Church*, 12 Barb. 67. This rule prevails under the statutes of California. *Dowdell v. Carpy*, 137 Cal. 333, 70 Pac. Rep. 167.

² *Dowdell v. Carpy*, *supra*.

³ *Reynolds v. Hosmer*, 45 Cal. 616; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449.

⁴ *Hays v. Griffith*, 85 Ky. 375, 3 S. W. Rep. 431, 11 id. 306.

⁵ *Northern Bank v. Riley*, 12 Ky. L. Rep. 92 (Ky. Super. Ct.).

⁶ *Bryant v. Fairfield*, 51 Me. 149.

⁷ *Raun v. Reynolds*, 15 Cal. 459, 18 Cal. 275.

county court.¹ The damages recoverable by one who has been wrongfully dispossessed of his property under an erroneous judgment include the reasonable rental value of it for the time he was out of possession for the purpose for which the owner used it, his necessary expenses in moving from and to the same, the deterioration of the property while it was wrongfully withheld so far as that was caused by the wrong-doer's neglect, less the taxes paid by the latter and the value of such reasonable and necessary repairs, as were of a permanent nature, made by him.²

Payment or collection of the erroneous judgment is not regarded as a payment of or upon the debt or demand upon which it was rendered, and if a new trial is ordered such payment or collection will only avail by way of set-off.³ Restitution in such cases, that is where, on reversal, a new trial is granted, is held to be discretionary in New York under the code, and the court may therefore impose conditions for the safe keeping of the funds to answer any eventual recovery.⁴ It was discretionary before the statute.⁵ In determining the

¹ *Estus v. Baldwin*, 9 How. Pr. 80; *Jacks v. Darrin*, 1 Abb. Pr. 232.

² *Lewis v. Scott*, 73 S. W. Rep. 1131.

³ *Ringgold v. Randolph*, 13 Ark. 328; *Close v. Stuart*, 4 Wend. 95.

⁴ *Marvin v. Brewster*, 56 N. Y. 671; *Young v. Brush*, 18 Abb. Pr. 171; *Britton v. Phillips*, 24 How. Pr. 111.

⁵ In *Kirk v. Eaton*, 10 S. & R. 103, a judgment confessed was, after a year and a day, sought to be revived by *scire facias*; there was an issue of payment. Judgment for the plaintiff having been rendered, land was sold on execution to third persons to satisfy it. Part of the money was paid to prior incumbrancers or creditors, and the residue to the plaintiff. The judgment was afterwards reversed for irregularity and the defendant asked restitution. On this question the court say, by Tilghman, C. J.: "Under the circumstances of this case that is a very important question. The plaintiff's

original judgment, which was a lien on the defendant's land, is in force. But the lien is gone by the sale of the land, because the purchaser will hold it, notwithstanding the judgment be reversed. Then if the money is put in the hands of the defendant all security is gone. It appears that the defendant is in bad circumstances. The proceeds of sale did not pay the whole of the plaintiff's debt. The plaintiff ought not to hold the money after the reversal of the judgment. But he has a right to ask of the court that they will place it where it may be found if it shall be proved that he has not received satisfaction for the original judgment. We cannot presume that the judgment has been satisfied. Its strength is not at all impaired by the reversal of the proceedings on the *scire facias*. I do not recollect that a case so circumstanced has hitherto been before the court. We have said that, in

rights of the parties on an application for restitution, demands between them not embraced in the original suit and not disposed of on the final judgment or decree will not be considered.¹ But when the rule has been made absolute and a money judgment has been rendered, it stands like any other judgment between the same parties and is subject to be set off by another judgment held against the party in whose favor the restitution is ordered.²

general, restitution is matter of course. But it will be found that in the cases which have been decided the original judgment has been reversed, and that there is no room for presumption that there is anything due to the plaintiff: or, if the original judgment has not been reversed, there has been no suggestion that the security of the plaintiff would be endangered by the restitution. The defendant will obtain substantial justice, and he ought to be satisfied if the money in the hands of the plaintiff be deposited in court, subject to the event of a trial on the issue of payment in another *scire facias* to be sued out by the plaintiff. If, indeed, the defendant had a right to an award of restitution *ex debito justitiae*, then this court would be forced to give it, be the consequence what it may. But that I do not take to be the case. In *Baker v. Smith*, 4 Yeates, 185, the court quashed the execution but refused to award restitution. In regard to executions levied on land, our situation is different from England. There the land is not sold, and therefore the judgment retains its lien, although restitution be made of the land. I mean in a case like the present, where the judgment on a *scire facias* is reversed without touching the original

judgment. But with us the lien is destroyed by the sheriff's sale, which stands good, though the judgment be reversed. Suppose judgment on a *scire facias* on a mortgage should be reversed for some defect in form after the mortgaged property had been sold. Would it not be a bad administration of justice if the mortgagee should be compelled to place the money in the hands of the mortgagor in insolvent circumstances and thus lose all security for his debt? And how, in principle, is that to be distinguished from the case before us? Courts of justice are studious to preserve to the parties all the security in their power. And in this they look to the defendant as well as the plaintiff. A writ of error is no *supersedeas* to an execution whose operation has commenced before notice to the plaintiff. Yet, if the case require it, the money levied by the execution will be retained in court till the event of the writ of error be known. 2 Saund. 101, note *b*; Willes, 271. There the court ties the hands of the plaintiff for the security of the defendant. Here we ought not to shut our eyes to the consequences of giving the money to the defendant."

¹ *Morgan v. Hart*, 9 B. Mon. 78.

² *Smith v. Bohou*, 12 Bush, 448.

PART II.

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SECTION 1.

PENALTIES.

§ 470. **Bonds and penalties.** A bond is a form of obligation under seal, by which the party making it, the obligor, acknowledges himself bound to the other party, the obligee, in a specified sum. If accompanied by no other agreement or condition it evidences an absolute debt, and no question of penalty ordinarily arises. In that form it is called a single bond. When a condition of defeasance is added the sum stated in the bond is called a penalty; for it is usually much larger in amount than the value of the thing specified to be done in the condition, which shows the real nature of the contract and contains its essence. There is no express agreement on the part of the obligor to perform such a condition; but he has thereby made the obligation subject to be discharged by performance of the act or acts which the condition specifies. Literally, the obligor, by the terms of the instrument, says he is absolutely obliged to pay the penalty unless he fulfills the condition. Such was formerly his legal obligation. On [2] failure to perform the condition the penalty became an absolute debt, and at law was recoverable. In equity, however, it was treated as security for performance of the condition, and relief was granted against the enforcement of the penalty on payment of a sum as damages, ascertained to be an equitable equivalent of the condition not performed; in other words, that court would not allow the obligee to take more than in conscience he ought.¹

§ 471. **Penalties in affirmative agreements.** Penalties are also often stipulated to be paid in agreements and covenants in the event of the breach of affirmative stipulations. In such cases the party injured is not confined to his action for the penalty, but has an election to sue on the agreement or covenant. In that action he is entitled to recover full damages without regard to the penalty. It is not the measure of dam-

¹ Black. Com., Book II, p. 251; Hale *id.* 243; Collins v. Collins, 2 Burr. v. Thomas, 1 Vern. 509; Bishop v. 820; Chilliner v. Chilliner, 2 Ves. 528. Church, 2 Ves. 371; Hobson v. Trevor. See Bonafous v. Rybot, 3 Burr. 1370. vor, 2 P. Wins. 191; Cannel v. Buckle,

ages, nor does it limit the recovery thereof, if the actual injury requires a larger amount for just compensation.¹ He may sue for the penalty, and when he does so the recovery is governed substantially by the same principles as when the action is upon a bond. By the early common law, in either case, if by the terms of the condition of defeasance or the agreement the penalty became forfeited it might be recovered, after which there could be no further recovery upon the obligation because, by recovery of the penalty, the whole was satisfied.²

§ 472. Statute of 8 and 9 William III. It was provided, however, in substance, by statute, enacted in 1697 in England, that in all actions in courts of record upon any bond or for the recovery of any penal sum for the non-performance of any covenants or agreements, in any indenture, deed or writing contained, the plaintiff might assign as many breaches as he saw fit, and the jury might assess not only the usual damages [3] and costs, but also damages for such of the breaches assigned as the plaintiff should prove. The ordinary judgment was to be entered on the verdict; and when given for the plaintiff on demurrer, by confession or *nil dicit* he might suggest breaches on the roll; and upon writ of inquiry prove them and recover damages; upon the defendant's paying, either upon execution or into court, the damages assessed with costs further execution upon the judgment was to be stayed; but the judgment remained as a security to answer further breaches which might again be suggested on *scire facias*. when a similar trial and proceeding were required.³ The assignment of breaches under this statute was held compulsory because the statute was made for defendants and was highly remedial, while it secured to the obligee all he in conscience ought to receive.⁴ This statute extends to all bonds and deeds for the performance of covenants or the payment of money which were of a divisible nature and capable of partial breach

¹ *Meinert v. Bottcher*, 60 Minn. 204, 62 N. W. Rep. 276; *New Holland Turnpike Co. v. Lancaster County*, 71 Pa. 442; *Lowe v. Peers*, 4 Burr. 2225; *Noyes v. Phillips*, 60 N. Y. 408; *Thompson v. Rose*, 8 Cow. 266; *Stroble v. Large*, 3 McCord, 112; *Haggart v. Morgan*, 4 Sandf. 193.

² *Id.*

³ 8 and 9 Will. III., ch. 11, § 8.

⁴ *Roles v. Rosewell*, 5 T. R. 538; *Hardy v. Bern*, id. 636; *Van Benthuysen v. De Witt*, 4 Johns. 213; *Hodges v. Suffelt*, 2 Johns. Cas. 406.

or a succession of breaches, or from 'the violation of which only part of the damages guarded against might arise.¹ It includes, therefore, bonds for the payment of money by instalments;² for the payment of an annuity;³ for the performance of an award;⁴ and where a bond is conditioned for the payment of a single sum, and also for the performance of other covenants breaches must be assigned though the action is merely brought to recover the single sum, for which purpose it is like the common money bond;⁵ for in all such cases, as the plaintiff would have been entitled at law to issue execution to the full amount of his judgment, the defendant would have been forced to an expensive remedy in equity.⁶

§ 473. Statute of 4 and 5 Anne. Another statute was enacted soon afterwards, providing for relief at law against penalties in money bonds conditioned for the payment of a lesser sum at a time certain. By this statute it was pro- [4] vided that where an action is brought upon any bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators have, before action, paid to the obligee, his executors or administrators the principal and interest due by the defeasance or condition, though such payment was not made strictly according to the condition or defeasance, yet it shall and may, nevertheless, be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition and defeasance and had been so pleaded. It also provided that if at any time pending an action upon any such bond with a penalty the defendant brings into court where the action is depending all the principal money and interest due thereon, and also all such costs as have been expended in any suit at law or in equity upon such bond, the money so brought in shall be deemed and taken to be in full satisfaction and discharge of the bond, and the court shall

¹ Mayne on Dam. (6th Eng. ed.) 249.

² Willoughby v. Swinton, 6 East, 530; Harrington v. Cox, 3 Ir. C. L. 87; Hodgkinson v. Wyatt, 1 Dowl. & L. 668; Randall v. Burton, 23 Up. Can. C. P. 268.

³ Walcott v. Golding, 8 T. R. 126;

Ryan v. Massey, 2 Ir. C. L. 642.

⁴ Welch v. Ireland, 6 East, 613.

⁵ Quin v. King, 1 M. & W. 42.

⁶ Mayne on Dam. (6th Eng. ed.) 249.

and may give judgment to discharge the defendant from the same accordingly.¹

These provisions merely recognized and confirmed the doctrine previously established in equity, that, in the case of a bond with a penalty, the true intent of the penalty was to insure payment, not only of the stated principal money and interest on the day fixed, but also of subsequent interest down to the actual payment of the principal, although the bond contained no stipulation for interest beyond the day fixed, and under them the interest is payable as interest, and not as damages for default in payment.² The statute applies wherever a single sum is, by the condition, payable at a certain time, or is contingently so payable after the contingency has happened. Thus, it is held to apply to *post obit* bonds;³ to bonds for the payment of interest and principal where both have become due,⁴ even though the money became payable in consequence of certain provisions in an indenture of even date; provided, that by the course of pleading the jury have found that the money had become payable;⁵ to bonds for the payment of principal and interest, with proviso that on default of paying the interest maturing before the principal the whole amount of principal and interest should become due.⁶

§ 474. American statutes and practice. Similar statutes have been enacted in this country. They are not all precisely [5] the same, nor has a uniform practice been adopted under them. They accomplish, however, the same purpose by avoiding the necessity of resorting to equity for relief from the penalty on paying or suffering recovery for such damages, not exceeding the penalty, as are a just compensation for non-performance of the condition.⁷ In most cases falling within the provisions of the statute of William special breaches are required to be assigned, and either successive recoveries are al-

¹ 4 and 5 Anne, ch. 16, §§ 12, 13. See 23 and 24 Vict., ch. 26, § 25.

² Heynes v. Dixon, [1900] 2 Ch. 561.

³ Murray v. Earl of Stair, 2 B. & C. 82; Cardozo v. Hardy, 2 Moore, 220.

⁴ Smith v. Bond, 10 Bing. 125, 2 Dowl. & L. 460.

⁵ Id.; Darbishire v. Butler, 5 Moore, 193.

⁶ James v. Thomas, 5 B. & Ad. 40; Husband v. Davis, 10 C. B. 645; Marriage v. Marriage, 1 C. B. 761.

⁷ The breach of an ordinary bond, conditioned for the performance of a special act, gives the obligee the right to recover only the damages actually sustained. Ripley v. Eady, 106 Ga. 422, 32 S. E. Rep. 343.

lowed therefor, or else upon any breach of the condition full damages are assessed once for all as upon a total breach.¹

Neither the statute of William nor the American statutes, as a rule, provide for a bond conditioned for the performance of a collateral undertaking, as a bond of indemnity. And where judgment on such a bond is entered under a warrant, the execution, following the judgment, goes for the penalty if nothing is shown by the record to restrain the plaintiff from collecting the whole sum. He proceeds, however, at his peril, subject to the interference of a court of equity, if he takes execution before there has been a breach of the condition, or if after a breach he directs the collection of a larger sum than the damages actually sustained. In either case equity will restrain the execution, direct an issue of *quantum damnificatus*, and, when the damages are ascertained upon the trial of such an issue, it will grant relief upon their payment.²

Under the code it has been intimated that breaches [6]

¹ Ahl v. Ahl, 60 Md. 207; Meinert v. Botcher, 60 Minn. 204, 62 N. W. Rep. 276; Waldo v. Forbes, 1 Mass. 10; Gardner v. Niles, 16 Me. 279; Sibley v. Rider, 54 Me. 463; Fales v. Hemenway, 64 Me. 373; Webb v. Webb, 16 Vt. 636; Clammer v. State, 9 Gill. 209; Dale v. Moulton, 2 Johns. Cas. 275; Rosenkrantz v. Durling, 29 N. J. L. 191; Moore v. Fenwick, 1 Gilmer, 214; Clark v. Goodwin, 1 Blackf. 73; Mitchell v. Porter, 3 id. 499; Rany v. Governor, 4 id. 2; Nelson v. Gray, 2 G. Greene, 397; Cameron v. Boyle, id. 154; Spalding v. Millard, 17 Wend. 331; Harmon v. Dedrick, 3 Barb. 192; Hughes v. Smith, 5 Johns. 168; Munroe v. Allaire, 2 Caines, 320; Van Benthuysen v. De Witt, 4 Johns. 213; Allen v. Watson, 16 id. 205; Nelson v. Bostwick, 5 Hill, 37, 40 Am. Dec. 319; Hodges v. Suffelt, 2 Johns. Cas. 406; Patterson v. Parker, 2 Hill, 598; Rogers v. Coleman, 3 Cow. 62; Smith v. Jansen, 8 Johns. 111; Caverly v. Nichols, 4 id. 189; Cook v. Tousey, 3 Wend. 444; Sprague v. Seymour, 15 Johns. 474; Farnham v. Mallory, 3 Keyes, 527; Howard v. Farley, 18

Abb. Pr. 260, 19 id. 126, 3 Robert. 308; O'Connor v. Such, 9 Bosw. 318; Van Wyck v. Montrose, 12 Johns. 350; Brown v. Hallett, 1 Caines, 517; Clark v. State, 7 Blackf. 570; Karch v. Commonwealth, 3 Pa. 269; State v. Lawson, 2 Gill, 62; State v. McAlpin, 6 Ired. 347; Black v. Caruthers, 6 Humpl. 87; Hinckley v. West, 9 Ill. 136; Scarborough v. Thornton, 9 Pa. 451; Arnold v. Commonwealth, 8 B. Mon. 199; Sims v. Harris, id. 55; Ray v. Justices, 6 Ga. 303; State v. Votaw, 8 Blackf. 2; Walcott v. Harris, 1 R. I. 404; Toles v. Cole, 11 Ill. 562; Fleming v. Toler, 7 Gratt. 310; Scott v. State, 2 Md. 284; Governor v. Wiley, 14 Ala. 172; Garrett v. Logan, 19 Ala. 344; Wilson v. Cantrel, 19 Ala. 642; Trice v. Turrentine, 13 Ired. 212; Young v. Reynolds, 4 Md. 375; Ruben v. Stephun, 25 Miss. 253; Mitchell v. Laurens, 7 Rich. 109; Witmore v. Rice, 1 Biss. 237; Richman v. Richman, 10 N. J. L. 114; Dent v. Davison, 52 Ill. 109.

² Per Chancellor Bates in *Stauts v. Herbert*, 4 Del. Ch. 508, 519, citing 2 Story's Eq. § 1314; *Sloan v. Wal-*

should in all cases be assigned because the cause of action is required to be stated in ordinary and concise language.¹ In some states an action of debt may be brought on a money bond as soon as there is any default in the payment of interest or any instalment of the principal;² in others, not until all the moneys payable by the condition are due.³ In Arkansas debt will not lie until all the instalments are due, but covenant may be brought when one becomes due.⁴ By the general practice judgment is rendered for the penalty, but it is only nominally the debt; the breach of the condition is treated as the gist of the action.⁵ Where damages are assessed upon particular breaches the judgment for the penalty is to be enforced only to the extent of such damages.⁶ If such a judgment be sued on in another state, the damages which had been assessed for the breaches measure the recovery.⁷ Though in the court where originally rendered it stands as security for further breaches, they cannot be assigned when the judgment is sued on in another jurisdiction.⁸ If a bond is [7] accompanied by a condition to do an illegal act it is void; but if the condition is illegal in part only, and that part severable, perhaps only void *pro tanto*.⁹

ter, 1 Bro. Ch. 418; Errington v. Aynesley, 2 id. 342; Hardy v. Martin, 1 Cox, 64.

¹ Western Bank v. Sherwood, 29 Barb. 383.

² Depuy v. Gray, 1 Ala. 357; Thatcher v. Taylor, 3 Munf. 249; Galbraith v. O'Bannon, Sneed, 61; Nailor v. Kearney, 1 Cranch C. C. 112; Davidson v. Brown, id. 250.

³ Booth v. Hall, 6 Md. 1; Peyton v. Harmon, 22 Gratt. 643. See Platt on Covenants, 545.

⁴ State v. Scroggin, 10 Ark. 326.

⁵ Murphy v. Sommerville, 7 Ill. 360.

In Wilson v. Spencer, 11 Gratt. 261, the judgment was rendered for the damages assessed instead of the penalty. It was held that the judgment was not entered in proper form; yet, as the error produced no injury to the defendant, it was not reversed. Pate v. Spotts, 6 Munf. 394. Compare Wales v. Bogue, 32

Ill. 464; Scarborough v. Thornton, 9 Pa. 451; State v. Cross, 6 Ind. 387.

⁶ Van Wyck v. Montrose, 12 Johns. 350.

⁷ Battey v. Holbrook, 11 Gray, 212.

⁸ Id. In People v. Compher, 14 Ill. 447, a judgment was obtained by the people on an official bond against the sheriff and his sureties for the penalty in the circuit court of S. county, and it was held that a subsequent assignment of breaches was not a distinct action, but was to be regarded as part of the original suit; and therefore the fact that the defendants resided in different counties from that in which the judgment was rendered, and were served with notice of such subsequent assignments of breaches where they resided, did not oust the court of jurisdiction.

⁹ Greenwood v. Colcock, 2 Bay, 67; Brown v. Gitchell, 11 Mass. 11; Low-

§ 475. **Statutory bonds.** A statutory bond has been held to be vitiated by the omission of a material condition required by the statute.¹ The principle is well settled that official bonds are valid if the condition substantially complies with the statute. The exact form prescribed is not essential unless made so by the charter or act.² Courts do not favor technical objections to such bonds, and when not strictly in compliance with the statute they have been sustained as voluntary obligations, the conditions of which secure the performance of official duty and contain nothing contrary to law.³

rey v. Barney, 2 Chip. 11; Kavenaugh v. Saunders, 8 Me. 422; State v. Findley, 10 Ohio, 51.

¹ Dixon v. United States, 1 Brock. 177. See Justices v. Wynn, Dudley, 22.

As to the effect of taking a statutory bond with a larger penalty or a severer condition than that prescribed, see also Commonwealth v. Lamb, 1 W. & S. 261; Woods v. State, 10 Mo. 698; People v. Carbanes, 20 Cal. 525.

If the conditions of a bond are not all sustainable, those which are good, if separable from the others, may be the subject of an action in case of a breach. United States v. Mora, 97 U. S. 413; State v. McGuire, 46 W. Va. 328, 76 Am. St. 822, 33 S. E. Rep. 313; Newman v. Newman, 4 M. & S. 70; Farrar v. United States, 5 Pet. 373. See United States v. Hodson, 10 Wall. 395; Speck v. Commonwealth, 3 W. & S. 324; United States v. Gordon, 1 Brock. 190, 7 Cranch, 287; Kavenaugh v. Saunders, 2 Me. 422; Hall v. Cushing, 9 Pick. 404; Sanders v. Rives, 1 Stew. 109; United States v. Morgan, 3 Wash. C. C. 10; United States v. Tingey, 5 Pet. 129; United States v. Brown, Gilpin, 155; Vroom v. Smith, 14 N. J. L. 479; Kountze v. Omaha Hotel Co., 107 U. S. 378, 2 Sup. Ct. Rep. 911.

Where there is a discrepancy between the condition and the penal portion of the bond, it will be held

single, and the obligee entitled to the whole amount. But to support the condition the court will transpose or reject insensible words, and construe it according to the obvious intention of the parties. Swain v. Graves, 8 Cal. 549. See Stockton v. Turner, 7 J. J. Marsh. 192; Butler v. Wigge, 1 Saund. 65.

² Holmes v. Langston, 110 Ga. 861, 36 S. E. Rep. 251; Moulding v. Wilhartz, 169 Ill. 422, 48 N. E. Rep. 189; Ten Hopen v. Taylor, 103 Mich. 178, 55 N. W. Rep. 657; Healy v. Newton, 96 Mich. 228, 55 N. W. Rep. 666; Jackson v. Hopkins, 92 Va. 601, 24 S. E. Rep. 234; Allegany County v. Van Campen, 3 Wend. 49; People v. Holmes, 2 id. 281, 615; Fellows v. Gilman, 4 id. 414; Lawton v. Erwin, 9 id. 233; Cornell v. Barnes, 7 Hill, 35; Myers v. Kiowa County, 60 Kan. 189, 56 Pac. Rep. 11.

³ Carnegie v. Hulbert, 70 Fed. Rep. 209, 16 C. C. A. 498; Painter v. Gibson, 88 Iowa, 129, 55 N. W. Rep. 84; Brady v. Butts, 15 Ky. L. Rep. 127 (Ky. Super. Ct.); Bellinger v. Thompson, 26 Ore. 320, 37 Pac. Rep. 714; McChord v. Fisher's Heirs, 13 B. Mon. 193; United States v. Rogers, 28 Fed. Rep. 607; State v. Wood, 51 Ark. 205, 10 S. W. Rep. 624; Camden v. Greenwald, 65 N. J. L. 458, 463, 47 Atl. Rep. 458; Mathews v. Lee, 25 Miss. 417; State v. Thomas, 17 Mo. 503; Postmaster-General v. Rice, Gilpin, 554;

There is a conflict of authority concerning the liability of sureties upon bonds given pursuant to an unconstitutional statute, or in proceedings before courts which have no jurisdiction of the subject-matter. In Indiana and Kentucky the law is settled that a bond or recognizance taken by an officer or court acting wholly under a statutory power must be authorized by the statute or it will be void; and in suing upon such instrument the complaint must set out the facts showing that it was taken in a case in which the law authorized it, and in many cases it must appear that it was taken exactly or substantially in accordance with the statutory power.¹ In Missouri it is held that it is not a defense to the sureties, after their principal has obtained possession of a defendant's property by means of their bond, that the statute pursuant to which it was given was unconstitutional.² In California there is an apparent conflict in the decisions. In *Benedict v. Bray*³ it is held that an attachment bond given in a case of which the court had no jurisdiction is void. In *McDermott v. Isbell*⁴ it is ruled that it is no defense to an action on a replevin bond that the court in which the suit was pending was incompetent to try it.

Davison v. Burgess, 31 Ohio St. 78; *Bagby v. Chandler*, 9 Ala. 770; *Montville v. Haughton*, 7 Conn. 543; *Stephens v. Crawford*, 3 Ga. 499, 1 id. 574; *Commonwealth v. Wolbert*, 6 Bin. 292, 6 Am. Dec. 452; *Governor v. Allen*, 8 Humph. 176; *Gathwright v. Callaway*, 10 Mo. 663; *Thomas v. White*, 12 Mass. 314, 369; *Kavanaugh v. Saunders*, 8 Me. 442; *Sweetzer v. Hay*, 2 Gray, 49; *Supervisors v. Coffinbury*, 1 Mich. 355; *Horn v. Whittier*, 6 N. H. 88; *State v. Perkins*, 10 Ired. 333; *Dalton v. Miami Tribe No. 1*, 2 Am. L. Record (Ohio), 329; *People v. Johr*, 22 Mich. 461; *Justices v. Ennis*, 5 Ga. 569; *McCroskey v. Riggs*, 12 Sm. & M. 712; *Compare Tucker v. Hart*, 23 Miss. 548; *Stevens v. Hay*, 6 Cush. 229; *Crawford v. Meredith*, 6 Ga. 522; *Supervisors v. Jones*, 19 Wis. 51;

Scarborough v. Parker, 53 Me. 254; *Governor v. Matlock*, 2 Hawks, 366; *Johnson v. Gwathmey*, 2 Bibb, 186, 4 Am. Dec. 694; *Stevens v. Treasurer*, 2 McCord, 107; *Grimes v. Butler*, 1 Bibb, 192; *Williamson v. Woolf*, 37 Ala. 298; *Cross v. Gabeau*, 1 Bailey, 211; *United States v. Tingey*, 5 Pet. 115; *Montville v. Haughton*, 7 Conn. 543; *Morrell v. Sylvester*, 1 Me. 248; *Smith v. Crocker*, 5 Mass. 538; *State v. Bowman*, 10 Ohio, 445; *Goodman v. Carroll*, 2 Humph. 490; *Lord v. Lancey*, 21 Me. 468.

¹ *Caffrey v. Dudgeon*, 38 Ind. 512, 10 Am. Rep. 126, citing numerous cases in that state; *Couchman v. Lisle*, 15 Ky. L. Rep. 543 (Ky. Super. Ct.).

² *State v. Stark*, 75 Mo. 566.

³ 2 Cal. 251, 56 Am. Dec. 332.

⁴ 4 Cal. 113. See § 485.

§ 476. **Impossible condition.** If the condition be im- [8] possible when the bond is made, or becomes so afterwards by the act of God, the law, or the obligee the penalty is saved; and the bond in the one case is void, and in the other is discharged.¹ But a bond for the performance of covenants is not discharged by the condition becoming impossible by the death of the obligor. In a South Carolina case, involving this point, the court say: "Although the rule of law formerly was that the penalty was saved and the performance of the condition excused in such an event, yet in equity the condition was enforced as an agreement; and, if specific execution were impracticable, a compensation in damages, to be ascertained by an issue at law, was awarded to the obligee. And since the courts of law have been authorized by statute to assess the damages actually sustained in an action for the penalty, they may obtain original jurisdiction in those cases where equity would have granted relief by directing an issue at law."² Impossibility of performance does not arise so long as it is in the power of the obligor to perform one alternative of the condition by the aid of the obligee; and if there are two conditions in the alternative, one of which is, at the execution of the bond, impossible, the condition of the bond will be broken if the other is not performed, or its performance is not prevented by some valid reason.³

§ 477. **Penalty limit of recovery, except as to interest.** The penalty is the limit of liability for breach of the con- [9]

¹ Commonwealth v. Overby, 80 Ky. 208, 44 Am. Rep. 471; Kirby v. Commonwealth, 1 Bush, 114; State v. Glenn, 40 Ark. 332; Phillipi v. Capell, 38 Ala. 575; Haralson v. Walker, 23 Ark. 415; Hanks v. Pickett, 27 Tex. 97; Scully v. Kirkpatrick, 79 Pa. 324, 31 Am. Rep. 62; Thornborow v. Whitacre, 2 Ld. Raym. 1164; People v. Bartlett, 3 Hill, 570; Barker v. Hodgson, 3 M. & S. 267; Brown v. London, 9 C. B. (N. S.) 726; White v. Mann, 26 Me. 211; Harmony v. Bingham, 12 N. Y. 99; Gilpins v. Consequa, Peters' C. C. 86; Clifford v. Watts, L. R. 5 C. P. 577; Ward v.

Syme, 8 N. Y. Leg. Obs. 95. See Butler v. Wigge, 1 Saund. 66; Wild v. Harris, 7 C. B. 1005; Milward v. Littlewood, 20 L. J. (Ex.) 2; Brewster v. Kitchell, 1 Salk. 198; Warren v. Powers, 5 Conn. 381; Jones v. Howard, 9 C. B. 19; Appleby v. Meyers, L. R. 2 C. P. 651; Taylor v. Caldwell, 2 B. & S. 326; Boast v. Firth, L. R. 4 C. P. 1. But see Irion v. Hume, 50 Miss. 419.

² Miller v. Nichols, 1 Bailey, 226. See White v. Mann, 26 Me. 361; Allen v. State, 6 Blackf. 252.

³ Pindar v. Upton, 45 N. H. 258; Seaman v. Paddock, 55 Mo. App. 296.

dition of a bond. This proposition is universally admitted.¹ And in the case of private bonds it is also the measure of the [10] obligation where it is founded solely on the bond.² But it is only where a suit is brought thereon that this limitation

¹ *Mullen v. Morris*, 43 Neb. 596, 62 N. W. Rep. 74; *Hughes' Adm'r v. Wickliffe*, 11 B. Mon. 202; *Wilde v. Clarkson*, 6 T. R. 203; *McClure v. Dunkin*, 1 East, 436; *McKnight v. McLean*, 3 Brown Ch. 596; *Tew v. Winterton*, id. 496; *Woods v. Commonwealth*, 8 B. Mon. 112; *New Haven Bank v. Miles*, 5 Conn. 587; *Cherry's Ex'r v. Mann*, Cooke, 269, 5 Am. Dec. 696; *Noyes v. Phillips*, 16 Abb. Pr. (N. S.) 400, 60 N. Y. 419; *Clark v. Bush*, 3 Cow. 151; *Payne v. Ellzey*, 2 Wash. (Va.) 143; *Hifford v. Alger*, 1 Taunt. 218; *Goldhawk v. Duane*, 2 Wash. C. C. 323; *Seamons v. White*, 8 Ala. 656; *Windham v. Coates*, id. 285; *Perry v. Denson*, 1 Greene, 467; *King v. Brewer*, 19 Ind. 267.

In *Sweem v. Steele*, 5 Iowa, 352, an action was brought on a bond in a penalty of \$100, conditioned to make title to land—verdict, \$224. The court was requested, but refused, to instruct the jury that they could not find for the plaintiff a greater amount than that specified in the bond given for, or to secure, a deed to the land. Woodward, J.: "The second instruction asked by defendant, that

the plaintiff could not recover beyond the penalty of the bond, involves the question whether the plaintiff may sue in covenant on the condition of a bond. If he may thus sue, we understand all the books which treat of damages recoverable on bonds and penal obligations to mean that he must recover without respect to the penalty. And after a pretty full examination of the subject, yet with some hesitation on the part of one of the court, it is our opinion that an action as for covenant broken will lie upon a penal bond of the nature of the one before us. Of this character were the cases of *Stewart v. Noble*, 1 G. Greene, 26, and *Buckmaster v. Grundy*, 1 Scam. 310, in which neither counsel nor court took any exception on this ground; and, although the damages actually rendered by the jury in these cases were within the penalty, still the rule of damage laid down and maintained in one of them did not restrict them to the penalty; and the other case comes within the principle of *Foley v. McKeegan*, 4 Iowa, 1, the obligor having died without neglect of performance." The refusal of the

² *Spencer v. Perry*, 18 Mich. 394. See *Niven v. Jardine*, 23 Up. Can. C. P. 470. The defendants gave a bond to the plaintiff in the sum of \$45, conditioned to pay him \$45 a year so long as he should continue the minister of a certain congregation. They paid him without suit for the first two years. For the next four years the plaintiff sued them, declaring upon the bond as a covenant, and obtained judgments, which were satisfied without any question being

raised. He then sued for the sixth year, and the question of defendants' liability was left to the court without pleadings. It was held that covenant clearly would not lie; but that to a declaration on the bond the former payments, not having been paid or received in satisfaction of the penalty, could form no defense; and that the defendants were entitled only to have satisfaction entered on payment of penalty and costs.

is material or effective. If brought on a judgment rendered on a bond,¹ or upon some distinct covenant in a bond or other obligation, the penalty is unimportant. Where a debt is secured as such by securities in addition to a bond, the fact that a bond has been taken will not usually affect the remedy on the other obligations.² If the bond debtor resorts to equity to obtain relief from legal proceedings it has been held that, as he who seeks equity must do equity, he might be compelled, after submitting his case to its jurisdiction, to do what was just under the circumstances, and not be allowed to reap advantage from a delay which he compelled his adversary to undergo.³ So equity will carry the debt beyond the penalty where the obligee is kept out of his money by injunction or is prevented from going on at law.⁴ So where an advantage [11] is made of the money.⁵ In a late Irish case, after a decree for administration of real and personal estate, a receiver, who had been previously appointed to collect the rents of the lands

instruction was held not erroneous. The judges were different when the case got to the supreme court again (10 Iowa, 374), and then Lowe, C. J., said: "If the facts set out in the petition were true, although not established, it would seem that the acts of the defendant most complained of, and the consequent damages accruing to the plaintiff, resulted from a breach of trust which occurred before the execution and delivery of the bond sued upon; and that the penalty in the bond was agreed upon as liquidated damages in the event the defendant should fail to obtain for plaintiff the title to the land in question; and it is more than doubtful in the case as stated whether the plaintiff, under any circumstances, should recover more than the penalty of the bond."

In *Hughes v. Wickliffe*, 11 B. Mon. 209, Graham, J., said: "In nearly all, if not in all, the cases in which damages exceeding the penalty have been given, there is an express and not an implied covenant in the condition

that the obligor must do or omit some particular act; and where that is not the case, it is manifest, as in *Graham v. Bickham*, 4 Dall. 149, that the parties could not and did not intend the liability of the obligor to be limited by the penalty." *Baker v. Cornwall*, 4 Cal. 15.

¹ *Blackmore v. Flemming*, 7 T. R. 442; *McClure v. Dunkin*, 1 East, 436.

² *Clarke v. Abingdon*, 17 Ves. 106; *Mower v. Kip*, 6 Paige, 91.

³ *Fraser v. Little*, 13 Mich. 195, per Campbell, J.; *Mackworth v. Thomas*, 5 Ves. 329; *Tew v. Winterton*, 3 Brown Ch. 489; *Knight v. McLean*, id. 496; *Hughes v. Wynne*, 1 M. & K. 20; *Clarke v. Sexton*, 6 Ves. 411; *Clarke v. Abingdon*, 17 Ves. 106; *Pulteney v. Warren*, 6 Ves. 92; *Grant v. Grant*, 3 Russ. 598, 3 Sim. 341; *Jendwine v. Agate*, 3 Sim. 129; *Walters v. Meredith*, 3 Y. & Coll. 264; *Hugh Andley's Case*, Hardress, 136.

⁴ *Pulteney v. Warren*, 6 Ves. 92.

⁵ *Lord Dunsany v. Plunkett*, 2 Bro. P. C. 251.

of the deceased, and to pay interest on the incumbrances, and who was also a mortgagee in possession, remained in possession. One of the incumbrances was a bond debt for 500*l.*, on which payment had been entered, and the judgment was registered as a mortgage against the lands. The receiver paid interest for a number of years to the bond creditor, his accounts being passed upon by the court and embodied in a final decretal order which showed that payments had been applied to interest, and that the principal sum remained due. Subsequently other payments of interest were made, the total amount thereof exceeding the penalty of the bond. The bond creditor claimed the amount of the principal and interest accrued since the last interest payment. His right to receive such amount was challenged by a subsequent bond creditor on the ground that his demand was satisfied by the payment of the penalty of the bond. This was held untenable; the payments having been made as interest, and the amount of interest due at any one time, together with the principal, never having reached the penalty, the rule which prevents a creditor from receiving more than the amount of the penalty did not apply.¹ The sole ground upon which relief in equity has been denied to the obligee of a money bond beyond the amount of the penalty is that at law the bond creditor is only entitled to the penalty of the bond, and where he comes into equity for a legal demand, equity will give the same relief as he would have been entitled to at law.²

¹ *Knipe v. Blair*, [1900] 1 Irish, 372.

² *Long v. Long*, 16 N. J. Eq. 59; *Grosvenor v. Cook*, 1 Dick. 208; *Hale v. Thomas*, 1 Vernon, 349; *Mackworth v. Thomas*, 5 Ves. 330.

In *Long v. Long*, *supra*, Chancellor Green discusses the anomalies of our jurisprudence relating to bonds with great learning and vigor. He says: "At law the penalty of the bond has always been considered the debt. Originally the obligor at law was required to pay the penalty as the debt, and could only be relieved in equity by paying the principal and interest money due. Such was originally its design, and such to this day it is in

form; a debt justly due to be paid, the obligation to be void only upon the performance of the condition. It is clear, said the master of the rolls in *Clarke v. Sexton*, 6 Ves. 415, that both at law and in equity the penalty is the debt, and upon this very ground it is urged that no interest can be recovered beyond the penalty. But if it be a debt, and if that debt become due, as it clearly does at law (in form at least), upon the breach of the condition, and judgment may be entered upon it, why may not interest be reckoned either upon the principle specified in the condition, or upon the pena'ty

In a few cases where a bond has been given for a [12] money demand, and the sum mentioned in the formal part and in the condition is the same, or nearly so, and that sum the actual debt, it has been recovered with the stipulated in-

to an amount equal to the sum due upon the bond? No form or principle of law is thereby violated. It is the constant practice of courts of law to recover interest beyond the penalty in the shape of damages; and yet the court of chancery in England, planting itself upon the rule at law, refuses to afford relief, which is both equitable and in accordance with the intention of the parties. The English penal bond is in form an anomaly. The bond is not given for the actual debt, but for the penal sum, with condition that if the real debt and interest are paid at maturity the bond is satisfied. If not paid at maturity the bond is unsatisfied, and the penal sum has become the real debt. So the courts of law held. Equity said, no: whatever may be the form, in substance the amount of the obligation is a mere penalty which the obligee shall not enforce. He is entitled only to the principal and interest of the real debt. After a long struggle, with the history of which we are all familiar, equity triumphed. What purports to be in form the real debt is but the penalty. The form is retained; the substance is changed. But if the form of the bond and the form of the remedy upon it are anomalous, the justice meted out to the parties is still more so. Equity says to the obligee, you shall not have the sum which the obligor bound himself to pay, and which he has acknowledged to be due, because, though in form a debt, in substance it is a penalty. The sum specified in the condition, with interest, is the real debt. But the moment the real debt exceeds the penalty, and the obligee asks for

the amount due, the answer is, the penalty is the debt, and you can have no more. But if the penalty is the debt, and the real debt and interest exceeds the penal sum, so that it is no longer inequitable to demand it, why shall not the obligee have interest on the penalty? Courts of law say he shall have it in the form of damages for the detention of the debt. Shall a court of equity hesitate to give it?

"The justice of the claim, and the anomalous attitude of the English courts upon the question, is thus clearly presented by Mr. Evans in his notes to Pothier. 2 Pothier on Obl. (3d Am. ed.) 93: 'The allowing a party to have satisfaction to the extent not only of the debt which constitutes the penalty, but also of the interest on that penalty, which is the proper damages for its detention, appears to be no more than answering the claims of ordinary justice, when the non-performance of the condition is attended with circumstances that render the penalty, without such interest, an imperfect satisfaction of the primary object of the contract; and it certainly ought to be the aim of every tribunal to render as perfect justice as is consistent with the rules of law. By the rules of law, real damages may be allowed for the detention of a debt. For that the case of *Holdipp and Otway*, 2 Saund. 106, is a decisive authority. By the forms of law, one shilling damages is always awarded for the detention of the penalty, or any other debt; and these forms will be best rendered subservient to their substantial purposes by their being extended so far as may be necessary

terest. The fact that the amount exceeded the sum so stated [13] in the formal part of the bond has not been regarded.¹ The sum stated was not considered as in the nature of a penalty; the bond was, therefore, allowed to operate as single.²

It has been held in two cases that the recovery on a statutory bond cannot exceed the sum designated in the statute as

for securing the original obligation, provided they are not extended further than is consistent with their own particular character. And this is particularly the case with respect to bonds for securing money, when the principal and interest amount to more than the formal penalty. Whilst the court restrains the legal operation of the formal instrument, in order that it may not be carried beyond the substantial purpose on the one hand, it is very unequal justice not to allow the full extent of that operation when it is necessary to enforce such purpose on the other. And it is the more extraordinary that courts of equity, which in other cases so far sacrifice the form to the substance of the transaction as to enforce the specific performance of an agreement, only evidenced by its being the condition of a penal obligation, without allowing the payment of the penalty to be substituted for the performance of the agreement, should so completely deviate from that practice in the very instance of all others where the real purpose of the agreement is most indisputably evident, and where the measure of justice is with the most facility ascertained. But so are the precedents; it is easier to follow precedents than to investigate principles, and there is often a timidity in deviating from even those precedents which are most at variance with principles.

. . . "I think both upon principle and upon authority, the plaintiff in an action upon a penal bond,

with condition for the payment of money only, is entitled to recover the full amount of the penalty as a debt, and the excess of interest beyond the penalty in the shape of damages for the detention of the debt. This being the relief to which the plaintiff is entitled at law, it is clear that the complainant in *equity* is entitled to at least as full relief. The only difficulty, as we have seen, in the obligee's recovering in equity the full amount of principal and interest due him upon the bond has been that the plaintiff, coming into equity to recover a legal demand, can recover no more than he would do at law. Independently, therefore, of all precedent or authority directly upon the question, I should hold that upon a bill in this court for the recovery of a bond debt, either upon the bond itself or a mortgage to secure the bond, the complainant may recover the full amount of principal and interest due upon the bond, though it exceed the amount of the penalty. And this upon the ground that it is the debt justly due, that it is in accordance with the intention of the parties, and that it violates no principle of law or equity. Equity will disregard the form in which the remedy is obtained, and look alone to the substance of the transaction."

¹ *Fleming v. Toler*, 7 Gratt. 310; *United States v. Arnold*, 1 Gall. 348; *Francis v. Wilson*, Ryan & M. 105; *Lonsdale v. Church*, 2 T. R. 388; *Snedes v. Hooghtaling*, 3 Caines, 48.

² *Fleming v. Toler*, *supra*.

the penalty, though the bond specifies a larger sum as penalty.¹ In the Indiana case cited the decision was influenced somewhat by statutes, one of which was to the effect that a bond like that in suit shall not be invalid, nor the principal or surety be discharged, but they shall be bound by such bond to the full extent contemplated by the law requiring the same. In South Dakota a majority of the court have held, under a statute declaring that no official bond shall be void for want of compliance with the statute, but shall be valid in law for the matter contained therein, that an official bond, voluntarily executed in a penal sum greater than that prescribed by statute, may be enforced to the full amount of the penalty.²

§ 478. *Same subject.* The condition of a penal bond not being an affirmative undertaking, but only at law an optional defeasance of the bond, the penalty fixes the extent of liability in case the condition is not performed. When the penalty became the actual debt under the old law, upon the forfeiture, the amount of it was the precise sum demandable except damages for its subsequent detention; and since the change in the law by which only a nominal forfeiture is recognized, and recovery is practically limited to the damages actually sustained by breach of the condition, the penalty has continued to be the utmost that can be recovered; for the change was intended for the benefit of the obligor. He is entitled to be discharged from the obligation of the bond when due by paying the penalty, however much the actual damages for breach of the condition may exceed it in amount.³ But if such damages exceed the penalty it has been made a question whether the [14] amount of the recovery can be increased beyond the amount of the penalty by interest from the time when the penalty, or damages to an equal amount, became due.⁴

¹ *McCaraher v. Commonwealth*, 5 W. & S. 21, 39 Am. Dec. 106; *Graham v. State*, 66 Ind. 386.

² *State v. Taylor*, 10 S. D. 182, 72 N. W. Rep. 407, 65 Am. St. 707.

³ *Mullen v. Morris*, 43 Neb. 596, 62 N. W. Rep. 74; *Sutorius v. Dunstan*, 59 N. Y. Super. Ct. 166, 13 N. Y. Supp. 601; *Bazemore v. Bynum*, 127 N. C. 11, 37 S. E. Rep. 67; *New Home Sewing Machine Co. v. Seago*, 123 N. C.

158, 38 S. E. Rep. 805; *Atwell's Adm'r v. Towles*, 1 Munf. 175; *Brangwin v. Perrott*, 2 W. Black. 1190; *Wilde v. Clarkson*, 6 T. R. 303; *Clark v. Seyton*, 6 Ves. 411; *McClure v. Dunkin*, 1 East, 436; *Hellen v. Ardley*, 3 C. & P. 12; *White v. Sealey*, 1 Doug. 49; *Carter v. Thorn*, 18 R. Mon. 613; *Culver v. Green*, 4 Hill, 570.

⁴ See § 477.

A distinction has sometimes been made between sureties and principals, the penalty being held as absolutely the limit in respect to the former.¹ And in certain cases interest has been allowed beyond the penalty as damages for its detention on money bonds, while the rule has been stated to exclude interest, beyond it, on bonds with other collateral conditions.² The cases which refuse interest beyond the penalty proceed on the technical ground that the penalty does not become the debt by the damages reaching an equal amount, and hence there can be no default predicated of the obligor's omission to pay it. Campbell, J., in a thoroughly considered Michigan case, pointedly remarked that "when an undertaking or condition is secured by a penal bond, which is not supposed to represent the actual debt by its penalty, such penalty never becomes the actual debt except by way of forfeiture; and upon such a forfeiture interest was never allowed to run by the common law or by statute. And the cases . . . from Massachusetts and Kentucky, which assume that interest runs merely from the fact that the penalty became the debt upon forfeiture, are entirely unsupported, and would probably never have been made had not the actual debt in these cases equaled or exceeded the penal sum. As authorities they are based upon a false assumption, and cannot be maintained on any such principle."³ The weight of American authority,

¹ Leggett v. Humphrys, 21 How. 66; Farley v. Larson, 5 Cow. 424; Clark v. Bush, 3 Cow. 151; Pitts v. Tilden, 2 Mass. 118; Mower v. Kip, 6 Paige, 88; Ansley v. Mock, 8 Ala. 444; Seamons v. White, id. 656.

The answer to this position has been thus expressed: "It may be a reasonable doctrine that a surety who has bound himself under a fixed penalty for the payment of money, or some other act to be done by a third person, has marked the utmost limit of his liability. But when the time comes for him to discharge that liability, and he neglects or refuses to do so, it is equally reasonable and altogether just that he should compensate the creditor for the delay

which he has interposed." Brainard v. Jones, 18 N. Y. 35; Wyman v. Robinson, 73 Me. 384, 40 Am. Rep. 360; James v. State, 65 Ark. 415, 46 S. W. Rep. 937.

² Long's Adm'r v. Long, 16 N. J. Eq. 59, Ives v. Merchants' Bank, 12 How. 159, 164.

³ Fraser v. Little, 13 Mich. 195; State v. Sandusky, 46 Mo. 377.

The rule that the penalty cannot be enlarged by the addition of interest is adhered to in Michigan. People's Savings Bank v. Campau, 124 Mich. 106, 82 N. W. Rep. 803; White Sewing Machine Co. v. Dakin, 86 Mich. 581, 49 N. W. Rep. 583, 13 L. R. A. 313.

however, is in favor of allowing interest as damages beyond the penalty. The penalty is the limit of liability at the time of the breach; interest is afterwards given, not on the ground of contract, but as damages for its violation; for delay of payment after the duty to pay damages for breach of the [15] condition to the amount of the penalty had attached.¹ [16]

In North Carolina the statute provides that penal bonds shall not draw interest. *New Home Sewing Machine Co. v. Seago*, 128 N. C. 158, 38 S. E. Rep. 805.

¹ *Mullen v. Morris*, 43 Neb. 596, 611, 62 N. W. Rep. 74, citing the text; *Grand Lodge A. O. U. W. v. Clegghorn*, 20 Tex. Civ. App. 134, 48 S. W. Rep. 750; *Whereatt v. Ellis*, 103 Wis. 348, 74 Am. St. 865, 79 N. W. Rep. 416; *Blewett v. Front Street Cable R. Co.*, 2 C. C. A. 415, 51 Fed. Rep. 625 (recognizing the rule, but not allowing interest under the facts); *Gloucester v. Eschbach*, 54 N. J. L. 150, 23 Atl. Rep. 360, approving *Long's Adm'r v. Long*, 16 N. J. Eq. 59, and disapproving *Wilson's Case*, 38 id. 205; *Camden v. Ward*, 67 N. J. L. 558, 52 Atl. Rep. 392; *Beard v. Shannon*, 73 N. Y. 292; *Olmstead v. Olmstead*, 38 Conn. 309; *Tyson v. Sanderson*, 45 Ala. 364; *James v. State*, 65 Ark. 415, 46 S. W. Rep. 937; *McMullen v. Winfield Building & Loan Ass'n*, 64 Kan. 298, 67 Pac. Rep. 892; *Folz v. Tradesmen's Trust & Saving Fund Co.*, 201 Pa. 583, 51 Atl. Rep. 379; *Brainard v. Jones*, 18 N. Y. 35; *Washington County Ins. Co. v. Colton*, 26 Conn. 42; *Bonsall v. Taylor*, 1 McCord, 503; *Carter v. Thorn*, 18 B. Mon. 613; *Harris v. Clap*, 1 Mass. 308, 2 Am. Dec. 27; *Pitts v. Tilden*, 2 Mass. 119; *Waldo v. Forbes*, 1 id. 10; *Lyon v. Clark*, 8 N. Y. 148; *Baker v. Morris*, 10 Leigh, 284; *Tennants v. Gray*, 5 Munf. 491; *Ronne's Adm'r v. Drummond*, 6 Rand. 182; *Tazewell's Ex'r v. Saunders' Ex'r*, 13 Gratt. 354; *State v. Wylie*, 2 Strobl

114; *Bank of Brighton v. Smith*, 12 Allen, 243, 90 Am. Dec. 144; *Carter v. Carter*, 4 Day, 30, 4 Am. Dec. 177; *United States v. Arnold*, 1 Gall. 348; *Bank of United States v. Magill*, 1 Paine, 661; *Marshall v. Winter*, 43 Miss. 666; *Maryland v. Wayman*, 2 Gill & J. 279; *Sillivant v. Reardon*, 5 Ark. 140; *Allen v. Grider*, 24 id. 271; *Boyd v. Boyd*, 1 Watts, 365; *Potter v. Webb*, 6 Me. 14; *Hughes v. Hughes*, 54 Pa. 240; *Roulain v. McDowall*, 1 Bay, 490; *Judge of Probate v. Heydock*, 8 N. H. 491; *Burchfield v. Haffey*, 34 Kan. 42, 7 Pac. Rep. 548, overruling *Simmons v. Garrett*, *McCahon*, 82; *Clark v. Wilkinson*, 59 Wis. 543, 18 N. W. Rep. 481; *Wyman v. Robinson*, 73 Me. 384, 40 Am. Rep. 360; *Carlton v. Dixon*, 14 Ore. 293, 12 Pac. Rep. 394; *Crane v. Andrews*, 10 Colo. 265, 15 Pac. Rep. 331. See *Perrett v. Wallis*, 2 Dall. 252; *Ritchie v. Shannon*, 2 Rawle, 196; *Norris v. Pitmore*, 1 Yeates, 408; § 331.

In *Tazewell's Ex'r v. Saunders' Ex'r*, 13 Gratt. 354, *Moncure, J.*, said: "I think, therefore, the true doctrine with us is that full interest on a bond, or judgment for a penalty, is generally recoverable at law or in equity, though the principal and interest exceed the penalty; the only difference between the forums being that, according to the strict rules of law, the penalty must still be considered in form as the debt, and the excess of interest can only be recovered indirectly in the shape of damages; while equity takes no notice of the penalty, but gives a direct decree for the principal and running interest,

For the purpose of recovering interest beyond the penalty after breach it does not appear to be necessary to consider the penalty the debt; it has its proper effect in limiting the [17] amount of damages when the condition was broken. If

as in other cases. Full interest should in all cases be given, though there be a penalty, and the principal and interest exceed it, wherever full interest would be given if there were no penalty. In other words, the penalty should have no effect on the question of interest, except in regard to the form of recovering the excess in an action at law upon the bond."

Pettes v. Tilden, 2 Mass. 118, was ejectment on a mortgage; objection to entering judgment for more than the penalty of the bond. It was said: "This has never been questioned except in the case of a surety. It has been ruled so often in the case of the principal that the point cannot now be brought in question. It rests on principles of law as well as equity."

Harris v. Clap, 1 Mass. 303, 2 Am. Dev. 27: Debt on bond to secure performance of an award and payment within one hundred and twenty days. It was held that the award had force from acceptance by the court of common pleas and judgment upon it there; that interest on the amount of the award, which was less than the penalty, from that time might be recovered though exceeding the penalty. *Sedgwick, J.*, dissented.

United States v. Arnold, 1 Gall. 348; *Story, J.*: "Notwithstanding some contrariety in the books, I think the true principle supported by the better authorities is that the court cannot go beyond the penalty and interest thereon from the time it becomes due by the breach." Referring to this case, *Campbell, J.*, in *Fraser v. Little*, 13 Mich. 195, said: "Although interest was awarded on a

penalty, yet the question of such allowance was not discussed, and is not mentioned on the appeal." 9 Cranch, 104.

Mower v. Kipp, 6 Paige, 88: Mortgage to secure \$1,650 mentioned in the condition of the bond; decree for the actual debt, which exceeded the penalty.

Smedes v. Hooghtaling, 3 Caines, 48; *Kent, C. J.*: "Interest is recoverable beyond the penalty, but it depends on principles of law, and is not an arbitrary, *ad libitum* discretion in the jury."

Warner v. Thurlo, 15 Mass. 154: Suit on replevin bond; the actual damages, interest and costs amounted to more than the penalty. The court held that recovery might be had of the penalty, and interest from the commencement of the suit. It is said that no case in Massachusetts goes further than that.

Wild v. Clarkson, 6 T. R. 303: Bond of indemnity to parish against the expense of a bastard child; application to pay penalty into court in full satisfaction allowed. *Lonsdale v. Church* overruled. *Kenyon, C. J.*: "Suppose the plaintiff proceeds in this action, and no defense is made to it; the judgment would be for the penalty of the bond and 1s. nominal damages for detention of the debt. But here the defendant is willing to pay the whole penalty and the costs of the action, and the plaintiff is not entitled to more. In actions on bonds, or on any penal sums for performance of covenants, etc., the act of parliament (8 & 9 Will. 3, ch. 11, sec. 8) expressly says there shall be judgment for the penalty; and that the judgment shall

the damages amounted then to the penalty, and could then have been assessed and their collection absolutely enforced, no principle is violated by allowing interest from that time, [18] if the matter of the condition be such that interest would ac-

stand as security for further breaches, but the obligor is not answerable *in the whole*, beyond the amount of the penalty."

McClure v. Dunkin, 1 East. 437: Judgment rendered on a bond in Ireland; *assumpsit* brought on that judgment; interest upon it was included in the recovery; motion to reduce the judgment to the penalty and costs of the first judgment, based on the supposed doctrine that there can be no recovery on a bond debt for more than the penalty and costs. Kenyon, C. J.: "If this had been an action on the bond, the objection would have holden good; but after judgment recovered, *transit in rem judicatam*, the nature of the demand is altered; and this being an action on the judgment, it was competent for the jury to allow interest to the amount of what was due."

Lonsdale v. Church, 2 T. R. 388: Defendant was receiver of harbor dues of Whitehaven, appointed by plaintiffs, who were trustees for carrying into execution acts of parliament relating to that harbor; he entered into three bonds, 2,000*l.* each, conditioned to account to plaintiffs for all the moneys received. On being called on to account he admitted he had 5,400*l.* in his hands. The trustees, supposing he had received interest for several parts of that sum, filed a bill for discovery, and brought three actions on the bonds. The defendant obtained a rule calling on the plaintiffs to show cause why a stay should not be granted in two of the actions on payment of the penalties into court; and why a reference should

not be granted to compute the amount due for principal in the third; and why, on payment of what a master might think due, and costs, a stay should not be granted. Buller, J., allowed the payment into court in two actions but refused a stay; he was not satisfied with the determination of White v. Sealy, 1 Doug. 49.

In Elliot v. Davis, Bunb. 22, in an action on a bond, decree was made for the whole amount, though it exceeded the penalty. Lord Mansfield, in another case, said the penalty is mere security, and when it is not sufficient, the plaintiff may recover damages as well as penalty. Nothing can prove the principle stronger than the constant practice where an action is brought on a bond of giving 1*s.* damages.

Dewall v. Price, 2 Show. P. C. 15: Debt on a bond; penalty 140*l.*; bill in chancery; reference to compute principal, interest and costs; principal 154*l.*; costs 67*l.*; decree for all.

White v. Sealy, 1 Doug. 49: Held that sureties were not liable for more than the penalty, though the bond was given for payment of the yearly rent, nearly as large as the penalty on a twenty years' lease.

In McKnight v. McLean, 3 Brown Ch. 496, Buller, J., sitting in an equity cause, allowed interest beyond the penalty of a bond, but he was overruled by Lord Thurlow, who held that there could be no such allowance, and that the rule was the same in equity as at law.

Bromley's Case, 1 Atk. 75: Where a bankrupt's estate was sufficient to pay all, with a large surplus, creditors whose debts carried interest

crue from such default had there been no penalty. Interest [19] may properly be charged against sureties for delay after it became their duty to pay, as well as against the principals.¹

In Maine, New York, Wisconsin and some other jurisdictions

were allowed it from the time the computation was stopped by the commission, but such as were creditors by bond, not beyond their penalties.

Bunscombe v. Scarborough, 6 Q. B. 13: Recovery on replevin bond limited to penalty and costs. *Lonsdale v. Church* treated as overruled, and stated that *Francis v. Wilson* did not re-establish it. Doubt expressed whether 1s. damages for detention of debt in such cases is right. See *Shut v. Proctor*, 2 Marsh. 226; *Brangwin v. Perrot*, 2 W. Black. 1190.

Anonymous, 1 Salk. 154: If one, by will, subjects his lands to payment of his debts, those barred by statute of limitations are to be paid; but bond debts, on which interest has overrun the penalties, held not to carry interest beyond the penalty; but if the trustee omits to pay in a reasonable time, he must pay interest after such neglect.

Hefrod v. Alger, 1 Taunt. 218: Replevin bond. Lord Mansfield, speaking of a bond to pay a smaller sum, said it is very reasonable to calculate interest on the sum secured by the condition; but when the principal and interest equal the amount of the penalty, the interest must thenceforth cease.

Hughes v. Wynne, 1 M. & K. 20: A person conveyed estates to trustees upon trust, to sell and apply the proceeds to discharge all his bond debts, together with the interest then due and to grow due to the day of payment; held, that a bond creditor was not entitled to principal and interest beyond the penalty.

Clarke v. Abingdon, 17 Ves. 106:

Debt secured by a bond and mortgage, the latter securing not the bond in terms, but the debt. Master of the rolls: "If he sues upon the former (bond) he cannot have interest beyond the penalty; but the mortgage is to secure payment, not of the bond, but of the sum for which the bond was given, together with all interest that may grow due thereon. The same sum is therefore differently secured by different instruments; by a penalty and by a specific lien. The creditor may resort to either; and if he resorts to the mortgage, the penalty is out of the question."

Johnes v. Johnes, 5 Taunt. 656: After judgment on a bond, affirmed, motion made for interest accruing between judgment and affirmation; refused on statute 8 and 9 Will. 3.

Grant v. Grant, 3 Sim. 340, 3 Russ. 598: Where an obligor has, by vexatious proceedings, delayed the obligee in recovering on his bond, a court of equity will decree payment of the full amount of principal and interest although it exceeds the penalty of the bond. See *Pulteney v. Warren*, 6 Ves. 79.

Jendwine v. Agate, 3 Sim. 129: Obligees held entitled to be paid out of the assets of the deceased obligor a sum exceeding the penalty. Held, that the doctrine of equity is that, "wherever there is a distinct agreement that a thing shall be done, whether it be the conveyance of an estate, the relinquishment of a right, the payment of an annual sum, or the payment of a sum indefinite in amount, there, notwithstanding the

¹ *Carter v. Thorn*, 18 B. Mon. 613.

interest is recoverable from the date of the breach;¹ in Massachusetts from the time the action was begun;² and in Pennsylvania from the time of making demand on the surety.³ If a demand upon the principal is necessary to start the interest

agreement appear in the form of a bond with a penalty, the court will consider that the recital in the condition of the bond is evidence of the agreement, and will not limit the relief it gives to the amount of the penalty." See *Kirwane v. Blake*, 4 Brown P. C. (Toml. ed.) 532.

Where an action is brought by a common informer no damages for detention of the penalty can be obtained. He has no right to the money before the action is commenced; and, therefore, it cannot be said to be detained from him. *Mayne on Dam.* 2.

But it is otherwise where the penalty is given to the party aggrieved. *North v. Musgrave*, 1 Roll. Abr. 574; *Frederick v. Lookup*, 4 Burr. 2018; *Cuming v. Sibley*, id. 2489. If a defendant does not pay a penalty which is certain on demand, but forces the plaintiff to a suit, he is subject to damages for its detention. But where the penalty is uncertain, as where treble damages are given, then no damages are allowed for the detention. *North v. Wingate*, Cro. Car. 559; *Sedgwick v. Richardson*, 3 Lev. 374. In an action for a penalty against several, only one penalty can be recovered against all. Although the words are, "that every person offending contrary thereto shall forfeit to the party aggrieved for every offense," etc., yet

the meaning is that the penalty shall relate to the offense, and not to the person. *Patridge v. Emson*, Noy, 62. When a penalty is given for a continuous offense, one penalty only can be recovered. *Garret v. Messenger*, L. R. 2 C. P. 583; *Apothecaries Co. v. Burt*, 5 Ex. 363.

When a statute imposes a penalty of forfeiture for an act injurious to the rights of another, and it is given to the party aggrieved, it is in the nature of a satisfaction for the wrong done. Only one penalty can be recovered for doing a prohibitable or punishable act, as for removing goods from demised premises; and all who assist in the commission of the offense may be sued together. *Conley v. Palmer*, 2 N. Y. 182.

Under the provisions of the New York statute of 1857, to prevent extortion by railroad companies, only one penalty of \$50, together with the excess of fare, can be recovered for all acts committed prior to the commencement of the action. The forfeiture is not given for the satisfaction of the injury received; that is fully satisfied by a return of the sum extorted, with interest; but it is given to compensate the party injured for his expenses in the prosecution, and to compel the payment of such a sum by the company violating the law as will effectually stop the practice. A recovery can

¹ *Brainard v. Jones*, 18 N. Y. 35; *Wyman v. Robinson*, 73 Me. 384, 40 Am. Rep. 360; *Thomssen v. Hall County*, 63 Neb. 777, 57 L. R. A. 303, 89 N. W. Rep. 393.

² *Warner v. Thurlo*, 15 Mass. 154;

Dwyer v. United States, 35 C. C. A. 448, 93 Fed. Rep. 616.

³ *Pennsylvania Co. v. Swain*, 7 Pa. Dist. Rep. 406, 189 Pa. 626, 42 Atl. Rep. 297; *Folz v. Tradesmen's Trust & Saving Fund Co.*, 201 Pa. 583, 51 Atl. Rep. 379.

period running against him it is necessary as to the sureties; and where the claim is wholly unliquidated, so that a demand against the principal will not start the interest period as against him, it will not against the sureties, nor will the commencement of the action have that effect, because the latter circumstance has no significance as to the time when interest should be computed other than that it constitutes a demand.¹ In New York interest is not recoverable upon a bond given to secure the performance of an act other than the payment of money. In such a case the recovery is limited to the amount of the penalty, and interest runs only from the judgment.² In addition to interest, the costs which the obligee is made to incur by the obligors' failure to pay on demand and subsequent defense of the action may be recovered.³

be had under this by a party who has paid the excessive fare when riding simply for the purpose of obtaining the penalty. *Fisher v. New York, etc. R. Co.*, 46 N. Y. 644.

¹ Per Marshall, J., in *Whereatt v. Ellis*, 103 Wis. 348, 79 N. W. Rep. 416, 74 Am. St. 865.

It is observed in the case last cited that only a few adjudications are out of harmony with the rule that the time of the breach of the bond fixes the beginning of the interest period if the principal is liable for interest from that time. Citing the text, and *United States v. Arnold*, 1 Gall. 348. The opinion in the latter case is by Justice Story. The following words were used: "I think the true principle, supported by the better authority, is that the court cannot go beyond the penalty and interest thereon from the time it becomes due by the breach." In *Wyman v. Robinson*, 73 Me. 384, 40 Am. Rep. 360, Peters, J., observed, in substance: It is commonly said that damages cannot exceed the penalty of a bond. Rightly understood that is true. It limits the

amount the sureties agreed to pay; but they agreed to pay that amount if the damages suffered by the obligee should equal it, immediately upon the breach of the bond. So in such circumstances, if the full penalty be paid at the date the bond is breached, an obligee will get no more than the sureties agreed to pay. If the obligation of the sureties be not met at the time of the breach, they become liable for interest from that time because of their failure to perform the contract. To the same effect are *United States v. Curtis*, 100 U. S. 119; *Bank of Brighton v. Smith*, 12 Allen, 243, 90 Am. Dec. 144; *Leighton v. Brown*, 98 Mass. 515; *Frink v. Southern Exp. Co.*, 82 Ga. 33; *Burchfield v. Haffey*, 34 Kan. 42, 7 Pac. Rep. 548.

² *Dwyer v. United States*, *supra*; *Sachs v. American Surety Co.*, 72 App. Div. 60, 76 N. Y. Supp. 335. See § 516.

³ *Polhemus Printing Co. v. Hallenbeck*, 46 App. Div. 563, 61 N. Y. Supp. 1056; *Sachs v. American Surety Co.*, 72 App. Div. 60, 66, 76 N. Y. Supp. 335.

SECTION 2.

BONDS OF OFFICIAL DEPOSITARIES OF MONEY.

§ 479. **Liability absolute for money received.** The official bonds of public officers whose duty is to receive, safely keep and faithfully disburse public moneys are of a distinctive character, and will receive first attention. There is a plain line of difference running through the cases upon this subject,¹ resulting from diverse principles which are held to govern the responsibility of such officers. Where the care and custody of public funds are so regulated by law that the specific moneys received are required to be kept and accounted for, the officer is a mere agent or bailee. In other cases no such regulations exist, and the officer is left at liberty to keep the funds according to his discretion; he is required to answer certain calls out of them, and to pay the residue to his successor. In cases of the former class, whatever may be the form of the bond, that is whether it be general for the faithful performance of [20] official duty, or special, the identical funds officially received belong to the public corporation for which the officer is a depository or treasurer. And though his responsibility is not wholly regulated by the law of bailments, it is largely so. If governed entirely by that law the funds in his hands would be at the risk of the owner so long as the regulations for their safe keeping are strictly followed; no loss would fall upon him unless it accrued through his fault. But from motives of policy, as well as upon the terms of the statutes and the bonds required, it seems to be settled that all official custodians of money and their sureties are held absolutely bound for its safe keeping, as well as to comply with any special regulations to preserve its identity.²

¹ See Mechem on Public Officers, §§ 298-301.

² *Muzzy v. Shattuck*, 1 Denio, 233; *Thompson v. Board of Trustees*, 30 Ill. 99; *Hancock v. Hazzard*, 12 Cosh. 112, 59 Am. Dec. 171; *Ross v. Hatch*, 5 Iowa, 149; *New Providence v. McEachron*, 33 N. J. L. 339; *Supervisors v. Kaine*, 39 Wis. 468.

In *United States v. Prescott*, 2 How.

578, McLean, J., said: "Public policy requires that every depository of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that he should keep safely 'the moneys which come to his hands. Any relaxation of this condition would open a door to fraud which might be practiced with im-

[21] Whether the identical money received is required to be kept and paid over so as to create a bailment in the strict sense, as is the case generally under statutes of the United States, or whether it is received with no regulations to pre-

punity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss without laches on his part."

In *Ross v. Hatch*, *supra*, the treasurer, from whom the public funds were stolen without his fault, was exonerated because on the terms of the law in Iowa, and of his bond, he was bound only to reasonable diligence.

In *Boyden v. United States*, 13 Wall. 17, it is held that where the law imposes but the duty of a bailee, the officer, by giving the required bond faithfully to discharge the duties of his office, will increase his responsibility to that of an insurer. Strong, J., said: "He would then (as a mere bailee) be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more, except in the case of common carriers, and the duty of a receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. He may, however, make himself an insurer by express contract; and this he does when he binds himself in a penal bond to perform the duties of his office without exception! There is an established difference between a duty created merely by law, and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities; but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything accruing after

the contract was made, though unforeseen by the contracting party, and not within his contract, he will not be excused. Metcalf on Contracts, 213; *The Harriman*, 9 Wall. 161. The rule has been applied rigidly to bonds of public officers intrusted with the care of public money. Such bonds have almost invariably been construed as binding the obligors to pay the money in their hands when required by law, even though the money may have been lost without fault on their part." See *United States v. Prescott*, 3 How. 578; *United States v. Dashiell*, 4 Wall. 182; *United States v. Keebler*, 9 Wall. 83; *State v. Harper*, 6 Ohio St. 607.

It seems to the writer that if the legal duty is only the due care and fidelity of a bailee, a bond which in terms merely secures the performance of that duty does not increase it. If the bond is required by a statute, and such a condition is prescribed, the two provisions — the one defining the officer's duties, and that prescribing the official bond — would be construed together as requiring the same thing. And if the bond is made, in the absence of a statute, pursuant to some executive regulation, the same rule would apply, for the officer could not require more than the performance of the duty imposed by law. The absolute responsibility is more satisfactorily based on the ground of public policy. See *United States v. Thomas*, 15 Wall. 337, and, for differing interpretations of it, *Livingston v. Woods*, 20 Mont. 91, 49 Pac. Rep. 437, and *Smythe v. United States*, 107 Fed. Rep. 376, 46 C. C. A. 354.

serve its identity, the officer is held to the same absolute rule of liability.¹ In the latter case, however, the authorities are not uniform that the officer is not a bailee or agent, though he may not be required to keep and account for the specific funds received; still it is his duty to keep the public funds separate from all others, and to devote them exclusively to the purposes for which he received them; and any deviation from

¹ *Lamb v. Dart*, 108 Ga. 602, 34 S. E. Rep. 160; *Coe v. Foree*, 20 Tex. Civ. App. 550, 50 S. W. Rep. 616; *Wilson v. Wichita County*, 67 Tex. 648; *Nason v. Directors of Poor*, 126 Pa. 445, 17 Atl. Rep. 616; *Tillinghast v. Merrill*, 151 N. Y. 135, 45 N. E. Rep. 375, 56 Am. St. 612, 34 L. R. A. 678; *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *Rose v. Douglass Township*, 52 Kan. 451, 39 Am. St. 354, 34 Pac. Rep. 1046; *Board of Education v. Jewell*, 44 Minn. 427, 20 Am. St. 586, 46 N. W. Rep. 914; *Smythe v. United States*, 107 Fed. Rep. 376, 46 C. C. A. 354, 188 U. S. 156, 23 Sup. Ct. Rep. 279; *Fairchild v. Hedges*, 14 Wash. 117, 44 Pac. Rep. 125, 31 L. R. A. 851; *Griffin v. Levee Commissioners*, 71 Miss. 767, 15 So. Rep. 107; *Van Trees v. Territory*, 8 Okl. 353, 54 Pac. Rep. 495; *State v. Blair*, 76 N. C. 78; *Bush v. Johnson County*, 48 Neb. 1, 66 N. W. Rep. 1023, 58 Am. St. 673, 33 L. R. A. 223; *Thomssen v. Hall County*, 63 Neb. 777, 57 L. R. A. 303, 89 N. W. Rep. 393; *Commonwealth v. Comly*, 3 Pa. 372; *Muzzy v. Shattuck*, 1 Denio, 233; *Hancock v. Hazzard*, 12 Cush. 112, 59 Am. Dec. 171; *Morbeck v. State*, 28 Ind. 86; *Halbert v. State*, 22 Ind. 128; *New Providence v. McEachron*, 33 N. J. L. 339; *State v. Harper*, 6 Ohio St. 607; *United States v. Prescott*, 3 How. 378; *United States v. Dashiell*, 4 Wall. 182; *United States v. Keebler*, 9 Wall. 83; *Board of Justices v. Fenimore*, 1 N. J. L. 212; *Hayes v. Greer*, 4 Bin. 80; *Hennepin County v.*

Jones, 18 Minn. 199; *State v. Bobleter*, 83 Minn. 479, 86 N. W. Rep. 461; *Arnold v. State*, 77 Miss. 463, 27 So. Rep. 596; *United States v. Watts*, 1 New Mex. 553; *Ramsay's Estate v. People*, 197 Ill. 572, 64 N. E. Rep. 549; *Northern Pacific R. Co. v. Owens*, 86 Minn. 188, 90 N. W. Rep. 371, 57 L. R. A. 634.

A treasurer who receives interest on public funds is liable therefor on his bond. *Richmond County v. Wandel*, 6 Lans. 33; *State v. McFetridge*, 84 Wis. 473, 54 N. W. Rep. 1, 998, 20 L. R. A. 857; *State v. Harshaw*, 84 Wis. 532, 54 N. W. Rep. 17. See § 353. If the funds were loaned by direction of the proper authorities. *Hunt v. State*, 124 Ind. 306, 24 N. E. Rep. 887.

In Colorado the state treasurer is absolutely liable for money received by him, but he is not bound to account for interest received on state funds deposited by him in bank, in the absence of a statute to that effect. *State v. Walsen*, 28 Pac. Rep. 1119, 17 Colo. 170, 15 L. R. A. 456.

In Kentucky the trustee of the jury fund is not liable for interest received thereon under a statute which imposes on him the duty to pay over moneys received. *Commonwealth v. Godshaw*, 92 Ky. 435, 17 S. W. Rep. 737. In accord. *Shelton v. State*, 53 Ind. 331, 21 Am. Rep. 197; *Bocard v. State*, 79 Ind. 270; *Snapp v. Commonwealth*, 82 Ky. 173. See *Thouren v. East Tennessee, etc. R. Co.*, 90 Tenn. 609, 18 S. W. Rep. 256.

this course is a breach of duty and of his official bond.¹ But in some states such officers are held as debtors for the money paid them; the title to money officially received vests in them [22] personally, and is, therefore, wholly at their risk; they are treated like bankers. They must account for it fairly, and meet all obligations when presented, to the extent of the funds received; then, and only then, is there no default or breach of the condition of their official bond.² On the death of such an officer the funds go to his personal representatives;³ and in no event can they be taken possession of specially by his successor or sued for by the public corporation for whose use the officer held them, in case he lends or otherwise mispends them.⁴ A custodian of federal obligations, lost without his

¹Supervisors v. Kaime, 39 Wis. 468; Freeholders v. Wilson, 16 N. J. L. 110.

²Perley v. Muskegon County, 32 Mich. 132, 20 Am. Rep. 637; Steinback v. State, 38 Ind. 483; Rock v. Stinger, 36 Ind. 346; Board of Justices v. Fennimore, 1 N. J. L. 242; Hayes v. Greer, 4 Bin. 80; Morbeck v. State, 22 Ind. 128; New Providence v. McEachron, 33 N. J. L. 339; Linville v. Leininger, 72 Ind. 491; Brown v. State, 78 id. 239.

³Allen v. State, 6 Blackf. 252; Rock v. Stinger, *supra*.

⁴Steinback v. State, Rock v. Stinger, *supra*.

In Perley v. Muskegon County, *supra*, an action for money had and received was brought by the county for moneys loaned by its treasurer, and it was held it would not lie. Campbell, J., said: "There can be no middle ground between personal and official ownership of moneys. If the moneys used by Martin Perley could be treated as specifically county funds, the liability of parties receiving them would be immediate, and would not depend upon his default. They might have been sued at any time, before as well as after his accounting. . . . In law there can

be no difference between a loan to a banker and a loan to any one else. There is no rule of law which presumes one borrower without security as safer than another. And where, as here, the deposits were promiscuous and from all sources, it would be idle to attempt to attach contract relations with the county to funds which no ingenuity could identify. There is not much difficulty in reaching the personal duty of the treasurer. He is bound to have money to pay liabilities as required, to the full extent of his receipts. And he is bound, when his term ends, to have the balance ready to turn over to his successor. He could not be liable to a civil action if he makes all the payments required by law to be made. He and his sureties are bound on their bond when any such failure occurs. And it appears reasonable that if he has, with any dishonest understanding, put money into the hands of others, which has not been returned, and which it was known could not have come from any other source, and could only have been derived from his office, and must be officially accounted for, and restored, those persons have done an injury for which they should

fault, is liable for their value, and not merely for the cost of reprinting new ones to take their place. The government can stand upon the officer's bond, and insist that he has not discharged his duties by safely keeping the moneys that came to his hands, and which he undertook to pay over when required, at least where the loss is not attributable to overruling necessity or to any public enemy.¹ According to some cases the strict rule of liability stated is limited to such funds as are the property of the public, the officer who holds private funds being regarded as a bailee for hire.² Other cases do not recognize such a distinction, the funds being in possession of the officer pursuant to a statute.³ Under a statute prohibiting an officer from using public funds and requiring him to keep them on deposit, he is regarded as standing in the position of a bailee for hire, and is bound, *virtute officii*, to exercise good faith and reasonable skill and diligence in the discharge of his trust, or in other words, to bring to its discharge that prudence, caution

be accountable to those whom they have injured. It may be questionable how far the county could be regarded as directly damnified, if the sureties are responsible or damnified beyond the deficiency in their ability. But there can be no injury where all that is borrowed has been restored. In such a case as the one suggested, the injury consists in destroying to a great extent his power to meet his obligations, and this cannot be done when he is placed again in his former position. As he is the only legal custodian of county funds, no one can be required to do more than to put them in his hands. He has a right to demand them, and he can keep them where he pleases. He is, himself, to all intents and purposes, the treasury, and bound to account for all that he receives, and no one else can supervise his action. But an action based on any such theory must be an action on the case or a bill in equity, and not an action for money had and received. It can never be determined in advance,

when money is lent, how far the county will be injured or that it will be injured at all. And the action is not based on the source or identity of the particular funds which have been used. It must depend more on the state of the accounts than upon the identity of the money, and the wrong is much in the nature of a voluntary transfer of property in fraud of creditors, whereby they will be delayed or hindered, and of which the county may justly complain if actually defrauded."

¹ *Smythe v. United States*, 188 U. S. 156, 23 Sup. Ct. Rep. 279.

² *People v. Faulkner*, 107 N. Y. 477, 14 N. E. Rep. 415; *Wilson v. People*, 19 Colo. 199, 34 Pac. Rep. 944, 22 L. R. A. 449, 41 Am. St. 243; *Fairechild v. Hedges*, 14 Wash. 117, 44 Pac. Rep. 125, 31 L. R. A. 851.

³ *Northern Pacific R. Co. v. Owens*, 86 Minn. 188, 195, 90 N. W. Rep. 371, 57 L. R. A. 634; *Morgan v. Long*, 29 Iowa, 434; *Wright v. Harris*, 31 id. 272; *Havens v. Lathene*, 75 N. C. 505; *State v. Gutzwiller*, 49 Mo. 17.

and attention which careful men usually exercise in the management of their own affairs, and is not responsible for any loss occurring without fault on his part, as by the failure of the bank in which he deposited money, having used the proper degree of caution in selecting the depositary and being without fault or negligence in allowing the money to remain there.¹ This view is admittedly against the weight of authority, and contrary to a former decision of the court promulgating it.² Substantially the same conclusion has been announced in other cases in the absence of a statute requiring the deposit of the funds.³ These diverse views in respect to the nature of such officers' control of the funds in their keeping leads necessarily to divergencies in the apportionment of responsibility between different sets of sureties for the same person holding office for several successive terms.

§ 480. Adjustment of liability between sets of sureties. [23] It is a universal rule that sureties are only liable for the defaults of their principal during the term for which their bond was given, and after it was given, unless it is retrospective in terms; for such contracts cannot be extended by construction.⁴ The doctrine is comprehensively stated by

¹ *Livingston v. Woods*, 20 Mont. 91, 49 Pac. Rep. 437.

² *Jefferson County v. Lineberger*, 3 Mont. 231. The rule is otherwise in Minnesota, the statute influencing the decision of the case. *State v. Bobleter*, 83 Minn. 479, 86 N. W. Rep. 461.

³ *State v. Copeland*, 96 Tenn. 296, 34 S. W. Rep. 427, 31 L. R. A. 844; *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 675; *Cumberland v. Pennell*, 66 Me. 357, 31 Am. Rep. 284; *State v. Houston*, 78 Ala. 567; *People v. Faulkner*, 107 N. Y. 477, 14 N. E. Rep. 415; *State v. Gramm*, 7 Wyo. 329, 52 Pac. Rep. 533, 40 L. R. A. 690; *Wilson v. People*, 19 Colo. 199, 34 Pac. Rep. 944, 22 L. R. A. 449; *Healdsburg v. Mulligan*, 113 Cal. 205, 33 L. R. A. 461, 45 Pac. Rep. 337; *Roberts v. Laramie County*, 8 Wyo. 177, 56 Pac. Rep. 915.

⁴ *Wilkes Barre v. Rockafellow*, 171 Pa. 177, 33 Atl. Rep. 269, 50 Am. St. 795, 30 L. R. A. 393; *Schoeneman v. Martyn*, 68 Ill. App. 412; *United States v. Boyd*, 15 Pet. 187; *Farrar v. United States*, 5 Pet. 373; *Patterson v. Freehold*, 38 N. J. L. 255; *State v. Paul's Ex'r*, 21 Mo. 51; *Myers v. United States*, 1 McLean, 493; *United States v. Spencer*, 2 id. 405; *Jeffers v. Johnson*, 18 N. J. L. 382; *Stone v. Seymour*, 15 Wend. 19; *Bryan v. United States*, 1 Black, 140; *United States v. January*, 7 Cranch, 572; *United States v. Eckford*, 1 How. 250; *United States v. Linn*, 1 How. 104; *Detroit v. Weber*, 29 Mich. 24; *Paw Paw v. Eggleston*, 25 id. 36; *Kingston Mut. Ins. Co. v. Clark*, 33 Barb. 196; *Peppin v. Cooper*, 2 B. & A. 431; *Townsend v. Everett*, 4 Ala. 607; *Postmaster-General v. Norvell*, 1 Gilpin, 126; *Hart v. Guardians of*

Mr. Justice Daniel of the federal supreme court: "This court has settled the law to be that the responsibility of the separate sets of sureties must have reference to, and be limited by, the periods for which they respectively undertake by their

the Poor, 81* Pa. 466; Mahaska County v. Ingalls, 16 Iowa, 81; Miller v. Stewart, 9 Wheat. 681; Thompson v. Dickerson, 22 Iowa, 360; Independent School District v. McDonald, 39 Iowa, 504; Bissell v. Saxton, 67 N. Y. 55; Vivian v. Otis, 24 Wis. 518, 1 Am. Rep. 199; Rogers v. State, 99 Ind. 218; Bartlett v. Wheeler, 195 Ill. 445, 63 N. E. Rep. 169; Grand Haven v. United States Fidelity & G. Co., 128 Mich. 106, 87 N. W. Rep. 104.

As to when the term ends in respect to sureties, see *State v. Wells*, 8 Nev. 105; *Placer v. Dickerson*, 45 Cal. 12; *Welch v. Sumner*, 28 Conn. 390; *Chelmsford Co. v. Demerest*, 7 Gray, 1; *State v. Berry*, 50 Ind. 496; *Riddle v. School District*, 15 Kan. 168; 74 Am. Dec. 370; *People v. Alkenhead*, 5 Cal. 106; *Mayor v. Horn*, 2 Harr. 190; *Rany v. Governor*, 4 Blackf. 2; *State v. Bird*, 2 Rich. 99; *Milliken v. State*, 7 Blackf. 77; *Tuly v. State*, 1 Ind. 500; *Bigelow v. Bridge*, 8 Mass. 275; *Commissioners v. Greenwood*, 1 Desaus. 450; *South Carolina Society v. Johnson*, 1 McCord, 41, 10 Am. Dec. 644; *South Carolina Ins. Co. v. Smith*, 2 Hill (S. C.) 589; *Commonwealth v. Fairfax*, 4 Hen. & M. 208; *Governor v. Cobb*, 2 Dev. 489; *Atkins v. Baily*, 9 Yerg. 111; *State v. Lackey*, 3 Ired. 25; *Williams v. Miller*, Kirby, 189; *State v. Crooks*, 7 Ohio, 573; *Munford v. Rice*, 6 Munf. 81; *Hughes v. Smith*, 5 Johns. 168; *Supervisors v. Kaime*, 39 Wis. 468; *Winneshiek County v. Maynard*, 44 Iowa, 15; *Middleton v. Colwell*, 4 Bush, 392; *Newman v. Metcalf*, 4 Bush, 67; *United States v. Cheeseman*, 3 Sawyer, 424; *Wapello County v. Bigham*, 10 Iowa, 39.

An antedated bond does not bind the sureties for the period preceding the date of the delivery, if its language is not retrospective. *Hyatt v. Grover & B. Sewing Machine Co.*, 41 Mich. 225, 1 N. W. Rep. 1037.

Sureties are liable for their principal's term, and for such further time as is reasonably sufficient for the election and qualification of his successor. *Supervisors v. Kaime*, 39 Wis. 468; *Rahway v. Crowell*, 40 N. J. L. 207, 29 Am. Rep. 224.

The rule of strict construction does not apply to a bond given by a bank to secure the payment of public funds deposited with it. Hence under a bond conditioned for the payment of any and all deposits of the county which may be deposited with the bank, the sureties are liable for deposits made before, as well as after, the acceptance of the bond. *Brown v. Wyandotte County*, 58 Kan. 672, 50 Pac. Rep. 888; *Myers v. Kiowa County*, 60 Kan. 189, 56 Pac. Rep. 11.

Under a county treasurer's bond conditioned for the payment to the proper person of all moneys he may receive and for the accounting for all balances remaining in his hands at the termination of the term, sureties are liable for a defalcation occurring after expiration of the term and before the qualification of the treasurer's successor. *Plymouth County v. Kerseborn*, 108 Iowa, 304, 79 N. W. Rep. 67, 75 Am. St. 257. See *Camden v. Greenwald*, 65 N. J. L. 458, 47 Atl. Rep. 458.

A county treasurer whose authority is limited to receiving and distributing money of the county does not make his sureties liable by mis-

contract, and that neither the misfeasance nor non-feasance of the principal, nor any cause of responsibility occurring within the period for which one set of sureties have undertaken, can be transferred to the period for which alone another set have made themselves answerable."¹ Where an officer is his own successor his sureties for either term are bound for him and should be held liable precisely as though the principal had succeeded some other person instead of being his own successor. Each set is required to account for all the public money that came to his hands during their term,² including moneys in his hands at the date the sureties assumed their obligation; such moneys being a part of the fund the bond

appropriating money illegally borrowed for the county. *Mason v. Commissioners*, 104 Ga. 35, 48, 30 S. E. Rep. 513; *Frost v. Mixsell*, 38 N. J. Eq. 586; *State v. Moore*, 56 Neb. 82, 76 N. W. Rep. 474, citing many cases. *Contra*, *Wylie v. Gallagher*, 46 Pa. 205; *Boehmer v. Schuylkill County*, id. 452.

It is not a defense to the sureties on a bond that the money which their principal has failed to account for was realized from illegal taxes. *Anderson County v. Hays*, 99 Tenn. 542, 42 S. W. Rep. 266. See *State v. Weeks*, 92 Mo. App. 359.

¹ *Jones v. United States*, 7 How. 631; *Smith v. Paul's Ex'rs*, 21 Mo. 51; *Draffin v. Boonville*, 8 Mo. 395; *Todd v. Boone County*, id. 431; *State v. Smith*, 26 Mo. 226, 72 Am. Dec. 204; *Drury v. Drury*, 36 Mo. 281; *State v. Atherton*, 40 Mo. 209; *Welch v. Seymour*, 18 Conn. 387; *Rochester v. Randall*, 105 Mass. 295, 7 Am. Rep. 519; *Board of Education v. Robinson*, 81 Minn. 305, 84 N. W. Rep. 105.

A bond of the treasurer of a corporation, whose term was for one year, provided for his honesty and faithfulness "during his continuance in office." Held, not to cover defaults made after the expiration

of that term and his re-election. *Ulster County Savings Institution v. Ostrander*, 163 N. Y. 430, 57 N. E. Rep. 627.

But where the bond was conditioned that if the obligor should be faithful "during his continuance in office," and that it was understood that it should be binding while he held the office, though under successive appointments, it was the intention of the parties that it should be a continuing security, and a default which occurred when the obligor held over with the consent of the trustees and by virtue of his prior appointments, after the termination of the periods for which he had been appointed and reappointed, was covered by it. *Ulster County Savings Institution v. Young*, 161 N. Y. 23, 55 N. E. Rep. 483. See *Barnes v. Cushing*, 43 App. Div. 158, 59 N. Y. Supp. 345.

² *Bush v. Johnson County*, 48 Neb. 1, 58 Am. St. 673, 32 L. R. A. 223, 66 N. W. Rep. 1023; *Roberts v. Laramie County*, 8 Wyo. 177, 56 Pac. Rep. 915; *Board of Education v. Robinson*, 81 Minn. 305, 84 N. W. Rep. 105; *Detroit v. Weber*, 29 Mich. 24; *Commonwealth v. Reitzel*, 9 W. & S. 109; *Freeholders v. Wilson*, 16 N. J. L. 110.

was intended to secure, and having come to the hands of the obligor in the course of a previous term.¹ The sureties upon a new bond given by a treasurer are liable for his default because of the failure of a bank in which the moneys were deposited, although such bank was insolvent when such bond was given.² Where a tax collector was elected for three years and required to give a bond each year as applicable to, and security for, the taxes of the year, the application of the moneys collected in one year in satisfaction of a balance due from him on the tax of the previous year was a misappropriation of such moneys and a breach of his bond for the year.³

If the officer on the expiration of a term must turn over the funds with which he is charged to a successor, who is a different person, actual payment is required; if made, the sureties for the expired term are thus exonerated; if not made, the deficiency is at once manifest, and there is a breach of the bond. Payment discharges the debt of the late incumbent if he held the funds as a debtor or banker; or fulfills the trust and performs the contract if he held them as agent or bailee. In either case the actual payment or the necessity of such payment prevents any uncertainty or confusion. The same result may be attained where the successor is the same person, if there is an actual identification and appropriation of funds to the amount charged, or a deficiency ascertained by an official settlement; but otherwise, the debt, which the state of the accounts for the earlier term shows, will not be satisfied, or be the subject of a default, until actual payment is subsequently called for. The theory that the officer is a debtor instead of a bailee postpones, in such a case, the exoneration of the sureties, and apparently extends the period of their responsibility. But if the officer is a mere bailee their exoneration depends solely on the fact whether the public funds are in hand at the expiration of their term; and the liability of the sureties for the next term depends on the same fact.⁴ As be-

¹ *Parsons v. Miller*, 46 W. Va. 334, 32 S. E. Rep. 1017; *Hetten v. Lane*, 43 Tex. 279; *United States v. Dudley*, 21 D. C. 337; *Bruce v. United States*, 17 How. 437.

² *Oeltjen v. People*, 160 Ill. 409, 43 N. E. Rep. 610, 56 Ill. App. 138.

³ *Commonwealth v. Knettle*, 182 Pa. 176, 38 Atl. Rep. 13.

⁴ *United States v. Boyd*, 15 Pet. 187; *Broome v. United States*, 15 How. 143; *Beyerle v. Hain*, 61 Pa. 226; *United States v. Eckford's Ex'r*, 1 How. 250; *Thompson v. Dickerson*,

tween an officer who succeeds another, or one who is his own successor, and as between the state and the sureties of such an officer, the acceptance or transfer of certificates of deposit issued by a bank in which public funds have been deposited is the equivalent of the payment of cash, notwithstanding the inability of the person accepting them to realize the money they call for because of the subsequent failure of the bank.¹

Where a treasurer holds his office for several consecutive terms, and is found to be a defaulter at the end of his last term, it has been presumed, in the absence of proof to the contrary, [26] that the entire default occurred in such term.² The sureties in the last bond, when a final settlement is made, are *prima facie* liable for the amount thus shown to be in his hands. To render the sureties in a former bond liable it must be established that the money was converted during the period covered by their bond.³ In case of the failure of an officer to turn over moneys to his successor and the absence of proof as to when they were misappropriated, it is presumed that the misappropriation occurred at the end of the term.⁴

§ 481. Same subject. If the officer owns the funds which come into his hands officially his sureties are bound until he

22 Iowa, 360; Commonwealth v. Reitzel, 9 W. & S. 109; Independent School District v. McDonald, 39 Iowa, 564; Creswell v. Nesbitt, 16 Ohio St. 35; Street v. Laurens, 5 Rich. Eq. 227. See Overacre v. Garrett, 5 Lans. 156.

¹ State v. Hill, 47 Neb. 456, 66 N. W. Rep. 541; Bush v. Johnson County, 48 Neb. 1, 58 Am. St. 673, 66 N. W. Rep. 1023; Paxton v. State, 59 Neb. 460, 476, 81 N. W. Rep. 383; Board of Education v. Robinson, 81 Minn. 305, 84 N. W. Rep. 105. Compare Hartford v. Franey, 47 Conn. 76.

² Kelly v. State, 25 Ohio St. 567; Hetten v. Lane, 43 Tex. 279.

³ Board of Education v. Robinson, 81 Minn. 305, 84 N. W. Rep. 105; Pine County v. Willard, 39 Minn. 125, 12 Am. St. 622, 39 N. W. Rep. 71; Hartford v. Franey, 47 Conn. 76; McMullen v. Winfield Building & Loan

Ass'n, 64 Kan. 298, 67 Pac. Rep. 892. 56 L. R. A. 924; Trustees of Schools v. Peak, 43 Ill. App. 50; State v. Bobleter, 83 Minn. 479, 86 N. W. Rep. 461; State v. Paul's Ex'r, 21 Mo. 51; State v. Smith, 26 Mo. 226, 72 Am. Dec. 204; Alvord v. United States, 13 Batchf. 279; Readfield v. Shaver, 50 Me. 36, 79 Am. Dec. 592; Bruce v. United States, 17 How. 437, 443; St. Joseph v. Merlatt, 26 Mo. 233, 72 Am. Dec. 207; Morley v. Metamora, 78 Ill. 394, 20 Am. Rep. 266; Snaggs v. Stone, 7 Jones, 382. See Miller v. Macoupin County, 7 Ill. 50; Coons v. People, 76 Ill. 383; Hetten v. Lane, 43 Tex. 279.

⁴ Stoner v. Keith County, 48 Neb. 279, 67 N. W. Rep. 311, citing Heppe v. Johnson, 73 Cal. 265; United States v. Stone, 106 U. S. 525, 1 Sup. Ct. Rep. 257.

has paid the debt arising from such receipt. Although the identical funds so received may be in his hands at the expiration of his term, and at the beginning of the term next succeeding, in which he is his own successor, still, unless they are in some way identified as public funds in the latter term so that the sureties for that term become responsible for so much received then by the principal, the sureties for the former term must continue to be liable until the money is actually paid according to law.¹ On the other hand, if the officer is required to hold the specific funds which he receives, or if he is merely agent of the public, so that all his acts in the management of the public funds are official, whatever changes they undergo in his possession, his liability ceases on the expiration of his term, if at that time none of them have been misapplied.

This difference in the principle of their liability is further illustrated by the decisions relative to the appropriation of payments made by the officer. On the principle that he owes a debt to the extent of his official receipts, and that the title to the public funds vests in him personally, all the payments he makes must be deemed to be made out of his own funds whether derived from public or private sources. Therefore, he would have a right, if he chose, to apply all the moneys which came to him in one term to satisfy defalcations in an-

¹ In *Goodwine v. State*, 81 Ind. 109, at the close of the officer's first term he was chargeable with money which was invested in his private business; during his second term he made up the amount; at its close he failed to pay his successor all that was due. The suit was against the sureties on his second bond, who insisted that the defalcation occurred during the first term. The court said that the officer became a defaulter in his first term, not because he invested money received from public sources in his private business, for that he had a right to do so long as he kept himself ready to pay out according to law all sums required for public use; but because, at the end of his term, he

did not have in his hands to turn over to his successor (himself) the amount for which he was then accountable. And had he never made good this defalcation, his prior bondsmen, and not the appellants, would have been responsible therefor. He did, however, make it good. By the sale of his property he obtained money and replaced that for which he was in default, and when he did this the appellants (sureties on the second bond) became liable therefor, as much as if another had been his predecessor in the office, and that other had been in like default and had afterwards made it good by payment to his successor of the amount due.

other.¹ But if the officer is a mere trustee, having charge of [27] and administering the funds of the public, of which he is the servant, he has no option to apply funds collected subsequently to the execution of the second bond to the discharge of the first, when the sureties are different.² Neither

¹ *Colerain v. Bell*, 9 Met. 499. The principle of this decision was approved and made the basis of the judgment in *Hancock v. Hazzard*, 12 Cush. 112, 59 Am. Dec. 171. See *Steinback v. State*, 38 Ind. 483; also *Chapman v. Commonwealth*, 25 Gratt. 721; *Sandwich v. Fish*, 2 Gray, 298; *Cook v. State*, 13 Ind. 154; *State v. Smith*, 26 Mo. 226, 72 Am. Dec. 204; *Wilson v. Burfoot*, 2 Gratt. 134; *Lyndon v. Miller*, 36 Vt. 329; *Seymour v. Van Slyck*, 8 Wend. 403.

² *United States v. January*, 7 Cranch, 570; *Jones v. United States*, 7 How. 681; *United States v. Eckford's Ex'r*, 1 How. 250; *Myers v. United States*, 1 McLean, 493; *United States v. Boyd*, 15 Pet. 208; *Farrar v. United States*, 5 Pet. 373; *Mahaska County v. Ingalls*, 16 Iowa, 81; *Besinger v. Dickerson*, 20 id. 260; *Warren County v. Ward*, 21 id. 85; *Readfield v. Shaver*, 50 Me. 36, 79 Am. Dec. 592; *Thompson v. Dickerson*, 22 Iowa, 360; *Paw Paw v. Eggleston*, 25 Mich. 36; *Porter v. Stanley*, 47 Me. 515, 74 Am. Dec. 501; *Mann v. Yazoo*, 31 Miss. 574; *Stone v. Lyman*, 15 Wend. 19; *Paducah v. Cully*, 9 Bush, 323; *State v. Smith*, 26 Mo. 226, 72 Am. Dec. 204; *Newcomer v. State*, 77 Tex. 286, 13 S. W. Rep. 1040.

In *Miller v. Macoupin County*, 7 Ill. 50, a school commissioner held office from 1834 to 1839 without any new appointment, being annually required to give, and giving, with fresh sureties, a new official bond. He received money every year. On going out of office in 1839 he had not legally disbursed any portion of the school fund, nor did he pay over

any to his successor. The county sued the bond for 1837. It was held that the sureties were liable for the moneys in his hands during the year 1837. *Scates, J.*, delivering the opinion, said the case was distinguished from the cases where the same person holds the same office for several terms as successor to himself. "Here," he says, "was no reappointment, but a continuing term of office, with annual bonds conditioned for the faithful performance of the duties required or thereafter to be required by law. It was the duty of the commissioner by law to loan all moneys in his hands belonging to the county and several townships, and keep the same at interest, except such sums as might be directed by law to be disbursed from time to time. Now, he neither loaned, disbursed nor paid over to his successor any portion of these funds. He only brought forward and stated them in account from year to year. Thus, by including all previous receipts in the statement of each year's account, he showed the whole amount in his hands. But surely, no one can rationally contend that this is a payment. He was not reappointed annually; he did not succeed himself; it was but one term of office from 1834 to 1839. It might as reasonably be contended that one in default, having received a new appointment, by including the amount in default in stating an account, thereby paid it. Such a position is not sustained by law, reason or justice. Not having, therefore, made loans, disbursements or payments to his successor

is such right vested in the officers to whom the defaulting official makes payments. The law regulates their duties, and they cannot, by any exercise of discretion, enlarge or restrict the obligations assumed in the bond of another officer, or by keeping an account current in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the rights of sureties thereon.¹

It is a general rule that, where the law requires an officer to perform a duty which is special in its nature and provides for a special bond for its faithful discharge, the sureties on such bond are solely liable for default in connection with those duties, in the absence of any declaration in the statute that liability shall attach to those who have signed the general bond.² Where the sureties were liable for one fund which came to the treasurer's hands but were not liable for another, and he had intermingled the two, the aggregate default being known and the total amount of both funds, and of the fund for which they were not responsible, it was held that a *pro*

of any portion of the money received during the year 1837, the sureties are still liable to account for that sum." *Postmaster-General v. Munger*, 2 Paine C. C. 189; *Poole v. Cox*, 9 Ired. 69, 49 Am. Dec. 410; *Holeran v. School District*, 10 Neb. 406, 6 N. W. Rep. 472.

¹ *United States v. Eckford's Ex'r*, 7 How. 688; *State v. Middleton's Sureties*, 57 Tex. 185; *Newcomer v. State*, 77 id. 286, 13 S. W. Rep. 1040; *Boring v. Williams*, 17 Ala. 510.

A treasurer who succeeded himself was a defaulter at the end of each of his two terms. Subsequently payments were made without any application thereof by any one. The funds paid were derived from loans and investments of the moneys for which he was in default, and also from sources having no connection with such moneys. The bonds for each term were equally good. In a suit on the earlier bond the payments were applied thus: the funds

derived from the public money were applied to the term from the moneys of which the loans and investments were made, and those realized from other sources to the defalcation of the first term. *Rogers v. State*, 99 Ind. 218.

² *Columbia County v. Massie*, 31 Ore. 292, 48 Pac. Rep. 694; *Anderson v. Thompson*, 10 Bush, 132; *County Board of Education v. Bateman*, 102 N. C. 52, 11 Am. St. 708, 8 S. E. Rep. 862; *Milwaukee County v. Ehlers*, 45 Wis. 281; *Crumpler v. Governor*, 1 Dev. 52; *Governor v. Barr*, id. 65; *Waters v. State*, 1 Gill, 302; *Commonwealth v. Toms*, 45 Pa. 408; *State v. Corey*, 16 Ohio St. 17; *People v. Moon*, 4 Ill. 123; *State v. Johnson*, 55 Mo. 80; *United States v. Cheeseman*, 3 Sawyer, 424; *State v. Young*, 23 Minn. 551; *Henderson v. Coover*, 4 Nev. 429; *Lyman v. Conkey*, 1 Met. 317, 35 Am. Dec. 374; *Williams v. Morton*, 38 Ma. 52.

rata of the loss was chargeable to each fund, and that the sureties were liable for the proportional loss of that for which they were responsible.¹ Though the law contemplates two bonds, if only one is given, and that is general in form, and it was the intention of all the parties to give a security which would be sufficient in terms and amount to cover all moneys coming into the officer's hands, such purpose will not fail because of ignorance and mistake of fact or law in taking one bond instead of two, and in equity the sureties will be liable thereon for a misappropriation of funds as to which a special bond should have been given.² The rule which limits the liability of sureties to the letter of their obligation was strictly applied in a late case. By order of court a receiver was directed to collect and disburse a particular debt upon giving a bond conditioned for the faithful discharge of his duty under that or any future order of the court in that cause. Subsequently he collected other funds under orders issued in the cause after his bond was given. For the misappropriation of funds so collected his sureties were not liable, the clause in the first order referring to future orders being construed to refer to orders relating to the particular debt thereby directed to be collected.³

[25] § 482. **Neglect of duty by other officers.** Official bonds are construed, as has been shown, as requiring the custodians of public moneys to safely keep and administer them. This duty is absolute, and the funds are wholly at the risk of the officer to whose keeping they are committed. His sureties are bound for the safety of the money, as against the fault or wrong of the officer himself. Laws requiring that official examinations of his accounts at short and stated, or at irregular, periods shall be made, are no part of the contract with the sureties. Such provisions are enacted for further security and protection of the public, and are not intended for their benefit.⁴

¹ *Britton v. Fort Worth*, 78 Tex. 227, 14 S. W. Rep. 585.

² *Hall v. Lafayette County*, 69 Miss. 529, 13 So. Rep. 38.

³ *Ayers v. Hite*, 97 Va. 467, 34 S. E. Rep. 44.

⁴ *Bush v. Johnson County*, 48 Neb.

1, 58 Am. St. 373, 66 N. W. Rep. 1023; *Anderson County v. Hays*, 99 Tenn. 542, 42 S. W. Rep. 266; *Campbell v. People*, 154 Ill. 595, 39 N. E. Rep. 578, 52 Ill. App. 338; *Loper v. State*, 48 Kan. 540, 29 Pac. Rep. 687; *Kelly v. Moody's Adm'r*, 12 Ky. L. Rep. 389

Such regulations may even impose the duty of active measures on the discovery of any defalcation for dismissal of the officer, or the recovery of moneys misapplied; but they are held directory, and, if not complied with, the omission is no defense to an action against the sureties.¹ The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches be applied to its transactions.² Where a bank which had been designated as the depository of county funds became insolvent at a time when it was largely indebted to the county and a receiver was appointed for it, the neglect of the county officers to file the claim of the county against the bank did not release the sureties of the county treasurer either in whole or in part, they not having requested the officers to act.³

Neither the neglect of one public servant to perform his duties, nor his malfeasance in office,⁴ can be set up as a reason why the sureties of another should be released from responsibility for the misconduct of their own principal, in no way caused by that neglect, and only made public later than it would have been if there had been no neglect or malfeasance.⁵ The same doctrine has been applied in actions against sureties of agents and officers of private corporations.⁶ "Neither the negligence

(Ky. Super. Ct.): *Winthrop v. Soule*, 175 Mass. 400, 56 N. E. Rep. 575; 815.

Hall v. Lafayette County, 69 Miss. 529, 13 So. Rep. 38; *Commonwealth v. Tate*, 89 Ky. 587, 13 S. W. Rep. 113; *Supervisors v. Otis*, 62 N. Y. 88.

Hart v. United States, 95 U. S. 316; *Ex parte Christian*, 23 Ark. 641; *Christian v. Ashley County*, 24 id. 142; *United States v. Kirkpatrick*, 9 Wheat. 720; *United States v. Van Zandt*, 11 id. 184; *United States v. Nicholl*, 12 id. 505; *People v. Jenkins*, 17 Cal. 500.

¹ *Id.* See *Ramsay's Estate v. People*, 197 Ill. 572, 64 N. E. Rep. 549.

² *United States v. Kirkpatrick*, 9 Wheat. 720; *Black v. Queen*, 29 Can. Sup. Ct. 693.

³ *Board of County Com'rs v. Secu-*

city Bank, 75 Minn. 174, 77 N. W. Rep. 815.

⁴ *Waseca County v. Sheehan*, 42 Minn. 57, 43 N. W. Rep. 690; *Supervisors v. Otis*, 62 N. Y. 88.

⁵ *People v. Foster*, 133 Ill. 496, 23 N. E. Rep. 615; *Commonwealth v. Tate*, 89 Ky. 587, 13 S. W. Rep. 113; *Jones v. United States*, 18 Wall. 662; *Detroit v. Weber*, 26 Mich. 184; *Paducah v. Cully*, 9 Bush. 323; *Ex parte Christian*, 23 Ark. 641; *Christian v. Ashley County*, 24 Ark. 142; *People v. Russell*, 4 Wend. 570; *People v. Foote*, 19 Johns. 58. The doctrine of *People v. Jansen*, 7 Johns. 332, is disapproved in *Supervisors v. Otis*, 62 N. Y. 88.

⁶ *State v. Atherton*, 40 Mo. 209.

nor failure of an obligee in a bond in the discharge of some duty to a third party, nor his negligence or laches in enforcing a compliance with its condition, will release the sureties from their obligation. Nothing less than the breach of a covenant which the obligee has made, or connivance at the principal's breach of the condition of the bond, or knowledge of such breach, and a continuance of his employment without communicating the fact to the sureties, or such a wilful shutting of the eyes to the evidences of the breach as warrants the inference of connivance, will have that effect."¹

SECTION 3.

OTHER OFFICIAL BONDS.

§ 483. **Scope of section.** Many of the cases considered in writing this section were brought against officers alone, their sureties not being parties. The principles underlying the adjudications illustrate the extent of, and the limitations upon, the liability of sureties. The liability of officers for affirmative wrong-doing is considered in the chapters which treat of trespass, conversion and related topics.

§ 484. **Right of action against officers.** An individual who sustains special injury by the non-feasance of a public ministerial officer,² or an officer who acts in a ministerial capacity, has a right of action against him,³ regardless of whether

Minor v. Mechanics' Bank, 1 Pet. 46; *State Bank v. Locke*, 4 Dev. 529; *Amherst Bank v. Root*, 2 Met. 522; *Morris Canal & B. Co. v. Van Vorst*, 21 N. J. L. 100. See *Atlantic & P. Tel. Co. v. Barnes*, 64 N. Y. 385, 21 Am. Rep. 621; *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Sanderson v. Ashton*, L. R. 8 Ex. 73; *McMullen v. Winfield Building & Loan Ass'n*, 64 Kan. 298, 67 Pac. Rep. 892, 56 L. R. A. 924.

¹ *Williams v. Lyman*, 31 C. C. A. 511, 88 Fed. Rep. 237.

² Official duty is ministerial when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the

time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion. Official action is ministerial when it is the result of performing a certain and specific duty arising from fixed and designated facts. *People v. Bartels*, 138 Ill. 322, 27 N. E. Rep. 1091.

If the same officer is charged with the performance of both judicial and ministerial duties, when he exercises ministerial functions only he is not protected by the judicial privilege. *Id.*; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *Wall v. Trumbull*, 16 Mich. 288, 97 Am. Dec. 141.

³ *People v. Bartels*, 138 Ill. 322, 27

the officer was influenced by malice.¹ If the act or omission complained of is made the basis of an action against the sureties on the bond of the officer, it must be in regard to a matter of duty imposed upon him by law;² and whether against him alone, or also against his sureties, must not have been directed or caused by the party who seeks redress for it.³ Such right of action is not affected by the imposition of a statutory penalty for the neglect of duty. "In cases where the public have an interest in the faithful discharge of official duty the penalty for neglect, unless the contrary appear, is for the protection of that interest, rather than to secure private rights; and in many cases the forfeiture is entirely inadequate for the latter purpose, and is not even available to the injured party."⁴ The penalty is an additional remedy.⁵ Damages which result from the failure to properly perform official duty at the instance of a citizen and which the law requires the officer to perform for a consideration moving from him who asks its performance flow not from the violation of a general duty, but from the breach of a special obligation, and arise *ex contractu*.⁶ Hence while a recorder of deeds is liable in damages for a false certificate of search for liens upon property, his liability is limited to the party who asks and pays for the certificate; it does not extend to that party's assigns or alienee.⁷

§ 485. Construction of bonds. There is no dissent from the principle that, so far as the liabilities of sureties are concerned, the bonds of public officers are *strictissimi juris*, and

N. E. Rep. 1091; Robinson v. Chamberlain, 34 N. Y. 389; Adsit v. Brady, 4 Hill, 630, 40 Am. Dec. 305; West v. Brockport, 16 N. Y. 168; Hover v. Barkhoof, 44 id. 113; Farrant v. Barnes, 11 C. B. (N. S.) 655; Nowell v. Wright, 3 Allen, 166, 80 Am. Dec. 62; Wall v. Trumbull, 16 Mich. 288, 97 Am. Dec. 141.

A tax collector is liable for personal injuries inflicted by his deputy while in the discharge of his duties. Case v. Hulsebush, 122 Ala. 212, 26 So. Rep. 155.

¹ Brayear v. Maclean, 33 L. T. (N.

S.) 1; Brewer v. Watson, 65 Ala. 88, 71 id. 299, 46 Am. Rep. 318.

² Moore v. Pye, 10 Kan. 247; Kahl v. Love, 37 N. J. L. 5.

³ Thompson v. Goding, 63 Me. 425.

⁴ Hayes v. Porter, 22 Me. 371, 376; Beckford v. Hood, 7 T. R. 620.

⁵ Farmers' Turnpike Co. v. Coventry, 10 Johns. 389.

⁶ Brigham v. Bussey, 26 La. Ann. 676; Brown v. Penn, 1 McGloun, 265.

⁷ Commonwealth v. Kellogg, 4 Phila. 90; Houseman v. Girard Building & Loan Ass'n, 51 Pa. 256.

cannot be extended by construction or enlarged by the acts of others.¹ A distinction is taken, however, between such obligations and those which are wholly between individuals. The former are to be read as though the statutes defining the duties of the officers for whose acts the sureties therein become responsible are embodied in them,² and also as if they expressly recognized the power of the legislature to add to or diminish the duties connected with the office.³ This power is not absolute, except so far as the added duties are of the same kind and nature as those previously required of the officer. The collection of license and docket fees from attorneys cannot be added to the duties of the clerk of a court so as to charge his sureties, whose obligation was previously assumed, with responsibility therefor;⁴ nor can the legislature add to the duties of a prosecuting attorney, subsequent to his becoming such and giving the bond required, the duty of collecting delinquent taxes upon real estate; that duty is not so germane to the office as to render the sureties upon his bond liable for any misappropriation on his part of delinquent tax moneys.⁵ In some states it is not competent for the legislature to extend the term of office of a county treasurer whose bond was for two years and until the election and qualification of his successor, and make his sureties liable for his acts beyond the time stipulated in the bond.⁶ The authorities upon this question and questions analo-

¹ *People v. Lucas*, 93 N. Y. 585. See § 480.

A very strict application of the rule was made in *Ayers v. Hite*, 97 Va. 467, 34 S. E. Rep. 44, stated in § 481.

² *Olean v. King*, 116 N. Y. 355, 22 N. E. Rep. 559; *People v. Pennock*, 60 N. Y. 426; *State v. Davis*, 96 Ind. 539; *Dawson v. State*, 38 Ohio St. 1; *Lowe v. Guthrie*, 4 Okl. 287, 44 Pac. Rep. 198; *Ramsay's Estate v. People*, 197 Ill. 572, 64 N. E. Rep. 549.

³ *People v. Vilas*, 36 N. Y. 459.

⁴ *Denio v. State*, 60 Miss. 949; *Brown v. Sneed*, 77 Tex. 471, 14 S. W. Rep. 248; *State v. Cheaney*, 52 Mo. App. 258.

⁵ *Spokane County v. Allen*, 9

Wash. 229, 37 Pac. Rep. 428, 48 Am. St. 830. See *Mechem on Public Officers*, §§ 305, 306; 2 *Brandt on Suretyship and Guaranty*, § 548.

⁶ *Brown v. Lattimore*, 17 Cal. 93; *King County v. Ferry*, 5 Wash. 536, 32 Pac. Rep. 538, 34 Am. St. 880, 19 L. R. A. 500; *Bigelow v. Bridge*, 8 Mass. 274; *Peppin v. Cooper*, 2 B. & Ald. 431; *Lord Arlington v. Merricke*, 2 Saund. 411; *Liverpool Water Works Co. v. Atkinson*, 6 East, 507; *Wardens, etc. v. Bostock*, 2 B. & P. N. R. 175; *Hassell v. Long*, 2 M. & S. 363; *State Treasurer v. Mann*, 34 Vt. 371; *Welch v. Seymour*, 28 Conn. 387; *United States v. Kirkpatrick*, 9 Wheat. 720; *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Wappello*

gous to it are in conflict. Some courts hold that the bond is made in contemplation of the law and must be construed with reference to the law governing the office, and that where the law provides that the term of office shall continue until the successor is elected and qualified the bond is given not only for the statutory term, but for the further time which may elapse between the end of the expressed statutory term and the time of the election and qualification of the successor; that the law becomes incorporated into the bond; that the sureties are bound to know that the principal's right to the office may extend beyond the period specified in the bond, and that such extension is taken into consideration and provided for in the bond.¹ There is also a conflict of authority as to the effect upon sureties of a statute extending the time for the collection of taxes by the collector and the settlement of his accounts. In Illinois, Tennessee and Missouri the passage of such an act, after the execution of the bond, and without the sureties' consent, relieves them.² This is denied in Mississippi, Virginia, Maryland and North Carolina.³ The sureties on the bond of a city clerk are not liable for his failure to pay over moneys which he received otherwise than in pursuance of law.⁴

§ 486. **Mode of redress for official dereliction.** The chief object of other official bonds than those of fiscal officers is to provide additional security for the faithful performance of official duties at the instance or for the benefit of private individuals. And in some form the persons who suffer injury by the neglect or misconduct of the officer may severally re-

County v. Bigham, 10 Iowa, 39, 74 Am. Dec. 370; Dover v. Twombly, 42 N. H. 59; Kingston Mut. Ins. Co. v. Clark, 33 Barb. 196; Patterson v. Freehold, 38 N. J. L. 255.

¹ State v. Berg, 50 Ind. 502; Commonwealth v. Drewry, 15 Gratt. 1; Pickering v. Day, 3 Houst. 474; State v. Kurtzeborn, 78 Mo. 98; Thompson v. State, 37 Miss. 518; McAfee v. Russell, 29 Miss. 84; Hughes v. Smith, 5 Johns. 168; People v. Beach, 77 Ill. 52; Kindle v. State, 7 Blackf. 589; Exeter Bank v. Rogers, 7 N. H. 21; State v. Daniels, 6 Jones, 444.

² Davis v. People, 6 Ill. 409; People v. McHutton, 7 id. 638; Johnson v. Harker, 8 Heisk. 388; State v. Roberts, 68 Mo. 234.

³ State v. Swinney, 60 Miss. 39; Commonwealth v. Holmes, 25 Gratt. 771; Smith v. Commonwealth, id. 780; State v. Carleton, 1 Gill, 249; Prairie v. Worth, 78 N. C. 169.

⁴ Lowe v. Guthrie, 4 Okl. 287, 44 Pac. Rep. 198; Salem v. McClintock, 16 Ind. App. 656, 46 N. E. Rep. 39, 59 Am. St. 330.

sort to the bond by independent proceedings for redress in damages. In some states the judgment is given for the penalty once for all; the party for whose benefit the action is instituted assigns such breaches as have affected him, and damages are assessed thereon and collected for his benefit; other breaches may be afterwards assigned by him and by others who have cause to complain until the aggregate recoveries equal the penalty.¹ In other jurisdictions judgment may be recovered in each individual case for the penalty to be discharged by payment or collection of special damages assessed [30] on the breaches assigned.² And in others the judgment is rendered directly for the damages awarded for breach of the condition; and to some extent by summary proceedings on motion.³ The person who first sues and obtains judgment is entitled to the whole penalty, if his demand amount to so much, in exclusion of other claimants.⁴ And the same rule

¹ Taylor v. Blyth, 9 Colo. App. 81, 47 Pac. Rep. 663; People v. Birdsall, 20 Johns. 297; People v. Mathewson, id. 300; Richardson v. Smith, 2 Jones, 8; Mitchell v. Laurens, 7 Rich. 109; Ridener v. Rogers, 6 B. Mon. 594; Skinner v. Phillips, 4 Mass. 68; McGuire v. Justices, 7 B. Mon. 340; Fuller v. Holmes, 1 Aik. 111; Rodes v. Commonwealth, 6 B. Mon. 359; Hartz v. Commonwealth, 1 Grant's Cas. 359; Jackson v. Rundlet, 1 Wood. & M. 381; Eason v. Sutton, 4 Dev. & Batt. 484; Gibson v. Martin, 7 Humph. 127; Wells v. Commonwealth, 8 B. Mon. 459; Trice v. Turrentine, 13 Ired. 212; Norton v. Mulligan, 4 Strobb. 355; Gwin v. Barton, 6 How. 7; Stephens v. Crawford, 3 Ga. 499; Harrison v. Brown, 1 Swan, 272; Wilson v. Cantrell, 19 Ala. 642; State v. McAlpin, 6 Ired. 347; Shepard v. State, 3 Gill, 289; White v. Wilkins, 24 Me. 299; Commonwealth v. Straub, 35 Pa. 137; Lynch v. Commonwealth, 16 S. & R. 368, 16 Am. Dec. 582; Campbell v. Commonwealth, 8 S. & R. 414; People v. Holmes, 2 Wend. 281; Lawton v.

Erwin, 9 id. 233; Treasurers v. Ross, 4 McCord, 273; Hernandez v. Montgomery, 14 Martin, 422. But see Hatch v. Attleborough, 97 Mass. 533.

² Sangster v. Commonwealth, 17 Gratt. 124; Skinner v. Phillips, 4 Mass. 68. *

When a private person brings a suit against a United States marshal and the sureties on his bond for official default, the judgment should be, under secs. 784, 785, R. S. of U. S., not for the penalty but for the plaintiff's damages. Hagood v. Blythe, 37 Fed. Rep. 249.

³ Wolverton v. Commonwealth, 7 S. & R. 273; Withrow v. Commonwealth, 10 id. 231; Adler v. Newcomb, 2 Dill. 45; Hendricks v. Shoemaker, 3 Gratt. 197; Tyree v. Donnelly, 9 id. 64; Graham v. Chandler, 12 Ala. 829; Camp v. Watt, 14 id. 614; Collier v. Powell, 23 id. 579; McCrosky v. Riggs, 12 Sm. & M. 712; Young v. Hare, 11 Humph. 303.

⁴ Dallas v. Chaloner, 3 Dall. 501, note, 4 id. 106, note; Christman v. Commonwealth, 17 S. & R. 381;

holds, though the party who first sues is prevented from obtaining judgment by a stay of proceedings, on the defendants paying into court the penalty of the bond.¹ And where, after one suit on such bond, several sue on it at the same term, the surplus will be divided among them *pro rata*; but if, instead of suing, they apply to the court to come in under the first suit, he who first applies will be entitled to priority of payment.² Such bonds are given for the benefit of all persons who may be aggrieved by the negligence or misconduct of the officer; and no individual can receive voluntary payment of the amount of it, and no payment to an individual will exonerate the obligor. Faithfully accounting for moneys to the amount of the penalty will not satisfy an official bond. It will stand good for losses and defalcations to that amount. For this reason it is unnecessary, in a declaration upon such a bond, to aver the non-payment of the penalty.³

§ 487. What private injuries covered by official bonds. In such actions damages may be recovered by any person suffering injury from neglect to perform, or negligent performance of, official acts which he had a right to require and have performed for his private benefit;⁴ or from torts committed by

Glidewell v. McGaughey, 2 Blackf. 357.

¹ McKean v. Shannon, 1 Bin. 370. See State v. Wayman, 2 Gill & J. 254. Compare State v. Ford, 5 Blackf. 393.

² McKean v. Shannon, 1 Bin. 370.

³ State v. McClane, 2 Blackf. 192; Potter v. Titcomb, 7 Me. 319; Commonwealth v. Montgomery, 31 Pa. 519.

⁴ Norton v. Kumpe, 121 Ala. 446, 25 So. Rep. 841; State v. Gobin, 94 Fed. Rep. 48; Hixon v. Cupp, 5 Okl. 545, 49 Pac. Rep. 927; Asker v. Cabell, 1 C. C. A. 693, 50 Fed. Rep. 818; Howard v. United States, 184 U. S. 676, 22 Sup. Ct. Rep. 543; State v. Wall, 9 Ired. 20; State v. Johnson, 7 id. 77; Wyche v. Myrick, 14 Ga. 584; Treasurers v. Ross, 4 McCord, 273; Rowland v. Wood, 4 Dana, 194.

The sureties on a sheriff's bond are

not liable to a printer for advertising notices, rules, audits, inquisitions and sales ordered by the sheriff, though it was part of his official duty to cause such advertisements to be made, and for neglect of which they would have been responsible. The duty to pay in such case is not official. Commonwealth v. Swope, 45 Pa. 535; Allen v. Ramey, 4 Strobb. 30; Crocker v. Fales, 13 Mass. 260; Wilson v. State, 13 Ind. 311; Brown v. Phipps, 6 Sm. & M. 51.

Where the rule prevails that the record of any instrument which is entitled to be recorded is only notice of the existence and record of the thing itself and not of the original, a mistake in recording a deed containing the grantee's contract to assume and pay \$500 as a part of the mortgage debt on the land conveyed, by which the record shows

[31] virtue or under color of office,¹ and which are specially injurious to him.² On making an arrest, by virtue of his office, a sheriff is bound to exercise ordinary and reasonable care, under the circumstances of each particular case, for the preser-

the assumption of only \$200 of such debt, renders sureties on the officer's bond liable for the damages resulting to the grantor in the deed by reason of such mistake. *State v. Davis*, 96 Ind. 539.

The liability of sureties does not extend beyond nominal damages unless there is proof that the plaintiff cannot collect the full amount due from the person who assumed the payment of the lien. *State v. Davis*, 117 Ind. 307, 20 N. E. Rep. 159.

The owner of a judgment is aggrieved by the misfeasance of the sheriff in failing to make the money on an execution issued thereon, and may sue on the sheriff's bond in his own name. *Burns v. George*, 119 Ala. 504, 24 So. Rep. 718.

¹In Indiana there is no distinction, so far as the liability of sureties is concerned, between acts done by color of office and those done by virtue of office. *State v. Walford*, 11 Ind. App. 392, 39 N. E. Rep. 162; *State v. White*, 88 Ind. 587, 593.

²But it has been repeatedly held that where a sheriff, or like officer, with process authorizing a seizure of A.'s property, takes B.'s, the latter may recover damages therefor upon such officer's official bond. *Lammon v. Fusier*, 111 U. S. 17, 4 Sup. Ct. Rep. 286; *Thomas v. Markman*, 43 Neb. 823, 62 N. W. Rep. 206; *Welter v. Jacobson*, 7 N. D. 32, 73 N. W. Rep. 65; *Norris v. Mersereau*, 74 Mich. 687, 42 N. W. Rep. 153; *Norwalk v. Ireland*, 68 Conn. 1, 35 Atl. Rep. 804; *Hill v. Ragland*, 24 Ky. L. Rep. 1053, 70 S. W. Rep. 634; *State v. Jennings*, 4 Ohio St. 418; *Sangster v. Commonwealth*, 17 Gratt. 124; *Archer v. Noble*, 3 Me. 418; *Harris v. Hanson*, 11

Me. 241; *Carmack v. Commonwealth*, 5 Bin. 184; *Skinner v. Phillips*, 4 Mass. 68; *Schloss v. White*, 16 Cal. 65; *Halliman v. Carroll*, 27 Tex. 23, 84 Am. Dec. 606; *Commonwealth v. Stockton*, 5 Mon. 192; *Forsythe v. Ellis*, 4 J. J. Marsh. 299, 20 Am. Dec. 218; *People v. Schuyler*, 4 N. Y. 173, reversing 5 Barb. 156, and overruling *Ex parte Reed*, 4 Hill, 572; *Van Pelt v. Little*, 14 Cal. 194; *Tracy v. Goodwin*, 5 Allen, 409; *Dennison v. Plumb*, 18 Barb. 89; *State v. Moore*, 19 Mo. 369, 61 Am. Dec. 563; *State v. Farmer*, 21 Mo. 160; *McElthaney v. Gilliland*, 30 Ala. 183; *Commonwealth v. Williams*, 4 Litt. 335; *Brunott v. McKee*, 6 W. & S. 513; *Gilbert v. Isham*, 16 Conn. 525; *Strunk v. Ocheltree*, 11 Iowa, 158; *Charles v. Haskins*, id. 329; *Greenfield v. Wilson*, 13 Gray, 384; *Dane v. Gilman*, 49 Me. 173. Compare *State v. Brown*, 11 Ired. 141, and *State v. Conover*, 28 N. J. L. 224, 75 Am. Dec. 54, also *Taylor v. Parker*, 43 Wis. 78; *Cairnes v. O'Brien*, 40 id. 470; *Gerber v. Ackley*, 37 id. 43, 19 Am. Rep. 751; *State v. Mann*, 21 Wis. 684.

The same rule applies where the wrong person is arrested under a warrant. *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. Rep. 752.

The judgment recovered against an officer who has levied on the property of one not a party to the writ is *prima facie* evidence in an action against the officer and his sureties as to the ownership of the property and the amount of the damages and costs resulting from the wrong done. *Barker v. Wheeler*, 60 Neb. 470, 83 N. W. Rep. 678, 83 Am. St. 541, overruling *Thomas v. Markman*, 43 Neb. 823, 62 N. W. Rep. 806,

vation of the health and life of his prisoner. That duty he owes the prisoner, and for a breach of it he and his sureties are responsible in damages on the bond, notwithstanding the act complained of was a crime.¹ A United States marshal, who, knowing that certain lawless persons are hostile to a prisoner in his custody, delivers him for transport, shackled to a deputy, whom he knows to be incompetent and unfit, is liable on his bond, because of his own negligence, for the killing of such prisoner by a mob through the deputy's unfitness.² In many jurisdictions the acts of an officer under a void process are trespasses for which he alone is responsible.³ In others the sureties of a sheriff are liable for money collected by him under color of his office, although the writ may have been erroneous or illegal.⁴ But it has been held that money received by a sheriff on account of an execution after the return day is not officially received, and a failure to pay it over is

and *Lewis v. Mills*, 47 Neb. 910, 66 N. W. Rep. 817, which latter cases held such a judgment conclusive, no fraud or collusion in obtaining it being shown.

Under a bond conditioned for the faithful performance of duty, as well with respect to all persons concerned as the state, the wrongful entry of the cancellation of a mortgage gives a right of action to a purchaser of the mortgaged premises who searched the registry and found such entry therein and relied upon it, although he did not employ the officer who made it to make a search of the record. *Appleby v. State*, 45 N. J. L. 161.

¹ *State v. Gobin*, 94 Fed. Rep. 48; *Hixon v. Cupp*, 5 Okl. 545, 49 Pac. Rep. 927; *Shields v. Pflanz*, 19 Ky. L. Rep. 648, 41 S. W. Rep. 267.

² *Asher v. Cabell*, 1 C. C. A. 693, 50 Fed. Rep. 818.

A statute making carriers liable for the death of any person caused by their negligence or carelessness "or by the unfitness or gross negligence or carelessness of their servants or agents," and which, in a sub-

sequent section, imposes such liability "when the death of any person is caused by the wrongful act, negligence, unskilfulness or default of another," does not make the sureties on the bond of a sheriff responsible for the act of a deputy sheriff in wrongfully killing a prisoner who was attempting to escape. *Hendrick v. Walton*, 69 Tex. 192, 6 S. W. Rep. 749.

Where the sheriff's deputies shot and killed a man believing him to be one whom they were ordered to arrest for a felony, the sureties on the sheriff's bond were liable for the wrong done. *Johnson v. Williams*, 23 Ky. L. Rep. 658, 63 S. W. Rep. 759, 54 L. R. A. 220.

³ *Allison v. People*, 6 Colo. App. 80, 39 Pac. Rep. 903; *State v. McDonough*, 9 Mo. App. 63; *McLendon v. State*, 92 Tenn. 520, 22 S. W. Rep. 200, 21 L. R. A. 738; *State v. Timmons*, 90 Md. 10, 44 Atl. Rep. 1003; *Marquis v. Willard*, 12 Wash. 528, 41 Pac. Rep. 889, 50 Am. St. 906.

⁴ *Rollins v. State*, 13 Mo. 437, 53 Am. Dec. 151; *Treasurers v. Buckner*, 2 McMull. 32.

not a breach of his official bond.¹ So, where a defendant in an execution paid to the sheriff the amount thereof in depreciated currency, adding a sum to make it equal to par, and the plaintiff in the execution refused to receive it, so that the defendant was compelled to pay the amount in other funds; and the sheriff, on demand, failed to repay him the depreciated funds, it was held that the sheriff and his sureties were not [32] liable therefor on his official bond, although the sheriff would be individually liable.² Money paid a sheriff by consent of the parties to a sale made by him, though received in advance of the time fixed by the order of sale for its payment, is presumed to have been received by him in his official capacity.³ The act of a constable in receiving money from an execution debtor under a contract not to serve an execution upon him, and to repay the money if the judgment should be reversed, is not one for which his sureties are liable.⁴ The failure of an officer to return money deposited with him by an execution plaintiff in lieu of a bond to protect him against liability for making a levy is not a breach of the official bond.⁵ The sureties on the bond of a sheriff who has tendered moneys to be received on redemption from a foreclosure sale to the agent of the plaintiff, who was authorized to demand, receive and receipt for the same, and who, without reason, refused to accept or receive the money, are thereby released from liability for the money tendered, notwithstanding the plaintiff subsequently demanded the money from the sheriff, who refused to pay it. The bond was not a continuing guaranty, and the refusal to pay on the demand of the plaintiff was not a new breach of its conditions.⁶

Without giving any reasons for doing so it has been ruled in

¹ *Dean v. Governor*, 13 Ala. 526; *Fitzpatrick v. Branch Bank*, 14 Ala. 533; *Commonwealth v. Cole*, 7 B. Mon. 250; *Radford v. Hull*, 30 Miss. 712.

² *Brown v. Mosely*, 11 Sm. & M. 354.

³ *State v. Cayce*, 85 Mo. 456.

⁴ *Feller v. Gates*, 40 Ore. 543, 67 Pac. Rep. 416, 56 L. R. A. 630.

⁵ *De Sisto v. Stimmel*, 58 App. Div. 486, 69 N. Y. Supp. 431.

⁶ *Hull v. Chapel*, 77 Minn. 159, 79 N. W. Rep. 669, 77 Am. St. 666. The court disapproved *State v. Alden*, 12 Ohio, 59, which determined that a sheriff who absconded with money in his possession, after having previously tendered it to the party entitled to it, and who refused to receive it, violated his bond, and that his sureties were liable.

Indiana that if a note is received by a justice of the peace in his official capacity and he collects it without issuing process or rendering judgment, and appropriates the proceeds to his own use, the sureties on his bond are liable.¹ According to several courts an action will not lie on an officer's bond, given for the faithful performance of the duties of his office, for an act which is beyond the scope of his authority, although done under color of his office.² But there are authorities which pointedly hold that an officer's sureties are liable for his illegal acts done *colore officii*, and not as an individual. This view is thus enforced. But it is insisted that, as the constable is shown to have had no lawful authority to arrest the plaintiff, his act was, therefore, not done in the line of his duty, but was illegal because it was in excess of his duty. In truth his act was in the line (direction) of official duty, but was illegal because it was in excess of his duty. In the discharge of official functions he violated his duty and oppressed the plaintiff. If, in exercising the functions of his office, the defendant is not liable for acts because they are illegal or forbidden by law, and, for that reason, are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in the discharge of his duty he, of course, is not liable. It follows that, if the defendant's position be sound, no action can be maintained upon the bond in any case.³ Where a sheriff sold property taken on attachment, by agreement between the plaintiff and defendant, and without an order of court, it was

¹ *Widener v. State*, 45 Ind. 244. See *People*, 6 Colo. App. 80, 39 Pac. Rep. 903.
Bosley v. Smith, stated in eighth note below.

² *Barnes v. Whitaker*, 45 Wis. 204; *Taylor v. Parker*, 43 id. 78; *People v. Foster*, 133 Ill. 496, 23 N. E. Rep. 615; *State v. McDonough*, 9 Mo. App. 63; *Kerr v. Brandon*, 84 N. C. 128; *Furlong v. State*, 58 Miss. 717; *People v. Gardner*, 55 Cal. 304; *Lowe v. Guthrie*, 4 Okl. 287, 44 Pac. Rep. 198; *Chandler v. Rutherford*, 43 C. C. A. 218, 101 Fed. Rep. 774; *Commonwealth v. Cole*, 7 B. Mon. 250; *Eaton v. Kelly*, 72 N. C. 110; *Allison v.*

Clancy v. Kenworthy, 74 Iowa, 740, 35 N. W. Rep. 427; *State v. Daniel*, 78 Miss. 1, 27 So. Rep. 991, 50 L. R. A. 118; *Turner v. Sisson*, 137 Mass. 191; *Brown v. Weaver*, 76 Miss. 7, 23 So. Rep. 388, 71 Am. St. 512, 42 L. R. A. 423; *Yount v. Carney*, 91 Iowa, 559, 60 N. W. Rep. 114; *Johnson v. Williams*, 23 Ky. L. Rep. 658, 63 S. W. Rep. 759, 54 L. R. A. 220. See the cases cited in the third note to this section.

held that his sureties could not be made liable on the bond for his failure to pay over the money.¹ The bond of a clerk of court was conditioned for the faithful performance of the duties required of him by law; but it was held not a part of his duty to collect the fees of other officers of the court, and that he could not be held liable on his bond for not paying over such fees if he had received any.² Under a bond conditioned that the clerk of a court will account for and pay over, as required by law, all money which may come to his hands by virtue of his office, his sureties are not liable for money paid to him in vacation, such payment not being equivalent to the payment of money into court.³ The bond of the clerk of a federal circuit court covers liability for money paid him with the sanction of the court in a pending cause, to be deposited as required by law.⁴ The clerk of a court is liable for falsely certifying in his certificate of the acknowledgment to a forged mortgage that the person whose name appears as having executed the same is personally known to him, the holder of such mortgage having by means of the certificate negotiated a loan from an innocent person who had no notice of the facts.⁵ Where a party arrested gave bail, which was objected to for insufficiency, and to obviate the objection made a deposit of money with the sheriff, it was held his sureties were not liable for it.⁶

¹ *Governor v. Perrine*, 53 Ala. 807.

² *Matthews v. Montgomery*, 25 Miss. 150.

As to the liability of the sureties of the clerk of the common pleas courts under the Ohio statutes, see *State v. Hobson*, 5 Ohio Dec. 442.

³ *State v. Enslow*, 41 W. Va. 744, 24 S. E. Rep. 679; *Stewart v. Madison*, 1 Call. 416; *Mazyck v. McEwen*, 2 Bailey 28; *Keith v. Smith*, 1 Swan, 92; *Currie v. Thomas*, 8 Port. 293; *Jenkins v. Lemonds*, 29 Ind. 294.

⁴ *Howard v. United States*, 184 U. S. 676, 22 Sup. Ct. Rep. 543.

⁵ *People v. Bartels*, 138 Ill. 322, 27 N. E. Rep. 1091.

⁶ *State v. Long*, 8 Ind. 415. See *Beals v. Commonwealth*, 7 Watts, 183; *Bosley v. Smith*, 3 Humph. 406;

State v. Daly, 3 Ind. 431; *Boehmer v. Schuylkill*, 46 Pa. 452; *Governor v. Pearce*, 31 Ala. 465; *State v. White*, 10 Rich. 442; *Webb v. Anspach*, 3 Ohio St. 522; *State v. Rollins*, 29 Mo. 267; *Mills v. Allen*, 7 Jones, 564; *Hinckler v. County Court*, 27 Ill. 39; *Boston v. Moore*, 3 Allen, 123; *Brooks v. Gibbs*, 2 Jones, 326; *Smith v. Berry*, 37 Me. 298; *Hardin v. Carico*, 3 Met. (Ky.) 289.

A constable gave a bond conditioned "well and truly to demean himself in office." Held, that he and his sureties were responsible for not paying over money collected as constable and retained by him though the collection was made without process. *Bosley v. Smith*, 3 Humph. 406.

If an act done by an officer under color of authority is in part in excess of his power and in part within it, the sureties on his bond will be liable for the latter part.¹ If the injury done resulted, proximately, from the acts of the officer as an individual his sureties will not be responsible though his official misconduct concurred in producing it. Thus, where a notary public, in his individual capacity, acted as agent of another and embezzled money, and also attempted to cover such embezzlement by delivering to his principal notes and deeds of trust to which he had forged the names of non-existent persons and had, as notary, attached false certificates of acknowledgments to such deeds, the embezzlement was the direct cause of loss, and the sureties on his bond were not liable.² The use of excessive and unnecessary force by an officer in making a lawful arrest is an act for which his sureties are liable.³ The sureties on the bond of a *de facto* officer are not liable to the *de jure* officer, upon his recovery of the office, for the fees or salary received by the intruder.⁴

§ 488. Measure of damages against sureties. The measure of damages for which the sureties on official bonds are bound, in the absence of any statutory rule, is just compensation for the injury actually sustained,⁵ in addition to nominal

¹ Kendall v. Aleshire, 28 Neb. 707, 26 Am. St. 367, 45 N. W. Rep. 167.

² State v. Boughton, 58 Mo. App. 155.

³ Towle v. Matheus, 130 Cal. 574, 62 Pac. Rep. 1064; State v. Walford, 11 Ind. App. 392, 39 N. E. Rep. 162.

⁴ Curry v. Wright, 86 Tenn. 636, 8 S. W. Rep. 593; Rowlett v. White, 18 Tex. Civ. App. 688, 46 S. W. Rep. 372.

⁵ Sheldon v. Upham, 14 R. I. 498; Boyd v. Desmond, 79 Cal. 250, 21 Pac. Rep. 755; Ivey v. Colquitt, 63 Ga. 509; Commonwealth v. Harmer, 6 Phila. 90; Probst v. Skillen, 16 Ohio St. 382; Hill v. Lowry, Tappan, 149; State v. Lawson, 2 Gill, 62; State v. Johnson, 7 Ired. 77; State v. Watson, id. 289; Sedam v. Taylor, 3 McLean, 547; Crawford v. Andrews, 6 Ga. 244; Ziegler v. Commonwealth, 12 Pa. 327; Bevans v. Ramsey, 15 How. 179;

Karch v. Commonwealth, 3 Pa. 269;

Brooks v. Governor, 17 Ala. 206;

Wyche v. Myrick, 14 Ga. 584; Taylor

v. Johnson, 17 Ga. 521; Dobbs v.

Justices, 17 Ga. 624; Chapman v.

Smith, 16 How. 114; Reed v. Goettie,

7 Rich. 126; Carpenter v. Doody, 1

Hilt. 465; State v. Atkinson, 17 Ind.

26; Governor v. Evans, 1 Dev. & Bat.

243; Governor v. Matlock, 1 Hawks,

425; Treasurers v. Clowney, 2 Mc-

Mull. 510; Anderson v. Joliet, 14 La.

Ann. 114; Bennett v. Vingard, 34

Mo. 216; Lowell v. Parker, 10 Met.

309, 43 Am. Dec. 436; Commonwealth

v. Allen, 30 Pa. 49; Findley v. Hut-

zell, 29 id. 337; Perkins v. Giles, 9

Leigh, 397, 33 Am. Dec. 249; Griffin

v. Underwood, 16 Ohio St. 389; Com-

monwealth v. Bradley, 1 Litt. 48;

Commonwealth v. Sayres, 1 Miles,

255; United States v. Moore, 2 Brock.

damages which follow the breach of such bonds. Sureties are not subject to exemplary damages as a rule, nor to penal-[33] ties imposed by statute upon their principal.¹ If an illegal arrest is made there may be a recovery for mental suffering and injury to the feelings although neither fraud nor malice is shown.² The natural and proximate consequence of the wrongful entry of the cancellation of a mortgage to the purchaser of the premises affected by it, who bought them at their full value, is the amount he was afterwards obliged to pay to relieve the property from the lien, and for that amount the officer's sureties are liable.³ If in consequence of the neglect of a register of deeds to include in a tract index, which he is required to keep, a mortgage on a parcel of land, such parcel is bought without knowledge of the mortgage, the purchaser of the land may buy such mortgage, and having exhausted his remedy to obtain reimbursement of his expenditures against his covenantee and against the mortgagor, may recover from the sureties on the register's bond the residue of such expenditures and interest thereon.⁴ The sureties of a

317; *Johnson v. Williams*, 23 Ky. L. Rep. 578, 63 S. W. Rep. 659, 54 L. R. A. 220; *State v. Ryland*, 163 Mo. 280, 63 S. W. Rep. 819. See *Crawford v. Ward*, 7 Ga. 445.

In assessing damages on a sheriff's bond in Arkansas for breach in not returning an execution, interest will not be computed on the aggregate of the debt and interest in the execution. *Norris v. State*, 22 Ark. 524; *Henry v. Ward*, 4 Ark. 151. See *Gibson v. Governor*, 11 Leigh, 600.

The liability of a surety company which has bound itself for the faithful performance of his duties by a postal clerk is not limited to the indemnity payable by virtue of statute by the government to the sender of the letter, the contents of which such clerk embezzled, but extends to the full sum embezzled. *Opinion of Attorney-General Knox*, 18 Bank. L. J. 763, 23 *Opinions of Att'ys Gen.* 476.

¹ *Hixon v. Cupp*, 5 Okl. 545, 49 Pac. Rep. 927; *State Bank v. Brennan*, 7 Colo. App. 427, 43 Pac. Rep. 1050; *Johnson v. Williams*, 23 Ky. L. Rep. 658, 63 S. W. Rep. 659, 54 L. R. A. 220; *Glascok v. Ashman*, 52 Cal. 493; *Boyd v. Desmond*, 79 id. 250, 21 Pac. Rep. 755; *Brooks v. Governor*, 17 Ala. 806; *Wyche v. Myrick*, 14 Ga. 584; *McDowell v. Burwell*, 4 Rand. 317; *Fletcher v. Chapman*, 2 Leigh, 565; *Treasurers v. Buckner*, 2 McMull. 323; *Treasurers v. Hilliard*, 8 Rich. 412; *Foote v. Van Zandt*, 34 Miss. 40. It is otherwise in Arkansas. *Christian v. Ashley County*, 24 Ark. 142. See *Lawson v. Pulaski*, 3 id. 1; § 390, note.

² *Yount v. Carney*, 91 Iowa, 559, 60 N. W. Rep. 114.

³ *Appleby v. State*, 45 N. J. L. 161.

⁴ *Johnson v. Brice*, 102 Wis. 575, 78 N. W. Rep. 1086; *Wacek v. Frink*, 51 Minn. 282, 53 N. W. Rep. 633, 38 Am. St. 502; *Chase v. Heaney*, 70 Ill. 268.

notary public who fraudulently attaches to counterfeit mortgages certificates of their due acknowledgment are liable to one who loans money upon the faith of the instruments for the value they would have had if they were valid; such value to be determined with reference to the apparent worth of the property pretended to be mortgaged.¹ If a notary makes a false certificate of acknowledgment to a forged deed his sureties are liable to an innocent grantee for the money paid on account of it, that being the value of the land described in it.² If a legatee fails to receive a legacy because of the neglect of a notary to properly state the residence of the witnesses who attested the will, the sureties of the notary are liable for the amount which the legatee would have received after the payment of succession debts and privileges.³ If exempt property sold has been returned to the owner the damages are mitigated, and the measure of liability is the expense of procuring its return with interest, and any special damage which may be proven. If there was sold with such property other property which was not exempt, the whole sum paid for the repurchase of the exempt, whose value is sued for, and of the non-exempt property sold therewith, should be apportioned between them according to their relative value, and the recovery should be limited to the sum apportioned to the exempt property, with interest and special damages.⁴ An indemnity mortgagee may recover from the sureties of an officer who has sold the mortgaged chattels upon execution under a lien junior to that of the mortgage the value of the property if that is less than the amount of the debt, or, if it is more than such amount, the amount of the indebtedness.⁵ Where the sheriff returned what purported to be a forthcoming bond for property levied on, and, upon default, an execution was issued thereon, which was quashed because the obligors did not execute the bond, the costs and attorney's fees incurred by the plaintiff in defending the proceedings to

¹ *Heidt v. Minor*, 89 Cal. 115, 26 Pac. Rep. 627; *McAllister v. Clement*, 75 Cal. 182, 16 Pac. Rep. 775. See *Doran v. Butler*, 74 Mich. 643, 42 N. W. Rep. 273.

² *Joost v. Craig*, 131 Cal. 504, 63 Pac. Rep. 840, 82 Am. St. 734.

³ *Weintz v. Kramer*, 44 La. Ann. 35, 10 So. Rep. 416.

⁴ *Blewett v. Miller*, 131 Cal. 149, 63 Pac. Rep. 157.

⁵ *Collins v. State*, 3 Ind. App. 542, 30 N. E. Rep. 12, 50 Am. St. 298.

quash the execution were the natural and proximate result of the sheriff's act, and his sureties were liable therefor.¹ A cause of action upon the bond of a constable for failing to take a sufficient replevin bond accrues when the suit is ended and a *retorno* is awarded. If the property is returned and there has been no depreciation in value, the damages are limited to the value of its use or the value of the right to sell the property during the time it was detained. The value of the property as stated in the affidavit is not necessarily the measure of damages, though the plaintiff in the replevin suit cannot deny that the property replevied was of less value than was stated in his affidavit.²

The sureties on the bond of a justice of the peace are only liable for his misconduct or defaults in respect to his ministerial duties; they are not liable for errors of a judicial character.³ A justice acts ministerially in making a return to an appeal, and is liable for the damage sustained by making a false one.⁴ Where such a return affected a question of law and prevented a reversal of the judgment, the justice was held liable for the amount awarded by it and the costs.⁵ For neglecting to issue an execution the damages are *prima facie* the amount of the judgment;⁶ but the cost of levying a void execution, or loss incurred in attempting to enforce it, cannot be recovered.⁷ The justice may show in mitigation of damages that the debtor does not own sufficient property to satisfy the judgment.⁸

A party who applies to the clerk of a court for process is not bound to see that he issues it, and if the failure to perform that duty deprives such party of the legal right to contest the question of his liability to another the sureties of the clerk are responsible for the resulting damages. They cannot rely on the presumption that the judgment of the trial court is correct, and thus escape with nominal damages. The court said: "There is but one case in point, and that only a *nisi prius*

¹ Burns v. George, 119 Ala. 504, 24 So. Rep. 718.

² Love v. People, 94 Ill. App. 237.

³ McGrew v. Governor, 19 Ala. 89. See Guesdorf v. Gleason, 10 Iowa, 495.

⁴ Brooks v. St. John, 25 Hun, 540.

⁵ MacDonell v. Buffum, 31 How. Pr. 158.

⁶ Nixon v. Hill, 2 Allen, 215; Carpenter v. Warner, 33 Ohio St. 416.

⁷ Nixon v. Hill, 2 Allen, 215.

⁸ Id.; Carpenter v. Warner, *supra*.

ruling. In *Cohen v. Marchant*¹ the action was against a justice of the peace for failing to date properly the appeal bond, whereby the right of appeal was lost. Judge Storer told the jury that they might measure the damages by the amount of the judgment. It is a rule in actions for negligence in issuing execution on a judgment, or for negligence in allowing the escape of one whose body is taken in execution, that the amount of injury is *prima facie* measured by the face of the judgment, and that the burden is on the negligent officer to reduce the recovery by showing the insolvency of the defendant.² As against a public officer who negligently deprives another of his right to be heard in a suit against him, we think the same rule of evidence should prevail, and that the plaintiff should be entitled to recover all that the negligence of the defendant has caused him to pay unless the officer can show that, even if he had not been negligent, the complaining litigant would have had ultimately to pay the same amount." It having been found by the court below that there was reversible error in the record, and no evidence being given to show that on a new trial a similar verdict would have been reached, judgment was entered for the amount paid on the judgment, with interest and costs.³

It is not a part of the contract of the sureties on an official bond that, before they shall become liable, their principal shall strictly comply with all the requirements of law so as to constitute himself, before entering upon the duties of his office, in all respects and in every particular an officer *de jure*, and not an officer *de facto* merely. Hence it is not a defense to them that he did not obtain his commission within the time limited by law; nor that he did not take, subscribe and indorse thereon the proper oath of office; nor that his bond was not approved and deposited within the prescribed time; nor that his commission was not sealed.⁴ It follows that responsibility for the principal's acts is assumed at the date he enters upon the discharge of his duties, unless the bond by its terms extends to

¹ 1 Disney, 113.

² *Carpenter v. Warner*, 38 Ohio St. 416.

³ *Baltimore & O. R. Co. v. Weedon*, 24 C. C. A. 249, 78 Fed. Rep. 584.

⁴ *State v. Toomer*, 7 Rich. 216; *Stevens v. Treasurers*, 2 McCord, 107; *Ramsay's Estate v. People*, 197 Ill.

past transactions;¹ and that it does not continue beyond the official term for which it was made, except in respect to such duties or business of that term as the incumbent is required to perform and complete afterwards.² When the law provides [34] that an officer shall hold until his successor is qualified it has been held that his bond covers his acts as long as he so holds.³ And where new bonds are required to be given periodically during an official term, all such additional bonds given during the same term are usually treated as cumulative.⁴ The sureties on each are held bound for so much of the term as is subsequent to its execution.⁵ It is otherwise, of course, where

¹ *Rochester v. Randall*, 105 Mass. 295, 7 Am. Rep. 519.

The liability of sureties upon a liquor seller's bond attaches when it is accepted and approved though it is not filed in the designated office until some time thereafter. *Brockway v. Petted*, 79 Mich. 620, 45 N. W. Rep. 61, 7 L. R. A. 740; *People v. Laning*, 73 Mich. 284, 41 N. W. Rep. 424.

² *People v. Toomey*, 122 Ill. 308, 13 N. E. Rep. 521; *King County v. Ferry*, 5 Wash. 536, 550, 32 Pac. Rep. 538, 34 Am. St. 880, 19 L. R. A. 500 (extension of term by statute); *People v. Foster*, 133 Ill. 496, 23 N. E. Rep. 615; *Tyree v. Wilson*, 9 Gratt. 59; *Ingram v. McComb*, 17 Mo. 558; *Dumas v. Patterson*, 9 Ala. 484; *State v. Johnson*, 7 Ired. 77; *Poole v. Cox*, 9 id. 69, 49 Am. Dec. 410; *Warren v. State*, 11 Mo. 583; *Faulkner v. State*, 9 Ark. 14; *State v. Van Pelt*, 1 Ind. 304; *Evans v. Bank*, 15 Ala. 81; *Dixon v. Caskey*, 18 Ala. 97; *Marney v. State*, 13 Mo. 7; *State v. Wall*, 9 Ired. 20; *State v. Roberts*, 12 N. J. L. 114, 21 Am. Dec. 62; *People v. Ring*, 15 Wend. 623; *People v. Ten Eyck*, 13 id. 448; *Tyler v. Nelson*, 14 Gratt. 214; *Low v. Cobb*, 2 Sneed, 18; *Latham v. Fagan*, 6 Jones, 62; *Collyer v. Higgins*, 1 Duvall, 6, 85 Am. Dec. 601; *Larned v. Allen*, 13 Mass. 295; *United States v. Giles*, 9 Cranch, 212; *Elkin*

v. People, 4 Ill. 207, 36 Am. Dec. 541; *People v. McHenry*, 19 Wend. 482; *Bruce v. State*, 11 Gill & J. 382; *Robey v. Turner*, 8 id. 125; *United States v. Spencer*, 2 McLean, 405; *State Treasurer v. Mann*, 34 Vt. 371; *Wapello v. Bigham*, 10 Iowa, 39, 74 Am. Dec. 370; *Manufacturers' & M. Savings & Loan Co. v. Odd Fellows' Hall Ass'n*, 48 Pa. 446; *State v. Grimsley*, 19 Mo. 171; *Welch v. Seymour*, 28 Conn. 387; *Dover v. Twombly*, 42 N. H. 59; *Thomas v. Summey*, 1 Jones, 554; *King v. Nichols*, 16 Ohio St. 80; *McCormick v. Moss*, 41 Ill. 352. See *Governor v. Robbins*, 7 Ala. 79; *Sherrell v. Goodrum*, 3 Humph. 419; *Butler v. State*, 20 Ind. 169.

³ *Thompson v. State*, 37 Miss. 518; *State v. Berg*, 50 Ind. 502; *Commonwealth v. Drewry*, 15 Gratt. 1; *Pickering v. Day*, 3 Houst. 474; *State v. Kurtzeborn*, 78 Mo. 98; *Hughes v. Smith*, 5 Johns. 168; *People v. Beach*, 77 Ill. 52; *Exeter Bank v. Rogers*, 7 N. H. 21; *State v. Daniels*, 6 Jones. 444.

⁴ *Poole v. Cox*, 9 Ired. 69, 49 Am. Dec. 410; *Postmaster General v. Munger*, 2 Paine C. C. 189; *Miller v. Macoupin County*, 7 Ill. 50; *State v. Crooks*, 7 Ohio, 573; *Governor v. Robbins*, 7 Ala. 79. Compare *Hewett v. State*, 6 Harr. & J. 95, 14 Am. Dec. 259.

⁵ *Id.*

on the execution of a new bond the sureties in the preceding one are in form or by implication released.¹ And a substituted surety in an existing bond will be held liable for past as well as subsequent transactions covered by it as executed by the original surety.²

Where the same official duty is neglected continuously from one term into another, by the same officer succeeding himself,—as where an execution is delivered to a sheriff near the close of his term, and he neglects to execute it, and by law it passes to the incumbent of the succeeding term, for which the same person is re-elected, who after his re-election continues his neglect to serve the writ,—the party injured may sue the sureties in the bond for either term at his election.³ And the circumstance that he might recover on the second, if he had chosen to do so, will not go even in mitigation in an action on the first bond.⁴ A sheriff who has attached animals shortly before the expiration of his first term, some of which died by reason of his neglect during his second term, commits, during the latter term, the act which makes his sureties therefor liable.⁵ Where a sheriff going out of office is bound to proceed with the execution of writs in his hands as if his term was not about to expire, and is not required to turn over the money realized therefrom to his successor, the sureties on his bond at the time he realizes money from a sale under a writ of attachment, his term expiring after the sale and a new bond being given by him as his successor to himself, are liable for his wrongful act in defaulting in the payment of such money.⁶

A bond given by a public officer is only a collateral security

¹ *Miller v. Moore*, 3 Humph. 189.

² *Treasurers v. Taylor*, 2 Bailey, 524.

The sureties on a bond which recites that it is given in lieu of a former bond are liable for the acts of their principal from the beginning of his term. *State v. Finn*, 23 Mo. App. 290.

³ *State v. Roberts*, 12 N. J. L. 114.

⁴ *State v. Wall*, 9 Ired. 20.

If a deputy-sheriff neglects to execute process which is placed in his

hands while he is acting as such for one sheriff, and such deputy is re-appointed by the former sheriff's successor and his neglect continues under his re-appointment, the last sheriff is responsible for it. *Simmonds v. Henchy*, 16 L. R. Ire. 467.

⁵ *Wood v. Lowden*, 117 Cal. 233, 49 Pac. Rep. 132.

⁶ *People v. Kendall*, 14 Colo. App. 175, 59 Pac. Rep. 409.

[35] for the faithful performance of his official duties. This collateral obligation can exist no longer than the liability it was created to secure. It is of the essence of the contract of suretyship that there be a subsisting valid obligation of the principal debtor. Whatever, therefore, amounts to a good defense to the original liability of the principal is such for the sureties.¹ The liability of the sureties of a custodian of public moneys for the federal government is measured by the face value of the treasury notes lost, and not by the cost of replacing them.²

If a town which sues the sureties on an officer's bond is indebted to the officer upon an implied contract for services which grew out of and are connected with the claim made, the damages which the town has suffered are lessened to the extent of the value of such services, and the sureties are entitled to the benefit of it in mitigation of their liability.³

§ 489. Measure of damages against officers for neglect of duty. The measure of damages for negligent escapes is not uniform in the several jurisdictions; there is also some variance as to the burden of proof. In Ohio, on proving his judgment against the escaped debtor, the plaintiff in an action against the sheriff is *prima facie* entitled to recover the whole amount of his debt. To reduce the recovery below that the burden is upon the defendant, who may not show that the amount is still collectible from the debtor, but may show his partial or total insolvency at the time he made his escape. The plaintiff is entitled to recover at least nominal damages. If the officer permitted the escape through fraud, malice or corruption, exemplary damages may be awarded against him.⁴ In Vermont an officer who holds final process against a debtor's body and neglects an opportunity to serve it or to arrest him is absolutely liable for the debt.⁵ The same result follows there and in Pennsylvania when the debtor escapes from the liberties of the jail by reason of the insufficiency of the secu-

¹State v. Blake, 2 Ohio St. 147;
Mt. Pleasant Bank v. Conway, 18
Ohio, 234.

²Smythe v. United States, 188 U.
S. 156, 23 Sup. Ct. Rep. 279.

³Brunswick v. Snow, 73 Me. 177;
State v. Hobson, 5 Ohio Dec. 442.

⁴Hootman v. Shriner, 15 Ohio St.

⁵43, Carpenter v. Warner, 38 id. 416.

⁶Goodrich v. Starr, 18 Vt. 227.

rity taken by the sheriff or the neglect of the prison officials.¹ In Connecticut the damages recoverable by a sheriff on the security taken by him for prison liberties include the debt, costs of the execution and interest.² Ordinarily the amount of damage is *prima facie* established by proof of the judgment in the former action and of the plaintiff's inability to collect it. But where the officer's neglect of duty makes such evidence impossible the plaintiff may prove what judgment he might or could have obtained in the former action but for such neglect.³ In Massachusetts the plaintiff is entitled to nominal damages on proof of an escape, but he cannot recover anything beyond that except an actual loss be shown. The officer may show in mitigation that the debtor was unable to pay the debt,⁴ or that it was barred by the statute of limitations.⁵ The burden of proving that he had a valuable debt against the person who has escaped is upon the plaintiff; this is not established by showing that he holds a note signed by him, if on its face it appears that it was barred when the escape was consummated.⁶ In North Carolina only the actual damages can be recovered.⁷ In Georgia the liability for an escape on *mesne* process is *prima facie* the original debt; the officer may show, the burden of proof being upon him, that the debt could not have been made out of the debtor.⁸ This is the rule in Arkansas,⁹ and in Maryland,¹⁰ where the escaped debtor is confined on final process.

The common-law rule that the insolvency of the debtor was provable by the sheriff in mitigation¹¹ has been changed by legislation in New York.¹² Under a statute which declares that the undertaking of the bail is "that the defendant shall

¹ *Wheeler v. Pettes*, 21 Vt. 398; *Saunders v. Smith*, 6 Pa. Co. Ct. 257; *Saunders v. Quigg*, 112 Pa. 546, 3 Atl. Rep. 814.

² *Seymour v. Harvey*, 8 Conn. 63.

³ *Swan v. Bridgeport*, 70 Conn. 143, 39 Atl. Rep. 110.

⁴ *Weld v. Bartlett*, 10 Mass. 470; *Brooks v. Hoyt*, 6 Pick. 468; *Woods v. Varnum*, 21 id. 165.

⁵ *Slocum v. Riley*, 145 Mass. 370, 14 N. E. Rep. 174.

⁶ *Id.*

⁷ *State v. Falls*, 63 N. C. 188.

⁸ *Crawford v. Andrews*, 6 Ga. 244.

⁹ *Faulkner v. State*, 6 Ark. 150.

¹⁰ *State v. Baden*, 11 Md. 317.

¹¹ *Patterson v. Westervelt*, 17 Wend. 543.

¹² *Dunford v. Weaver*, 84 N. Y. 445.

The same rule applies where an undertaking has been given to admit a judgment debtor to the jail liberties. *Flynn v. Union Surety & Guaranty Co.*, 61 App. Div. 170, 70 N. Y. Supp. 403.

at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein," and the liability of the sheriff to be that, "if, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail," an officer cannot mitigate the damages if bail is not put in by proof of the debtor's insolvency.¹ Such proof was not admissible on behalf of the bail under the English statutes.² In Indiana the liability of the sureties of a sheriff who voluntarily permits an escape does not extend beyond the actual damages.³ But the officer himself is liable for the amount of the judgment notwithstanding the insolvency of the prisoner;⁴ and, *prima facie*, the same measure of liability attaches to a constable who purposely allows a defendant to escape after a preliminary examination in a bastardy proceeding and before final judgment.⁵ If the escape was the result of mere negligence the prisoner's inability to satisfy the judgment may be shown to mitigate the damages;⁶ and if the prisoner is re-arrested and held in custody under a judgment recovered against him while he was at large, the sheriff's liability is confined to the actual damages.⁷ In England the damages are to be measured by "the value of the custody of the debtor at the moment of escape."⁸ In equity the sheriff is charged with the whole debt and has the burden of proving that less would have been recovered if the prisoner had not escaped, in answer to which the plaintiff may show what sources of payment were open to him.⁹ On this question the jury may take into consideration not only the debtor's own resources, but all reasonable probabilities, founded upon his position in life and surrounding circumstances, that the debt or any portion of it would have been paid if he had remained in custody,

¹ Metcalf v. Stryker, 31 N. Y. 255;
Bensel v. Lynch, 44 id. 162.

² Beddome v. Holbrooke, 1 B. & P.
450, n.; Maurice v. Partridge, 14 East,
599; Rooksby v. State, 92 Ind. 71;
Turner v. State, 66 id. 210.

³ State v. Johnson, 1 Ind. 158.

⁴ State v. Hamilton, 33 Ind. 502;
State v. Mullen, 50 id. 598.

⁵ Lakin v. State, 89 Ind. 68.

⁶ State v. Mullen, 50 Ind. 598.

⁷ State v. Newcomer, 109 Ind. 243,
8 N. E. Rep. 920; State v. Caldwell,
115 Ind. 6, 17 N. E. Rep. 185.

⁸ Arden v. Goodacre, 11 C. B. 371.

⁹ Moore v. Moore, 25 Beav. 8.

as that the debtor was an only son and his father was wealthy and very old and that the debtor's solicitor had made an offer to compromise the debt of his client.¹

§ 490. Same subject. Some of the early American cases applied a very harsh measure of liability to officers who refused or neglected to serve final process. Such conduct, it was held, made the debt upon which the process was issued the officer's own, and he was liable for the full amount of it, notwithstanding the debtor was unable to pay it or any part of it.² But the later cases establish the reasonable and just rule that the measure of liability, if the officer acts in good faith, is the actual damages the plaintiff sustains,³ which is, *prima facie*, the amount of the debt due the plaintiff.⁴ The value of property lost by reason of a void levy is the measure of damages,⁵ not its appraised value, though the officer's return shows that value.⁶ The value of the property is to be determined by what it would have brought at such a sale as the officer was to have made.⁷ As in other cases of breach of duty, an officer is liable at least for nominal damages for failing to return an execution.⁸ And if the judgment debtor has sufficient non-exempt property to satisfy it the sheriff is liable for the amount, unless he shows some reason for not making the money;⁹ as that the debt was not collectible on account of the debtor's insolvency;¹⁰ but not by showing that the judgment

¹ Macrae v. Clark, L. R. 1 C. P. 403.

² Turner v. Lowry, 2 Aik. 72; Hall v. Brooks, 8 Vt. 485, 30 Am. Dec. 485.

³ Blodgett v. Brattleboro, 30 Vt. 579.

⁴ Gilbert v. Watts-De Golyer Co., 66 Ill. App. 625, affirmed, 169 Ill. 129, 48 N. E. Rep. 430, 61 Am. St. 154.

⁵ Hurlock v. Reinhardt, 41 Tex. 580; French v. Snyder, 30 Ill. 339, 83 Am. Dec. 193.

⁶ Parker v. Peabody, 56 Vt. 221.

⁷ Harris v. Murfree, 54 Ala. 161.

⁸ Gallup v. Robinson, 11 Gray, 20.

⁹ Bank of Rome v. Curtis, 1 Hill, 275; Pardee v. Robertson, 6 id. 550; Swezey v. Lott, 21 N. Y. 481, 78 Am. Dec. 160; Dunphy v. Whipple, 25

Mich. 10; Wilkin v. American Freehold Land Mortgage Co., 106 Ga. 182, 32 S. E. Rep. 135; Brannon v. Barnes, 111 Ga. 850, 36 S. E. Rep. 689.

¹⁰ Crooker v. Melick, 18 Neb. 227, 24 N. W. Rep. 689; Hellman v. Spielman, 19 Neb. 152, 27 N. W. Rep. 131; Ledyard v. Jones, 7 N. Y. 550; Abbott v. Gillespy, 75 Ala. 180; State v. Dixon, 80 Ind. 150; Collier v. State, 10 id. 58.

In some states constables are by statute made absolutely liable for the amount of the debt for neglecting to return an execution. Robertson v. County Com'rs, 10 Ill. 559; Limpus v. State, 7 Blackf. 43; Bachman v. Fenstermacher, 112 Pa. 331, 4 Atl. Rep. 546.

may yet be collected.¹ The statutory damages for not returning an execution cannot be recovered in a common-law action on the sheriff's bond. In such an action there can be no recovery of more than nominal damages, unless the proof shows that greater damages were sustained.²

If there is needless delay in executing a writ of assistance as the result of which the parties in possession of the property wilfully and maliciously injure or destroy it, the officer's negligence is the proximate cause of their acts and he is liable for the consequences.³ Substantial damages may be recovered for wrongfully refusing to execute a writ of possession, including, it seems, the value of the rents and profits of the premises from the date of the return of the writ to the time of judgment in the action in which the writ was issued, subject to deduction on the principle requiring the plaintiff to do his duty by exercising reasonable diligence to minimize the loss.⁴

In Connecticut the early cases held an officer who neglected to serve *mesne* process liable for the plaintiff's whole debt.⁵ In a later case it is said that it is peculiarly the province of the jury to assess the damages, "and in doing so they are not limited to any precise sum. They may even give more than the plaintiff's original debt. Where that debt has been lost by the wilful misconduct or negligence of the officer, they may add to it the costs and charges of a second suit. And as the jury may give more than the debt, so they may give less. And if it should be found by them that the failure of the officer to return the writ was owing to a mere mistake in consequence of which the party had suffered nothing, they might give, and indeed it would be their duty to give, only nominal damages."⁶

In the absence of bad faith or other aggravating circumstances the measure of liability for the failure to attach property is the damage sustained,⁷ which is, *prima facie*, the amount of the judgment and costs, with interest on the former.⁸ The

¹ Ledyard v. Jones, 7 N. Y. 550.

² Marcum v. Burgess, 67 Ala. 556.

³ Chapman v. Thornburgh, 17 Cal. 87, 76 Am. Dec. 571.

⁴ State v. Harrington, 41 Mo. App. 439.

⁵ See Gleason v. Chester, 1 Day, 152; Hubbard v. Shaler, 2 id. 195.

⁶ Clark v. Smith, 10 Conn. 1, 6, 25 Am. Dec. 47.

⁷ Ransom v. Halcott, 18 Barb. 56; Perkins v. Pitman, 34 N. H. 261.

⁸ Springett v. Colerick, 67 Mich. 362, 370, 34 N. W. Rep. 683.

sufficiency of the levy made is to be determined by the result of the sale, not by an appraisement made subsequent to the attachment.¹ If by reason of the officer's neglect a subsequent writ is first levied and a part of the debtor's property is not covered by it, the damages against the officer may be mitigated to the extent of the value of that portion if the creditor might have levied upon it.² If the attachment plaintiff knows of the officer's neglect to serve the writ and the property remains in the same situation as before he cannot decline to have a second issued and after its attachment by another creditor recover the value of the property from the officer.³ But in Massachusetts a creditor whose lien is lost through an officer's neglect in levying an execution is not bound to waive his rights against the latter and take out another writ unless on request or an offer of indemnity; the officer is liable for the value of the lien that would have been obtained but for his dereliction.⁴ An action for the unauthorized release of attached property is for a tort, and the sheriff may show that the released attachment was levied subject to other attachments, and that the property attached was delivered to a receiver, who held it subject to the liens created by the prior attachments.⁵

§ 491. **Same subject.** If property held under process is released by the officer, without the approval of the bond by the creditor, and the sureties are insolvent, the officer must respond for the resulting loss.⁶ And if property in the officer's custody is lost by his negligence he is liable for its value,⁷ and is not entitled to have deducted therefrom the expense which might have been incurred in keeping it.⁸ If property lawfully attached and held is sold illegally, and between the time of the attachment and sale it deteriorated in value, without fault on the officer's part, his liability in an action on the case is for its value at the time of the sale.⁹ If mortgaged chattels are levied upon and sold and possession thereof given

¹ Ransom v. Halcott, 18 Barb. 56.

² Townsend v. Libbey, 70 Me. 162.

³ Clark v. Smith, *supra*; Blodgett v. Brattleboro, 30 Vt. 579; French v. Willett, 10 Bosw. 566.

⁴ Franklin County Nat. Bank v. Kimball, 152 Mass. 331, 25 N. E. Rep. 460.

⁵ Lowenberg v. Jefferies, 74 Foll. Rep. 385.

⁶ Miner v. Coburn, 4 Allen, 136.

⁷ Tudor v. Lewis, 3 Met. (Ky.) 378.

⁸ Lovejoy v. Hutchins, 23 Me.

272.

⁹ Walker v. Wilmarth, 37 Vt. 289.

to the purchaser without requiring him to pay the debt or perform the contract which the mortgage was given to secure, the officer is liable on his bond and cannot avoid responsibility by showing that the purchaser is solvent; but if the property is so situated that the mortgagee may subject it to his mortgage, he is bound to do so, and can recover from the officer only such damages as he has actually sustained.¹ By neglecting to tender a deed to the purchaser of land at an execution sale and conveying the land to another the sheriff releases such purchaser and becomes liable for the difference between the amount of his offer and the sum paid by the other person;² and by making a sale under an execution on credit, without authority from the creditors, he assumes responsibility for the amount for which the property was sold, but not for interest on it;³ but if interest is received on the purchase price of property so sold the officer must account for it to the execution debtor if the creditors have been paid.⁴

The measure of damages for taking an insufficient bail bond is, *prima facie*, the amount of the judgment against the debtor, subject to reduction by proof that he was unable to pay.⁵ That fact will not mitigate the damages for refusing to deliver such a bond,⁶ but the insolvency of the bail may be shown for that purpose.⁷ If an insufficient replevin bond is negligently taken the sheriff is liable to the defendant who has obtained judgment for the return of the property, for its value at the time it was taken and the costs of the replevin suit,⁸ and also of a futile suit on the bond.⁹ The amount recoverable by the plaintiff in the replevin suit is not the value of the property, but the amount of his loss.¹⁰ Where the defendant in such suit brings an action against the officer the latter may show, the suit in replevin having been dismissed, that the property was owned and possessed by the plaintiff in that suit.¹¹

¹ McDaniel v. State, 118 Ind. 239, 20 N. E. Rep. 739; Slifer v. State, 114 Ind. 291, 14 N. E. Rep. 595, 16 id. 623.

² State v. Lines, 4 Ind. 351.

³ Chase v. Monroe, 30 N. H. 427.

⁴ Farley v. Moore, 21 N. H. 146.

⁵ West v. Rice, 9 Met. 564; Danforth v. Pratt, 9 Cush. 318.

⁶ Simmonds v. Bradford, 15 Mass. 82; Seeley v. Brown, 14 Pick. 177.

⁷ Bradt v. Holden, 12 R. I. 335.

⁸ O'Grady v. Keyes, 1 Allen, 284.

⁹ Norman v. Hope, 13 Ont. 556, 14 id. 287.

¹⁰ Carter v. Duggan, 144 Mass. 32, 10 N. E. Rep. 486; Mortland v. Smith, 32 Mo. 225, 82 Am. Dec. 128.

¹¹ Case v. Babbitt, 16 Gray, 278.

Under a statute providing that unless the sureties in a re-delivery bond justify, or their justification is waived by the plaintiff, the sheriff shall be responsible for them, it is not necessary in an action against him for failure to take a good bond to plead and prove the value of the property released; the sheriff is liable for the value thereof as determined in the proceeding in which the bond was given.¹

In the absence of proof of pecuniary loss resulting from a false return the officer's liability, independently of statute, is limited to nominal damages.² But if the amount an execution calls for has been lost by reason of such a return the officer cannot lessen his liability for it by showing that it was not due under the judgment;³ but he may do so by proving that prior executions in his hands would have exhausted the property.⁴ If property is sold for taxes as the result of a false return of personal service, the officer is liable for its reasonable value with interest.⁵ A tax collector who falsely returns that he has been unable to find personal property on which to collect the tax due on land is liable to the owner of the land for the money paid in consequence of such return, there being on the premises sufficient personalty to pay the tax, and a tenant having agreed to pay it as a part of the rent.⁶ For a false return of *nulla bona* the officer must respond for the reasonable value of the property, as shown by a sale of it under a subsequent execution in favor of another creditor.⁷

§ 492. Same subject. A judgment creditor can only recover, without proving more, nominal damages against officers who refuse to place upon the tax-roll they make the amount necessary to pay a judgment held by him.⁸ But in a very aggravated case the officers were held liable for counsel fees.⁹

¹ *Magnus v. Woolery*, 14 Wash. 43, 44 Pac. Rep. 130.

² *Pelham v. Way*, 15 Wall. 196.

³ *Bacon v. Cropsey*, 7 N. Y. 195.

⁴ *Forsyth v. Dickson*, 1 Grant's Cas. 26.

Under the Missouri statute the liability for a false return is absolute. *State v. Case*, 77 Mo. 247.

⁵ *State v. Finn*, 13 Mo. App. 285.

⁶ *Kean v. Kinnear*, 171 Pa. 639, 53 Atl. Rep. 325.

⁷ *Thayer v. Roberts*, 44 Me. 247.

⁸ *Dow v. Humbert*, 91 U. S. 294; *Branch v. Davis*, 29 Fed. Rep. 888. The first case is fully stated and the grounds upon which it is ruled are given in § 161.

⁹ *Newark Savings Inst. v. Panhorst*, 7 Biss. 99.

A more rigid rule prevails in New York. There an officer who refused to comply with a statute which made it his duty to present to the proper authorities the re-assessment of damages found by a jury as compensation for laying out a highway was held liable for the amount thereby awarded with interest on it; although the plaintiff might have presented his claim to the authorities at a subsequent time, he was not obliged to do so.¹ Under a statute which makes a town liable to a purchaser of property at a tax sale for all damages which have accrued to him by reason of the tax collector's neglect of duty, the measure is the sum paid with interest, not the value of the property.² A drainage commissioner who fails to properly construct a drain is liable for the expense of finishing it according to the plan he should have followed.³ A collector of customs refused to sign a bill of entry unless a sum which he erroneously claimed as duty was paid. After payment under protest, the property was delivered to the importer. The officer was liable for the sum collected and the loss arising from the detention of the property, including a decline in its price which occurred between the time of his refusal and its delivery.⁴ The purchaser of land, a defect in the title to which was not discovered because of an error on the part of an officer, may recover from him the price paid, the expense of the sale and of a suit to maintain his possession, the defense being made in good faith; possibly, also, the sum expended in making repairs upon the property, if that cannot be recovered from the actual owner.⁵ If the defendant in a replevin suit is obliged to resort to *mandamus* proceedings to secure the entry by a justice of the peace of a judgment of nonsuit to which he was entitled, he may recover the expense of such proceedings in an action against the justice to recover damages for his misconduct.⁶

In the last English edition of Mayne on Damages⁷ the law concerning the liability of sheriffs for the breach of miscellaneous duties is thus stated: "The principle that where the sheriff

¹ Clark v. Miller, 54 N. Y. 528.

² Saulters v. Victory, 36 Vt. 351.

³ Smith v. State, 17 Ind. 167.

⁴ Barrow v. Arnaud, 8 Q. B. 595.

⁵ Brown v. Penn, 1 McGloin, 265.

See Howe v. Taylor, 9 Ore. 288.

⁶ Cagney v. Wattles, 121 Mich. 469,

80 N. W. Rep. 245.

⁷ 6th ed. (1899), p. 479.

has been in fault the plaintiff is entitled to be placed in the same position by means of damages as if the defendant had done his duty is maintained in actions for delay in executing a writ of arrest;¹ in selling under a *fi. fa.*;² in returning the writ;³ for a false return;⁴ for not levying.⁵ In all these the damages are measured, not by the amount of the debt, but by the amount which could or would have been recovered if the breach of duty had not taken place.⁶ And if the sheriff return *nulla bona* to a writ of *fi. fa.*, and the creditor knows of goods belonging to his debtor, he need not sue forth a second writ of *fi. fa.*, but may, in an action for a false return, recover the value of the goods which the sheriff ought to have taken.⁷

There is a difference to be observed in these actions, viz., that in those the whole gist of which is pecuniary damage some such damage must be proved or the action will fail. But in others there is an injury to a right, even independent of actual loss, and the fact of loss being negatived merely makes the damages nominal. Thus in an action for a false return,⁸ for not arresting on *mesne* process,⁹ or for permitting a debtor arrested on *mesne* process to escape,¹⁰ it has been held that proof of absence of loss entitled the defendant to a verdict.¹¹ In all these cases the truth of the return or the deten-

¹ Clifton v. Hooper, 6 Q. B. 463.

² Aireton v. Davis, 9 Bing. 740; Bales v. Wingfield, 4 Q. B. 580, n.

³ Rex v. Sheriff of Essex, 1 M. & W. 720.

⁴ Crowder v. Long, 8 B. & C. 598; Heenan v. Evans, 3 M. & G. 398.

⁵ Augustien v. Challis, 1 Ex. 279; Mullett v. Challis, 16 Q. B. 239.

⁶ And all the probabilities of the case must be looked at; as, for example, whether or not, if the execution had been levied, the plaintiff would have got any benefit from it, the other creditors of the execution debtor having been in a position to make him bankrupt. Hobson v. Thellusson, 8 B. & S. 476, L. R. 2 Q. B. 642.

⁷ Per cur., Arden v. Goodacre, 11 C. B., at p. 377, 20 L. J. (C. P.) 184. *Prima facie*, the measure of damage

is the value of the goods which might have been and were not levied. Hobson v. Thellusson, *supra*.

⁸ Wylie v. Birch, 4 Q. B. 566; Levy v. Hall, 29 L. J. (C. P.) 127; Stimson v. Farnham, L. R. 7 Q. B. 175, 41 L. J. (Q. B.) 52.

⁹ Curling v. Evans, 2 M. & G. 349.

¹⁰ Williams v. Mostyn, 4 M. & W. 145; Lewis v. Morland, 2 B. & A. 56-64; Planck v. Anderson, 5 T. R. 37, overruling Barker v. Green, 2 Bing. 317.

¹¹ So where the action was against the sheriff for selling the reversionary interest of the plaintiff in goods in the possession of an execution debtor. Tuncred v. Allgood, 4 H. & N. 438, 28 L. J. (Ex.) 362. See, also, Lancashire Wagon Co. v. Fitzhugh, 6 H. & N. 502, 30 L. J. (Ex.) 231.

tion of the debtor was only of importance to the plaintiff as contributing to some ulterior result. If no such result could have been produced, or has been effected by it, there was no ground of action. But the case of escape on final process was different. The creditor, it was said, when he was ascertained to be such by a judgment, and had charged the debtor, had a right to the body of his debtor every hour till the debt was paid.¹ This itself was the end, not the means. Consequently, a right of action for nominal damages arose on any escape, for however short a time, even though no pecuniary damage arose,² or on any delay in making the arrest.³ It would appear in all cases in which damage is necessary to maintain the action that proof of the breach of duty will lay upon the defendant the *onus* of showing that no damage ensued; but to entitle plaintiff to substantial damage specific evidence of loss must be given."⁴

SECTION 4.

PROBATE BONDS.

§ 493. Bonds for administration of decedents' estates. The responsibility of the obligors in these bonds arises from their contract, which is adapted to secure the performance of the principal's duties. These include making and returning a full and true inventory, care and fidelity in the preservation and administration of the estate, and, in the end, a faithful accounting. In the case of decedents' estates assets constitute a trust fund, first for creditors and secondly for legatees and distributees.⁵ The ordinary administration bond has substantially the following conditions: (1) that the administrator will make and exhibit an inventory; (2) that he will well and truly administer the estate; (3) that he will make a true account of his administration; and (4) that he will deliver and pay over to the persons entitled the residue. Distributees have an interest in the performance of all these conditions; creditors only in the performance of the first two.⁶

¹ Per Buller, J., *Planck v. Anderson*, 5 T. R. 40.

² *Williams v. Mostyn*, 4 M. & W. 153.

³ *Clifton v. Hooper*, 6 Q. B. 468.

⁴ *Bales v. Wingfield*, 4 Q. B. 580. n.; 324.

Wylie v. Birch, 4 Q. B. 566, 578; *Scott v. Henley*, 1 M. & Rob. 227.

⁵ *Dawson v. Dawson*, 25 Ohio St. 443.

⁶ *Blakeman v. Sherwood*, 32 Conn.

§ 494. How such bonds made; what recoveries may be had. Such bonds are usually executed to the state or to some [36] officer having probate jurisdiction. When sued for the benefit of the estate, as the practice is in some states, especially [37]

In *Ordinary v. Cooley*, 30 N. J. L. 271, Vredenburg, J., gives an interesting sketch of the early practice and the successive statutes on the subject of administration of the personal estates of deceased persons. He says: "In very early times the king, as *parens patriæ*, was entitled to the personal property of intestates. He took possession of them, and, practically, after paying debts, gave two-thirds to the widow and children and kept the balance himself. This payment of debts and giving two-thirds to the widow and children was a matter of grace and not of legal right. He had the legal right to keep the whole if he saw fit. But in those early times the influence of the Roman clergy was very great and continually on the increase. They represented to the king that the souls of the intestates were inconveniently delayed in purgatory for the want of masses said for them, and that it was an unconscientious thing in him to deprive the intestate by distribution thus of his own property just when he most wanted it, and that the king ought to pass his prerogative in this regard to them so that they could appropriate it to that use, and thus the true owner get the value of his property. Partly by such persuasions and partly from fear of the pope the king finally passed these prerogatives to Roman bishops, who, by virtue thereof, stood in the king's shoes, and so legally entitled to the whole personal estate of intestates; and this is the origin of the ecclesiastical courts of England, and the prerogative and orphans' courts in this state. The Roman clergy, being thus under

no legal obligation to pay debts or to distribute any part of the estate to the next of kin, felt bound in conscience strictly to execute the trust. The widow and children easily acquiesced in this arrangement, but the creditors were always somewhat reluctant; and accordingly we find that the barons at Runnymede procured an insertion in *Magna Charta* that the bishops should pay the debts and distribute. But the Roman clergy had influence enough to avoid its execution. So that this provision of the great charter fell obsolete. Not only so, but afterwards, in the great charter of Henry the Third, they had influence to cause the whole subject-matter to be ignored. Things remained in this condition, the bishops having the legal right to all the personal property of intestates, and without either paying debts or accounting to the next of kin, until the thirteenth year of the reign of Edward the First, when it was enacted that the ordinary should be bound to pay the debts of the intestates as far as his goods extended. But the ordinary yet gave no security whatever, and all the residuum, after the payment of debts, still remained in his hands to be disposed of for pious uses. Thus it continued until the thirty-seventh year of the reign of Edward the Third, when parliament, in consequence of the flagrant abuses practiced, enacted that 'in case where the death of an intestate occurs, the ordinary shall depute of the next and most lawful friends of the dead person to administer his goods; which persons deputed shall have action to demand and recover as executors the debts of

for the breach of the first condition, the recovery inures to the benefit of all parties interested in the same order as they would have been benefited by a due performance of the administrator's duty. There can be no recovery beyond nominal dam-

said intestate to administer and dispense for the soul of the dead, and shall answer also in the king's courts to others to whom the said deceased was holden and bound.' It will be observed that this statute merely took from the ordinaries the power to administer, and compelled them to grant the administration to the next and most lawful friends of the intestate; and all the administrator had to do was to pay the debts. He gave no bond of security; and he retained all the residuum after the payment of debts as his own property.

"There was yet no such thing as distribution amongst the next of kin, or security given by the administrator either to pay debts or to distribute. As soon as the debts were paid the estate was administered and there was nothing further to be done by the administrator. All the rest of the estate belonged to himself to *dispense*, in the language of the statute, for the soul of the dead. The administration by this statute, it will be observed, was granted to the next and most lawful friends of the intestate. The language was afterwards altered by the statute of Henry VIII., and the ordinary compelled to grant the administration to the widow or the next of kin of the intestate; and which is the same as our own statute now in force. It will be perceived that as yet no change is made in the rights of the administrator. There is yet no statute of distribution; the administrator takes all after the payment of debts. But this statute of 21 Henry VIII. introduces one great change. It requires, for the first time in the history of

administrations, that the ordinary shall take surety from the administrator, not to distribute, but only to pay debts. It could not have been, surely, that the administrator shall settle in the prerogative court, and pay the surplus after the payment of debts to the next of kin, for the surplus yet belonged to the administrator himself, to do with it as he pleased; and, moreover, there was as yet no statute of distribution. But the only surety that could be required was that the administrator would make and exhibit an inventory, and pay the debts, or, as it was then technically called, administer the estate. So that, by the statute of 21 Henry VIII., the bond given by the administrator contained two conditions; one was the exhibiting an inventory, the other was to pay the debts. These, it will be observed, are the two first conditions in the bond now required by our statute. . . . But these two first conditions were provided in the interest of creditors, and not in the interest of the next of kin; because there were yet no next of kin that could take or had an interest in the estate. Things remained in this condition until the 22d of Charles II., over a hundred years, when the first English statute of distributions was passed. This statute provided that the ordinary should call administrators to account, and order a just and equal distribution (after debts and funeral expenses were paid) among the wife and children and next of kin, substantially as our statute does now. And it provided in the second place, that the ordinary should require of the administrator a bond with secu-

ages unless there is such misconduct of the administrator [38] as results in actual injury to some person for whose protection the bond is required.¹

The heir at law may prosecute a suit on the bond in the name of the obligee for neglect to return an inventory, although

ity, and with the same conditions as our statutes now provide, viz.: 1st, to file an inventory; 2d, to well and truly administer the estate, or, in other words, to pay the debts; 3d, account in the prerogative court; and 4th, pay the surplus found upon such accounting to the next of kin. Hence it is manifest that these two last conditions in the bond were required to compel the administrator to perform the two additional duties imposed upon him by the last statute of 22 Charles II., viz.: 1st, to account to the prerogative court; 2d, to pay over the surplus found upon such accounting to the next of kin. This is further manifested from another historical fact. After the said statute of Edward III. took away from the Roman bishops the power to administer themselves, and forced them to grant administration to the next of kin, like other people, they were very prompt to force others to be honest, as soon as they had no temptation to be otherwise themselves, and they attempted to force the administrator to give security to distribute to the next of kin; but they were restrained by the courts of common law, by prohibitions, upon the ground that the statute of Edward III. meant to give to the administrator appointed by the ordinary the same rights of property that the ordinary himself had before that statute was passed, and that consequently the administrator was not obliged to account or distribute, and that his only duty was to pay the debts, and that he might do with the surplus what he pleased; and no bond ever was or ever could be re-

quired of the administrator to account or distribute until those additional duties were expressly imposed upon him by the said statute of 22 Charles II. This statute was passed in the year 1661, and was among the very first of our colonial statutes, and has to this day remained unaltered upon our statute book. So that by this short historical resumé, it appears that originally the administrator neither paid debts nor distributed. After some hundreds of years, he was first made to pay debts; after some more hundreds of years he was next made to give security to pay debts; after over a hundred years more, he was made to distribute the surplus after paying the debts, and to insert in his bond the additional condition that he would distribute. So that it would appear that these conditions of our administration bonds of the present day were the growth of many centuries of English legislation, each additional condition being added as each additional duty was imposed by statute upon the administrator. Thus we see how each stone was laid in the edifice, and came to have its peculiar form and color. The very antiqueness of the language of these conditions gives evidence of their origin, and their natural import is in accord with their history."

¹ *Edwards v. White*, 12 Conn. 28; *Spencer v. Wilkinson*, 11 id. 1; *Adams v. Spaulding*, 12 id. 350; *Searborough v. State*, 24 Ark. 20; *State v. Bloxom*, 1 Houst. 446.

The costs of proceedings taken to compel an administrator to account are chargeable to his sureties; but

his precise interest as heir has not been definitely ascertained, either by settlement of the administration account, or by an order for distribution;¹ but one who claims as next of kin, and is not entitled to a distributive share, cannot prosecute such an action.² In the former case the full value of the property with-
[39] held from the inventory may be recovered. The estate is the loser to that precise extent; and the loss should be made good. If any equitable circumstances exist which would go to show that the loss is less, it devolves on the defendant to prove them.³ The plaintiff acts as trustee for the persons beneficially interested in the estate.⁴ And the money recovered must be applied to the payment of all the debts of the intestate in their order, giving preference to those that have a preference by law, and making a ratable distribution among all others.⁵ If the estate be insolvent, each creditor is entitled to

not the amount paid for counsel fees therein. *Mann v. Everts*, 64 Wis. 372, 25 N. W. Rep. 209.

¹ *Blakeman v. Sherwood*, 32 Conn. 324.

² *Judge of Probate v. Southard*, 62 N. H. 228.

³ *Blakeman v. Sherwood*, 32 Conn. 324, 329; *Minor v. Mead*, 3 Conn. 289; *State v. Bennett*, 24 Ind. 388; *Boston v. White*, 21 Pick. 58. See *Dawson v. Dawson*, 25 Ohio St. 443.

⁴ *Thomas v. Leach*, 2 Mass. 152; *Paine v. Ball*, 3 Mass. 235; *Skinner v. Phillips*, 4 Mass. 874; *Rowland v. Isaacs*, 15 Conn. 115.

⁵ *Dickerson v. Robinson*, 6 N. J. L. 202, 10 Am. Dec. 396. In this case *Kirkpatrick, C. J.*, said: "This is certainly the course of the ecclesiastical courts in England. . . . To show the more clearly that the application of the money recovered in these actions must necessarily be to the payment of all debts, let us pursue the thing a little. Let us suppose the administrator to have wasted the whole estate, and to be himself insolvent, and that there is nothing to respond to creditors but the administration bond; shall he that can first get the assignment of it, and a ver-

dict and judgment for his debt, even though it be a simple contract debt, swallow up the whole penalty, take the whole money recovered to himself, and leave all other debts, even of a superior order, altogether unpaid? This, I think, would be hardly maintained by anybody; and it is to prevent this that the money recovered must be distributed by the judge of the prerogative court. What then is to be done upon such a recovery? Is the judge of the prerogative court to divide the sum so recovered among all the creditors, and so pay the assignee of the bond but a part of his debt [as would be the case if the assignee recovered only the damage to himself], and then put every other creditor to go through with the same course, and make a like division of what he might recover? And if it be an estate in which there is a surplus, shall he, after all, compel the next of kin to run the same race? This would, indeed, as *Lord Ch. J. Holt* says, be *endless and infinite*. But it is not so. No such breach can be assigned. The law runs itself into no such absurdity."

receive an average with others.¹ There is no liability beyond the amount of assets which come to the hands of the administrator. But it is his duty to apply them to the payment of debts; and a suit on his bond by a creditor having a debt [40] so liquidated that it is the administrator's duty presently to pay it is an action to recover for a breach of the bond. And it is no answer to such an action that the administrator has not wasted or misapplied the assets. His retention of the assets, and failure to apply them to such debt, is a breach of the bond.² A creditor is in such cases entitled to recover the amount of his debt on the bond if the assets are sufficient; and if not, such ratable proportion thereof as it was the administrator's duty to pay.³ Suits by legatees and distributees may also be instituted for the amount of the legacy or distributive share, when the administration has gone to such point that the immediate duty to pay it is imposed and neglected.⁴ Service performed or

¹ Warren v. Powers, 5 Conn. 373.

² Cannon v. Cooper, 39 Miss. 784, 80 Am. Dec. 101; State v. Nichols, 10 Gill & J. 27; Lining v. Giles, 3 Brev. 530; People v. Dunlap, 13 Johns. 437; Hazen v. Durling, 2 N. J. Eq. 133; Brown v. Glascock's Adm'r, 1 Rob. (Va.) 461.

When the bond expressly admits that the surety is presently indebted in a specific sum, unless the administrator shall perform his duties, the surety becomes indebted as soon as default is made though no judgment has been rendered on the bond. Ransom v. Brinkerhoff, 56 N. J. Eq. 149, 53 Atl. Rep. 919.

³ McKim v. Haley, 173 Mass. 112, 53 N. E. Rep. 152; Peirce v. Whittemore, 8 Mass. 282; Thomson v. Searcy, 6 Port. 393; Fairfax v. Fairfax, 5 Cranch. 19; Sturdivant v. Rumes, 1 Leigh, 481; Burnett v. Harwell, 3 id. 89; Gardner v. Vidal, 6 Rand. 106; Miller v. Gill, 4 Ala. 359; Seat v. Cannon, 1 Humph. 471; Gordon v. State, 11 Ark. 12; Calla v. Patterson, 18 B. Mon. 201; Daws v. Shea, 15 Mass. 6, 8 Am. Dec. 89; Inglehart v. State, 2 Gill & J. 235;

People v. Summers, 16 Ill. 173; Warren v. Powers, 5 Conn. 373; Willey v. Paulk, 6 id. 74; People v. Randolph, 24 Ill. 324; State v. Campbell, 10 Mo. 724; Strong v. White, 19 Conn. 238; Hobbs v. Middleton, 1 J. J. Marsh. 176; Smith v. Fagan, 2 Dev. 292; Chairman v. Moore, 2 Murph. 22; Ordinary v. Bracey, 2 Bay. 542; People v. Dunlap, 13 Johns. 437; Gookin v. Hoyt, 3 N. H. 392; O'Connor v. Such, 9 Bosw. 318.

⁴ Ralston v. Wood, 15 Ill. 159, 58 Am. Dec. 604; State v. Bennett, 24 Ind. 383; Jackson v. Justices, 2 Bibb, 292; State v. Ruggles, 20 Mo. 99; Judge v. Looney, 2 Stew. & Port. 70; Judge v. Emery, 6 N. H. 141; Judge v. Coulter, 3 Stew. & Port. 348.

Where the personal estate of an intestate consisted of slaves, it was held in action upon the administration bond by a distributee that the plaintiff could not recover both the appraised value of the slaves and their increase and hire from the time of granting the letters, or the appraisement. He may claim their appraised value and interest thereon, or their increase and hire up to,

money expended in aid of the defendant's administration cannot be shown in support of a suit on his bond, nor as a set-off against payments by the administrator, but are a claim on the defendant individually.¹ The sureties are liable for any default on the part of their principal in not accounting for moneys received before as well as after the execution of their bond.²

[41] Where the breach is the non-payment of a dividend struck in the probate court, on a plea of payment, receipts showing payment to the plaintiff by a former administrator are admissible in evidence, and their effect cannot be defeated by showing waste by such administrator.³

The liability of the sureties does not extend beyond the acts and omissions of their principal in his representative capacity. Where real estate of the decedent was not administered on, but administration was dispensed with by agreement among the heirs, they all being *sui juris*, and having joined in a deed conveying it to a purchaser at private sale, the payment of the purchase price to the person who was administrator was not a payment to him in his representative capacity, and the sureties on his bond were not liable for his failure to pay the money to his co-heirs.⁴ The same rule applies if the money was held by the person who was executor in the capacity of a trustee for the widow and heirs of the decedent.⁵ Where the administrator collected rents which accrued after the death of his intestate and which belonged to the widow and heir, and which he, as administrator, had no right to collect, the sureties on his bond were not liable therefor, notwithstanding he expended the greater part of the money in payment of claims against the estate. The sureties were entitled to credit for such expenditures, regardless of the source from which the funds to make them came.⁶

and real value at, the time of bringing the action, and the pleadings must disclose which course he elects to take. *Burch v. State*, 4 Gill & J. 444.

¹ *Gordon v. Clapp*, 5 Vt. 129.

² *McIntire v. Linehau*, 178 Mass. 263, 59 N. E. Rep. 767.

³ *Gordon v. Clapp*, 5 Vt. 129.

⁴ *Johnson v. Hall*, 101 Ga. 687, 29 S. E. Rep. 37; *Cronan v. Cotting*, 99

Mass. 334; *Shields v. Smith*, 8 Bush, 601; *Pace v. Pace*, 19 Fla. 454. See *Ashby v. Ashby*, 7 B. & C. 444.

⁵ *People v. Petrie*, 191 Ill. 497, 61 N. E. Rep. 499, 94 Ill. App. 652; *Clay v. Hart*, 7 Dana, 1; *Hinds v. Hinds*, 85 Ind. 312. See *Bellinger v. Thompson*, 26 Ore. 320, 37 Pac. Rep. 714.

⁶ *Denton v. Crouch*, 101 Ky. 386, 41 S. W. Rep. 277.

§ 495. Actions on bond as to sureties; liability for executor's debt to estate. In an action against the sureties on an administrator's or a guardian's bond for a breach by the principal, the proceedings taken in the probate court, in passing on the account rendered by the administrator or guardian, and a decree rendered therein directing him to pay over a sum found remaining in his hands, are admissible in evidence against the sureties, although they were not parties to the same. Such a decree is equally conclusive upon the principal and his sureties; and upon the refusal of the former to obey the same the liability of the sureties attaches; they cannot go behind the decree to inquire into the merits of the matter therein passed on unless they can show that it was obtained by fraud or collusion.¹ A clause in a decree finding the amount due from the guardian to his ward to the effect that the same was without prejudice to any defense the sureties might have in any action against them on the bond is inoperative as to the legal effect of the decree.² As a general rule sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have had their day in court or an opportunity to be heard in their defense, but administration bonds form an exception to this rule.³

The principle that sureties are generally liable only for such assets as may have come to their principal's possession or which might have been reduced to possession by the exercise

¹ Judge of Probate v. Sulloway, 68 N. H. 511, 44 Atl. Rep. 720, 73 Am. St. 619; Deobold v. Oppermann, 111 N. Y. 531, 19 N. E. Rep. 94, 7 Am. St. 760, 2 L. R. A. 644; Choate v. Arrington, 116 Mass. 552, 556; Douglass v. Ferris, 138 N. Y. 192, 34 Am. St. 435, 33 N. E. Rep. 1041; Bellinger v. Thompson, 26 Ore. 320, 37 Pac. Rep. 714; Treweek v. Howard, 105 Cal. 434, 39 Pac. Rep. 20; Crook v. Newborg, 124 Ala. 479, 27 So. Rep. 432; Jacobson v. Anderson, 73 Minn. 426, 75 N. W. Rep. 607; Cross v. White, 80 Minn. 413, 83 N. W. Rep. 393, 81 Am. St. 267; Botkin v. Kleinschmidt, 21 Mont. 1, 52 Pac. Rep. 563, 69 Am. St.

641; Thompson v. Dekum, 32 Ore. 506, 52 Pac. Rep. 517; Irwin v. Backus, 25 Cal. 214, 85 Am. Dec. 125; Slagle v. Entrekin, 44 Ohio St. 637, 10 N. E. Rep. 675; Braiden v. Mercer, 44 Ohio St. 339, 7 N. E. Rep. 155; Shepard v. Pebbles, 38 Wis. 373; Scofield v. Churchill, 72 N. Y. 565; Knox v. Kearns, 73 Iowa, 286, 34 N. W. Rep. 861; Knepper v. Glenn, 73 Iowa, 730, 36 N. W. Rep. 763; Stovall v. Banks, 10 Wall. 583; Harrison v. Clark, 87 N. Y. 572.

² Allen v. Kelly, 55 App. Div. 454, 67 N. Y. Supp. 97.

³ Cases cited in first note to this section.

of due diligence does not obtain where he owes a debt in his individual capacity to the estate he represents. In such a case the right to demand and the obligation to pay co-exist in him, and the law presumes instantaneous payment and extinguishment of the debt on the qualification of the representative. The sureties in such a case are conclusively liable for the debt.¹ This rule rests wholly on technical grounds, and will not be extended so as to work injustice to sureties. Hence they will not be so liable beyond the ability of their principal to pay his debt to the estate. By signing the bond the sureties have aided him to get possession of assets from his indebtedness only to the extent of his ability to pay it. If in such a case the executor accounts to the probate court for his debt, and distribution is therein decreed accordingly, a court of equity will grant the relief.² The sureties are liable for the costs in an action against their principal by a creditor of the estate who recovered judgment therein.³

In New Hampshire if the executor is charged, pursuant to a decree of the probate court, with the amount of his indebtedness to the testator, the liability of the sureties therefor is not affected by the fact that the executor was insolvent at the date of his appointment and continued unable to discharge his indebtedness to the estate. It is there provided by statute that all debts due from the executor or administrator to the testator or intestate shall be assets in his hands for which he shall account in the same way and manner as for a debt against any other person, and the judge of probate is authorized to ascertain and liquidate such debt and charge the executor or administrator therewith. There is no power in such

¹McGaughey v. Jacoby, 54 Ohio St. 487, 44 N. E. Rep. 231; Charles v. Jacobs, 9 S. C. 295; Succession of Bailey, 30 La. Ann. 75; Davenport v. Richards, 16 Conn. 310; Wright v. Lang, 66 Ala. 389; Seawell v. Buckley's Distributees, 54 id. 592; Choate v. Thorndike, 138 Mass. 371; Probate Court v. Merriam, 8 Vt. 234.

²State v. Gregory, 119 Ind. 503, 22 N. E. Rep. 1; McCarty v. Frazer, 62 Mo. 263; Terhune v. Aldis, 44 N. J.

Eq. 146, 14 Atl. Rep. 638; Baucus v. Barr, 107 N. Y. 624, affirming without opinion, 45 Hun, 532; Rader v. Yeargin, 85 Tenn. 486, 3 S. W. Rep. 178; Lyon v. Osgood, 58 Vt. 707; Garber v. Commonwealth, 7 Pa. 265; Piper's Estate, 15 id. 533; Gottsberger v. Smith, 5 Duer, 566; Harker v. Irick, 10 N. J. Eq. 269.

³McKim v. Haley, 173 Mass. 112, 53 N. E. Rep. 152.

judge, said the court, to relieve the executor from that liability, though a surety might, upon taking appropriate steps, be relieved; as if, *e. g.*, he executed the bond in ignorance of the executor's insolvency, the executor might be removed and another appointed, or he might be discharged under a statute, and a new bond required.¹ If a responsible party was bound with the executor for the debt, either as joint principal or as surety, equity would compel him to pay on the application of the surety. Referring to the rule in Vermont and New Jersey, which holds the surety for the executor's debt only when he is solvent, it is said that when the executor is solvent and able to pay and no surety is needed, the surety is responsible for his debt, but when the executor is unable to pay and a surety's liability would be valuable, the surety is not liable.²

In California the statute, in connection with the principles of equitable estoppel presented by the facts, has led to the declaration of the rule that the sureties upon the bond of an executor are guarantors of a debt owed by him to the testator.³ But it is otherwise as to administrators, the code declaring that no executor or administrator is accountable for any debts due to the decedent if it appears that they remain uncollected without his fault. As to administrators, the sureties are liable for the debt or any part thereof which remained unpaid through the fault of the administrator, where he was able to pay and failed to do so.⁴

§ 496. Guardian's bond; sureties' liabilities. A surety upon a bond given by a guardian for managing the whole estate of the ward is liable for all money in the hands of the guardian belonging to the ward, whether received before or after the undertaking.⁵ It includes property of the ward received

¹ See *Benchley v. Chapin*, 10 Cush. 173, 176.

² *Judge of Probate v. Sulloway*, 68 N. H. 511, 44 Atl. Rep. 720, 73 Am. St. 619.

³ *Treweek v. Howard*, 105 Cal. 434, 39 Pac. Rep. 20.

⁴ *Walker's Estate*, 125 Cal. 242, 73 Am. St. 40, 57 Pac. Rep. 991; *Sanchez v. Forster*, 133 Cal. 914, 65 Pac. Rep. 1077.

⁵ *State v. Buck*, 63 Ark. 218, 37 S. W. Rep. 881; *McDowell v. Caldwell*, 2 McCord Ch. 43, 16 Am. Dec. 635; *Merrells v. Phelps*, 34 Conn. 109; *Ammons v. People*, 11 Ill. 6. See § 494.

In *Bockenstedt v. Perkins*, 73 Iowa, 23, 5 Am. St. 652, 34 N. W. Rep. 488, the only evidence as to the possession of the money by the guardian when the bond was executed was

by him in another state.¹ It is not limited to such as was owned by the ward at the time the bond was executed, but extends to that subsequently acquired which came into the guardian's hands,² and to money which could and should have been collected by a faithful discharge of the guardian's duties. That liability exists notwithstanding a subsequent guardian resorted to a security for the payment of such indebtedness and realized a part of it.³ An action at law, however, cannot be maintained before the accounts have been adjusted and a specific sum decreed to be paid over.⁴ Nor can a guardian's sureties be made [42] liable for work done for him by the ward.⁵ In actions upon the bond the recovery is measured by the actual injury;⁶ and where there is merely a technical breach of the condition, but no loss, only nominal damages can be recovered.⁷ If the breach consists in the conversion of a chose in action the sum apparently due upon it is *prima facie* the damages;⁸ and if it

that it had been received by him six days prior to that time. The court refused to set aside a judgment against the sureties on the ground that it was not sustained by the proof.

¹ McDonald v. Meadows, 1 Met. (Ky.) 507.

There is a tendency in some decisions to limit the liability of the sureties of personal representatives to assets within the state of their appointment. Keaton v. Campbell, 2 Humph. 224; Snodgrass v. Snodgrass, 1 Baxter, 157. The same rule was assumed to be applicable to a guardian's sureties. Andrews' Heirs, 3 Humph. 592. It is said that there are grave difficulties in holding, as a general proposition, that the sureties of a guardian whose bond has been made with reference to the estate of the ward in one state may also be held liable for an equal amount of assets brought from another state, thus covering the entire penalty which the statute only requires to be in double the value of the estate. Pearson v. Dailey, 7 Lea, 674. In the case last referred to the ward's es-

tate consisted wholly of a fund in the hands of a guardian in another state, which the domestic guardian obtained possession of through the court which appointed him, and the receipt of which he acknowledged in his report. His sureties were held liable for it. See Brooks v. Tobin, 135 Mass. 69.

² Gray v. Brown, 1 Rich. 351.

³ Ames v. Williams, 74 Miss. 404, 20 So. Rep. 877.

⁴ Anderson v. Maddox, 3 McCord, 237; State v. Strange, 1 Ind. 538; Hunt v. White, 1 Ind. 105; Barrett v. Monroe, 4 Dev. & Bat. 194; Stilwell v. Mills, 19 Johns. 304; Salisbury v. Van Hoesen, 3 Hill, 77; Probate Court v. Slason, 23 Vt. 306. It is otherwise in Tennessee. Justices v. Willis, 3 Yerg. 461; Foster v. Maxey, 6 Yerg. 224. See Call v. Ruffin, 1 Call (Va.), 333.

⁵ Phillips v. Davis, 2 Sneed, 520.

⁶ State v. Murray, 24 Md. 310, 87 Am. Dec. 608.

⁷ Fuller v. Wing, 17 Me. 222; Buchanan v. State, 106 Ind. 251, 6 N. E. Rep. 614.

⁸ State v. Berning, 74 Mo. 87.

consists in the failure to account on the ward's attaining his majority and it is not shown that the guardian received interest, the recovery, as against the sureties, is the sum due with simple interest; and, in the discretion of the court, the penalty prescribed by statute; exemplary damages cannot be awarded.¹ If a guardian whose accounts have been restated for fraud in obtaining credits in his final settlement has paid out more for the support of his ward than he has been given credit for, he should not be charged with more than the legal rate of interest on the account due from him.² If one bond is given to secure three wards the recovery thereon must be limited to the amounts proportionately due those who are plaintiffs.³ In Indiana the recovery in an action by one of the parties interested must be for the entire existing liability; the amount collected is brought into court for distribution.⁴ In no case can the damages exceed the penalty of the bond,⁵ except in jurisdictions where interest is allowed.⁶

By taking title to his ward's land in his own name, and incumbering it to secure a loan for his own benefit, a guardian renders his sureties liable for the reasonable expenses of a suit by the ward to set aside the incumbrance, including counsel fees, especially if the surety has consented to the suit and participated in it.⁷ A guardian who has received the estate of his ward safely invested according to law and who changes such investment, without authority and without cause, for one comparatively worthless, and which was, *prima facie*, a questionable investment for trust funds, is liable on his bond for the sum so invested and a sum equal to the intervening dividends, less any money realized from the new investment and used for the benefit of the ward. If he acted in good faith interest should not be compounded.⁸ A guardian cannot enlarge the obligation of his sureties by receiving and charging himself

¹ Peelle v. State, 118 Ind. 512, 21 N. E. Rep. 283.

² Campbell v. Clark, 63 Ark. 450, 39 S. W. Rep. 262.

³ Knox v. Kearns, 73 Iowa, 286, 34 N. W. Rep. 861; Hooks v. Evans, 68 Iowa, 52, 25 N. W. Rep. 925; Edmonds v. Edmonds, 73 Iowa, 427, 53 N. W. Rep. 505.

⁴ Moody v. State, 84 Ind. 433.

⁵ Woods v. Commonwealth, 8 B. Mon. 112.

⁶ See §§ 477, 478.

⁷ State v. Tittmann, 134 Mo. 162, 35 S. W. Rep. 579.

⁸ State v. Washburn, 67 Conn. 187, 34 Atl. Rep. 1034; Pearson v. Haydel, 87 Mo. App. 495.

with moneys which he had no legal right to receive¹ and for which a special bond should have been given, as upon the sale of real estate.² So long as the real estate of a ward is in care of the administrator of the ward's ancestor the guardian is not chargeable with its rental value, but only with the money actually received by him.³ An order removing a guardian cannot be rescinded at a term of court subsequent to that at which it was made; the effect of such order, so far as the surety is concerned, is to limit his liability for the money for which the guardian was liable when the order was made. If no new guardian is appointed, and no order made concerning the disposition of funds in the hands of the one removed, the surety is not liable for interest thereon.⁴

§ 497. *Mitigation of damages.* Where the father or mother of a ward is called to account as guardian the general rule is that the sureties upon the bond cannot claim an allowance out of the ward's estate for his support, if the parent was able to maintain him. The law imposes that duty upon parents.⁵ If the ward's estate is small and the father never made any charge for his support, the sureties on the bond cannot be granted an allowance on account of it.⁶ Neither will such an allowance be made in the absence of proof that the father was unable to support the ward, where he had the benefit of his labor.⁷ Courts, "however, will look with liberality to the circumstances of each particular case, and to the respective estates of father and children, and will authorize the income arising from the estates of infants to be applied to their support whenever, under all the circumstances, it appears to be proper."⁸ When the ward lives with the guardian as a member of his family, though not legally such, receiving support

¹ *Johnson v. Chamberlain*, 18 App. Div. 495, 46 N. Y. Supp. 132.

² *Allen v. Kelly*, 55 App. Div. 454, 67 N. Y. Supp. 97.

³ *Haden v. Swepston*, 64 Ark. 477, 43 S. W. Rep. 393.

⁴ *Id.*

⁵ *Guion v. Guion*, 16 Mo. 48; *Cummings v. Cummings*, 8 Watts, 366; *Presley v. Davis*, 7 Rich. Eq. 195; *Edwards v. Durgen*, 19 Grant's Ch.

(Up. Can.) 101; *Martin v. Foster*, 38 Ala. 688.

⁶ *Walling's Case*, 35 N. J. Eq. 105; *Pratt v. McJunkin*, 4 Rich. 5; *Myers v. Appleton*, 45 Ind. 160.

⁷ *Wilson's Case*, 38 N. J. Eq. 205.

⁸ *Evans v. Pearce*, 15 Gratt. 513, 78 Am. Dec. 635; *Dawes v. Howard*, 4 Mass. 97; *McGeary v. McGeary*, 181 Mass. 539, 63 N. E. Rep. 917.

on the one hand, and on the other rendering the ordinary household services required by parents of their children, such services will be presumed, in the absence of a clear showing to the contrary, to be a sufficient compensation for the board of the ward.¹ On his final accounting a guardian will not be credited for items of board, clothing, medicine and tuition bills for which he did not intend to charge at the time the expenses were incurred.² When application is made on behalf of a parent who was guardian *de facto* for credit on account of support furnished his ward it must be made before the guardianship terminated, otherwise it will not be granted without the clearest proof that justice requires it.³ If the person who is guardian is not charged by law with the duty of supporting his ward he cannot waive his right to charge therefor to the damage of the sureties on his bond.⁴ If an executor or administrator has been guilty of a flagrant breach of his trust, the commissions which would otherwise have been due him will not be allowed his sureties in mitigation of their liability.⁵ If a joint bond has been given by administrators for the faithful administration of the estate that may come to their hands, and all the personal property of the decedent has been possessed by them and one of them has committed waste after the other's death, the surety on their bond may have the estates of both exhausted before he can be made to answer for the wrong-doing of the survivor.⁶ The sureties upon the general bond of a guardian are co-sureties with the sureties upon a special bond given to authorize the sale of real estate only to the extent of the proceeds of the latter; and the sureties on the special bond are entitled to have a sum realized from a security given by the guardian for the indemnity of all the sureties credited upon their liability in proportion to their lia-

¹ Campbell v. Clark, 63 Ark. 450, 39 S. W. Rep. 262; Otis v. Hall, 117 N. Y. 131, 22 N. E. Rep. 563; Doan v. Dow, 8 Ind. App. 324, 35 N. E. Rep. 709; Marquess v. La Baw, 82 Ind. 550; Folger v. Heidel, 60 Mo. 285; Horton's Appeal, 94 Pa. 62.

² Reynolds v. Jones, 63 Ark. 259, 38 S. W. Rep. 151. See McGeary v. McGeary, 181 Mass. 539, 63 N. E. Rep. 917.

³ Evans v. Pearce, 15 Gratt. 513, 78 Am. Dec. 635.

⁴ Hauser v. King, 76 Va. 731.

⁵ State v. Berning, 74 Mo. 87, 100.

⁶ Eckert v. Myers, 45 Ohio St. 525, 15 N. E. Rep. 862.

bility for the funds realized from the real estate to the liability of the sureties on the general bond for other funds.¹

§ 498. *Liability as between sets of sureties.* As has been shown, the liabilities of sureties on official bonds are limited to the term for which their principal was elected or appointed.² There is a marked distinction in this respect between such bonds and those given by executors, administrators and guardians. The distinction rests on the fact, aside from the difference in the language of the instruments, that public officers hold for designated terms, while the principals in probate bonds exercise their functions from the commencement until the close of the administration; and in guardian's bonds until the ward reaches his majority; there are no terms. When a new bond is given there is no new commitment of the estate to their hands, nor is there any settlement or rest made in their accounts.³ When a guardian gives an additional bond as further security, pursuant to an order of the probate court the sureties thereon are liable for the failure of their principal to account for money on hand at the time it was executed. Nothing appearing to the contrary, except the insolvency of the guardian, the presumption is that there had been no misappropriation of moneys previously received, and that they were in his possession when such bond was given.⁴ If such a bond is conditioned for the faithful execution of the trust. "and also to obey all orders of the surrogate touching the estate committed," the sureties are liable for the failure of their principal to obey an order as to the payment of money which came to his possession before their obligation was assumed, although the money was previously lost or disposed of.⁵ Such a bond is cumulative without regard to the time it was executed.⁶ The same liability attaches to the sureties of an executor under a new bond conditioned that he "shall administer, according to law and the will of the testatrix, all

¹ *Swisher v. McWhinney*, 64 Ohio St. 343, 60 N. E. Rep. 565.

² § 480.

³ *Scotfield v. Churchill*, 72 N. Y. 565; *Beard v. Roth*, 35 Fed. Rep. 397.

⁴ *Clark v. Wilkinson*, 59 Wis. 543, 18 N. W. Rep. 481; *Whitworth's Dis-*

tributees v. Oliver, 39 Ala. 286; *Choate v. Arrington*, 116 Mass. 552.

⁵ *Scotfield v. Churchill*, 72 N. Y. 565.

⁶ *Lacoste v. Splivalo*, 64 Cal. 35, 30 Pac. Rep. 571; *Bellinger v. Thompson*, 26 Ore. 320, 37 Pac. Rep. 714, 40 id. 229; *Thompson v. Dekum*, 32 Ore. 506, 52 Pac. Rep. 517.

her goods, chattels, etc., which shall at any time come to the possession of the executor."¹ The breach in such a case occurs during the life of the second bond, the *gravamen* of the action on which is the failure to pay over according to duty.² It is not necessary that the original bond be exhausted before resort is had to the second. The former is in force and is as obligatory upon its makers as if no other had been given. A creditor or other person interested in the estate may sue upon either if the wrong complained of was a breach of both.³

The sureties upon one or more of several bonds of an executor will not be compelled to contribute with the surety on another bond to the payment of the amount charged against the executor for interest on money of the estate loaned to the

¹ Foster v. Wise, 46 Ohio St. 20, 15 Am. St. 542, 16 N. E. Rep. 687; Brown v. State, 23 Kan. 235; Pinkstaff v. People, 59 Ill. 148.

Seven years after the appointment of a substituted trustee his accounts were passed by a judgment which adjudged that a certain sum was held by him to be divided among the several *cestuis que trust*, which division he was ordered to make. Three years later the trustee gave, pursuant to an order of court, another bond conditioned that he "shall faithfully execute the trust reposed in him as such trustee, and shall faithfully pay over, distribute and divide and account for all the property and money which shall come into his hands as trustee, in accordance with the provisions of the will." The surety upon the last mentioned bond was not responsible for any previous neglect of duty by the trustee. It was said: Under this bond the defendant was liable for any failure of the principal to account for all property and money which should come into his hands as such trustee; and the proof offered upon the trial was a judgment in an action brought against the trustee's executrix for an account-

ing, from which it appeared that the trustee had failed to account for certain sums of money which had come into his hands prior to the time that the bond in suit was executed; and although I think this judgment would have been conclusive if it had adjudicated that the trustee had failed to account for moneys which had come into his hands after the execution of the bond, as there was no such adjudication, and as the whole record shows that the action was brought to compel an accounting by the trustee for money which he had received long before the execution of the bond, the judgment was not, I think, evidence against this defendant of the breach of the condition of the bond which would entitle the plaintiff to recover. Thomson v. American Surety Co., 56 App. Div. 113, 67 N. Y. Supp. 564.

² Bellinger v. Thompson, 26 Ore. 320, 341, 37 Pac. Rep. 714; Dugger v. Wright, 51 Ark. 232, 14 Am. St. 48, 11 S. W. Rep. 213; Brown v. State, 23 Kan. 235; Beard v. Roth, 35 Fed. Rep. 397; Pinkstaff v. People, 59 Ill. 148.

³ Pinkstaff v. People, *supra*.

latter surety.¹ In South Carolina and Tennessee the second bond is the primary security, and the first is at least suspended until the other is exhausted.² This is the rule in South Carolina although only one of the sureties on the first bond petitioned for relief from liability and for a new bond, unless some act of such surety led the sureties on the second bond to believe that the sum in the administrator's hands was less than it in fact was, in which case the primary liability for the difference between the amount actually on hand and that which was represented will be on the original bond.³ If the second bondsmen prove insufficient the first are responsible up to the date of their release; the former must account, first, for any default after their bond was given, and then for such as accrued prior thereto.⁴ It is provided by statute in Missouri that when an additional bond is given and approved "it shall discharge the former securities from any liability arising from any misconduct of the principal after the filing of the same, and such former securities shall only be liable for such misconduct as happened prior to the giving of such new bond." Where the assets of the estate were pledged by the administrator for his own purposes, while the original bond was the only security for his conduct, the fact that after another bond was given he failed to recover the pledged securities did not operate to shift the resulting loss wholly upon the sureties on the latter; both sets were liable.⁵

¹ *Thompson v. Dekum*, 32 Ore. 506, 52 Pac. Rep. 517.

² *Glenn v. Wallace*, 4 Strobb. Eq. 150, 53 Am. Dec. 657; *Bobo v. Vaiden*, 20 S. C. 271; *Morris v. Morris*, 9 Heisk. 814, 822.

The Tennessee statute provides: "Every guardian, at the time of exhibiting his biennial list or statement of his ward's estate, shall renew his bond in a penalty of double the value of the estate, with the same conditions as the original bond." § 2499. The sureties on a renewed guardian's bond are liable before those on a former bond, although the guardian misappropriated the ward's money prior to the

execution of the last bond. *Crook v. Hudson*, 4 Lea, 448.

The same rule applies to new sureties given by way of substitution for former sureties released according to law. *Crawford v. Penn*, 1 Swan, 388.

And to new sureties given by way of counter-security. *Steele v. Reese*, 1 Yerg. 263.

If the new security is given pursuant to an order of court requiring other or better security, the two sets of sureties are equally liable. *McGlothlin v. Wyatt*, 1 Lea, 717.

³ *Bobo v. Vaiden*, 20 S. C. 271.

⁴ *Morris v. Morris*, 9 Heisk. 814, 822.

⁵ *State v. Berning*, 74 Mo. 87; *Wolff v. Schaeffer*, id. 154.

A person holding funds in one fiduciary capacity cannot by his own election shift the responsibility therefor from one set of sureties to another, as by signing a receipt to himself in the capacity of trustee, and, without having funds in hand, transfer his liability and that of his sureties as guardian to himself and his sureties as trustee. That can only be done by the transfer of substantial assets.¹ Sureties upon a guardian's bond are only liable for money or property actually in his hands during the term covered by their bond. Thus, where a guardian deposited his ward's funds in bank in his own name, mingling them with his own, the sureties on his then bond were liable, it being shown in an action against the sureties on a bond subsequently given that such funds had all been checked out before they became sureties.² Settlements made and approved by the proper court are *prima facie* evidence that the estate was not misappropriated when they were made.³ Under a statute providing that when a new bond shall be required the sureties in the prior bond shall, nevertheless, be liable for all breaches of the conditions committed before the new bond shall be approved by the court, where successive bonds, with different sets of sureties, have been given by an executor, and a *devastavit* has occurred before the execution and approval of some of the bonds, the liability of the sureties in the subsequent bonds is secondary to that of the sureties on those subsisting and in force when the estate was wasted, and if the former have made good the loss they may recover from the latter the full sum paid.⁴

Under a statute which provides that the discharged surety "shall only be liable for such misconduct as happened prior to giving the new bond," one who has been discharged is not responsible for moneys found due the estate on a settlement made subsequent thereto unless it is shown that the wrong was done before the discharge.⁵ The demand upon the discharged surety need not be made before a new bond is given.⁶ Independently

¹ State v. Branch, 151 Mo. 637, 52 S. W. Rep. 390.

² State v. Elliott, 157 Mo. 609, 57 S. W. Rep. 1037, 80 Am. St. 643. Compare State v. Dennis, 58 Mo. App. 568, an earlier case.

³ State v. Holman, 93 Mo. App. 611.

⁴ Corrigan v. Foster, 51 Ohio St. 225, 37 N. E. Rep. 263.

⁵ Beard v. Roth, 35 Fed. Rep. 397.

⁶ Conover's Case, 35 N. J. Eq. 108.

of statute, new sureties on a guardian's bond are liable for so much money as he might have collected on a loan made before they became such.¹ And so if a new bond is filed by order of the court, the guardian not being discharged or re-appointed nor the sureties on the first bond being released, and the evidence fails to show whether the money previously received had been misappropriated or not, the new security will be cumulative for the whole term.² If the bond is conditioned that the guardian will pay all moneys which may come into his hands or possession and faithfully discharge the office and trust of guardian according to law, the sureties on an additional bond will be liable to pay the whole amount ordered to be paid though it had been wrongfully expended before their obligation was given.³ If an administrator resigns and afterwards succeeds himself and a balance is found due from him on the settlement of the first administration, the distributees may charge the sureties on either bond.⁴ If sureties have been discharged and a new bond has been accepted and there was a breach of the first bond before their discharge by the administrator's neglect to render his account, the original sureties are not subject to the statutory rule of damages which makes them liable for the full value of the property in his hands if the appropriation was not made before they were discharged; their liability is for nominal damages, or such as resulted from his neglect. If the property of the estate was lying idle and unproductive, interest during the period of such delay is the measure of damages.⁵ In Indiana the liability of the sureties on a new bond is prospective only.⁶ But if it appears that money received while the first bond was in force was on hand when the second was given, the sureties on the latter are liable for it.⁷ A guardian who has resigned and been re-appointed in another county, where he gives a new bond and charges

¹ *McWilliams v. Norfleet*, 63 Miss. 183; *Rader v. Yeargin*, 85 Tenn. 486, 3 S. W. Rep. 178.

² *Douglass v. Kessler*, 57 Iowa, 63, 10 N. W. Rep. 313; *Loring v. Baker*, 3 Cush. 465; *Bell v. Jasper*, 2 Ired. Eq. 597; *Jones v. Blanton*, 6 id. 115, 51 Am. Dec. 415.

³ *Knox v. Kearns*, 73 Iowa, 286, 34 N. W. Rep. 861.

⁴ *Modawell v. Hudson*, 80 Ala. 265.

⁵ *McKim v. Bartlett*, 129 Mass. 226.

⁶ *Lowry v. State*, 64 Ind. 421; *State v. Page*, 63 id. 209; *Parker v. Medsker*, 80 id. 155; *State v. Barrett*, 121 id. 92, 22 N. E. Rep. 969.

⁷ *Parker v. Medsker*, 80 Ind. 155.

himself with the amount received under his first appointment, does not thereby release his original sureties from liability for a defalcation committed while their bond was in force.¹ An involuntary payment made on behalf of a guardian who committed a breach of trust under two bonds will be applied *pro rata* upon the liability under both, although the sureties upon one of them have become insolvent.²

There is ample authority and reason for saying that when the law provides for a special bond as security for the performance of a special duty imposed upon any officer, and such bond is given, the sureties upon his general bond are relieved from liability for the discharge of that duty unless it is clear from the law that such was not the intention.³ It is provided in the statutes of many states that when the real estate of a ward is to be sold the guardian shall give an additional bond to secure the proper application of the proceeds. If such a statute is mandatory it may be said with the best of reasons that the sureties in the general bond did not contemplate that they were assuming responsibility for money coming to their principal's hands from that source, and that whether such a bond was given or not they are not responsible for funds so received.⁴ In Florida the statutory provision is that the county judge shall require such security from guardians as is necessary: he may authorize a sale of the real estate of minors and shall require "such additional bond as in his discretion may seem to be necessary to protect the interests of the infant." A bond so given is subsidiary and auxiliary to the general bond and cannot be sued until the latter is exhausted.⁵ The same rule has been declared as to administrators in Indiana,⁶ Alabama,⁷

¹ *Yost v. State*, 80 Ind. 350; *Naugle v. State*, 101 id. 284.

² *Bond v. Armstrong*, 88 Ind. 65.

³ § 481.

⁴ *People v. Huffman*, 182 Ill. 390, 398, 55 N. E. Rep. 981; *Madison County v. Johnston*, 51 Iowa, 152, 50 N. W. Rep. 492; *Bunce v. Bunce*, 65 Iowa, 106, 21 N. W. Rep. 205; *Morris v. Cooper*, 35 Kan. 156, 10 Pac. Rep. 588; *Lyman v. Conkey*, 1 Met. 317; *Williams v. Morton*, 38 Me. 47, 61 Am. Dec. 229; *Warwick v. State*, 5

Ind. 350; *Lowry v. State*, 64 id. 421; *Hannum v. Day*, 105 Mass. 33, 38; *State v. Peterman*, 66 Mo. App. 257.

The distinction between statutes of this character which are mandatory and those which are not is pointed out in *Hughes v. Goodale*, 26 Mont. 93, 101, 66 Pac. Rep. 702.

⁵ *Hart v. Stribling*, 21 Fla. 136.

⁶ *Salyer v. State*, 5 Ind. 202; *Salyers v. Ross*, 15 id. 130.

⁷ *Clarke v. West*, 5 Ala. 117.

Ohio¹ (under a discretionary statute), and in Pennsylvania under a mandatory one.² If part of the funds with which a guardian is charged are the proceeds of real estate and one who had been his surety upon both his general and special bonds has been discharged from liability and a new bond has been executed by order of the court, the last covers liability for all money in the guardian's hands when it was executed.³ If the proceeds of land sold under a decree are personalty a guardian who has given a general bond, and, later, an additional bond to secure such proceeds, is primarily liable on the latter for them.⁴ Where the court, in the exercise of its discretion, does not require the guardian to give additional security before selling real estate, the sureties on his general bond who bound themselves to render a just and true account of all moneys and other property received by him are liable for the proceeds of real estate paid to the guardian.⁵

SECTION 5.

REPLEVIN BONDS.

§ 499. **Their original conditions.** The English statute, enacted nearly six hundred years ago, provided that sheriffs or bailiffs from henceforth shall not only receive of the plaintiff pledges for the pursuing of the suit before they make deliverance of the distress, but also for the return of the beasts if return be awarded.⁶ The statute of George II. was intended rather as an improvement and modification of the old security than as the creation of a new one.⁷ This required a bond, with two sureties, in double the value of the goods distrained, and conditioned for prosecuting the suit with effect and without delay, and for duly returning goods and chattels distrained in case a return should be awarded.⁸ Though framed for exclusive application to replevin on distress for rent, as were some early American statutes, it was the foundation of the practice

¹ Wade v. Graham, 4 Ohio, 126.

² Commonwealth v. Loyd, 12 Phila. 231.

³ Moody v. State, 84 Ind. 433.

⁴ Findley v. Findley, 42 W. Va. 372, 26 S. E. Rep. 433.

⁵ Allen v. Kelly, 171 N. Y. 1, 63 N. E. Rep. 528; Hughes v. Goodale, 26 Mont. 93, 66 Pac. Rep. 702.

⁶ West. 2, ch. 2; Edw. 1.

⁷ Morris on Repl. 267.

⁸ 11 Geo. 2, ch. 19, § 23.

in other cases. These conditions have always been treated as independent, and if either was not complied with the bond was forfeited.¹ The condition to prosecute the suit to effect and without delay has been generally interpreted to mean a continuous prosecution to a final judgment in favor of the plaintiff; he must diligently pursue the case and succeed.² But according to some authorities there is no liability on the part of the sureties if the replevin suit is dismissed, whether by consent or for lack of jurisdiction;³ in Ohio the court has

¹ Moore v. Bowmaker, 7 Taunt. 97; Perreau v. Bevan, 5 B. & C. 284; Balsley v. Hoffman, 13 Pa. 603; Smith v. Newton, 38 Ill. 228; Lomme v. Sweeney, 1 Mont. 584; Morris on Repl. 250; Dunbar v. Dunn, 10 Price, 542; Whitman v. Jones, 5 N. H. 362; Gibbs v. Bartlett, 2 W. & S. 29; Neville v. Williams, 7 Watts, 421; Short v. Hubbard, 2 Bing. 348; Vinyard v. Barnes, 124 Ill. 346, 16 N. E. Rep. 254; Parrott v. Scott, 6 Mont. 340, 12 Pac. Rep. 763; Boom v. St. Paul F. & Manuf. Co., 33 Minn. 253, 22 N. W. Rep. 538; Imel v. Van Deren, 8 Colo. 90, 5 Pac. Rep. 803; Pittsburgh Nat. Bank v. Hall, 107 Pa. 583; Elliott v. Black, 45 Mo. 372; Gardiner v. McDermott, 12 R. I. 206; Thomas v. Irwin, 90 Ind. 557, quoting the text; Pace v. Neal, 92 Ill. App. 416.

In New Hampshire and Ohio a judgment for return seems never to have been a feature of the practice in replevin, and the bond contains no such condition. Bell v. Bartlett, 7 N. H. 178; Smith v. McGregor, 10 Ohio St. 461.

² Pefley v. Kenrick, 4 Ind. App. 510, 31 N. E. Rep. 40, citing the text; Smith v. Whiting, 100 Mass. 122; McAlester v. Suchy, 1 Ind. Ty. 666, 43 S. W. Rep. 952 (the condition was to duly prosecute); Little v. Bliss, 55 Kan. 94, 39 Pac. Rep. 1025 (same condition). But in Citizens' State Bank v. Morse, 60 Kan. 526, 57 Pac. Rep. 115, the condition to duly prosecute was construed not to mean to prose-

cute with effect, but to prosecute to verdict and judgment without delay. Biddinger v. Pratt, 50 Ohio St. 719, 35 N. E. Rep. 795, contains a *dictum* to the contrary. To the same effect as the text, Alderman v. Roesel, 52 S. C. 162, 29 S. E. Rep. 385; Turnor v. Turner, 2 Brod. & B. 107; Crabbs v. Koontz, 69 Md. 59, 13 Atl. Rep. 591; Boom v. St. Paul F. & Manuf. Co., 33 Minn. 253, 22 N. W. Rep. 538; Meigs v. Keach, 1 Wash. Ty. 305; Perreau v. Bevan, 5 B. & C. 284; Axford v. Perrett, 4 Bing. 586; Harrison v. Woodle, 5 B. & Ad. 146; Harrison v. Montstephen, 2 Dow. & Ry. 343; Balsley v. Hoffman, 13 Pa. 603; Morgan v. Griffith, 7 Mod. 380; Dias v. Freeman, 5 T. R. 195; Brown v. Parker, 5 Blackf. 291; Gould v. Wenner, 3 Wend. 54; Jackson v. Hanson, 8 M. & W. 477; Phillips v. Price, 3 M. & S. 183; Persse v. Watrous, 30 Conn. 139; Lindsay v. Blood, 2 Mass. 518; Sevey v. Blacklin, id. 543.

³ It is held, though by a divided court, the better reasons being given by the dissenting judge, that the defendant's remedy for a breach of the bond in failing to prosecute the suit is not waived by his consenting to a dismissal of the action merely. Hall v. Smith, 10 Iowa, 45.

A settlement of the matter in dispute and a dismissal of the action pursuant to it bars a suit on the bond. Gerard v. Dill, 96 Ind. 101; Clow v. Gilbert, 54 Ill. App. 131.

ruled otherwise.¹ Under a statute providing that where the merits of the case have not been determined in the trial of the action in which the bond was given, the defendant in the action upon the bond may plead that fact and his title to the property in dispute in said action of replevin, the dismissal of an action for want of jurisdiction does not bar plaintiff from the right given.² The condition to prosecute the suit is not one the performance of which is in itself beneficial to the party for whose benefit the bond is made. But the recovery of a final judgment in favor of the plaintiff makes it clear that, when the property was delivered to him at the commencement of the action, he received his own, and no wrong was done the defendant. His bond is a penal undertaking to establish at as early a day as practicable that he had a right to possession when he obtained the writ. If he fails to do so, it appears clearly that the possession which the plaintiff acquired by process based on the bond was wrongful and injurious to the defendant to the extent of his interest in the property, and the costs to which he has been subjected in asserting that interest. On failure to fulfill the conditions the penalty of the bond is forfeited, and relief is granted against a demand of the whole only on the terms of making equitable compensation according to the injury caused to the defendant by the process by which he was deprived of possession. This compensation is only limited by the penalty of the bond; within that limit the plaintiff is entitled to the value of the property and costs of the replevin suit.³ And the liability of the sheriff for taking [44] insufficient bail, or for other official neglect resulting in a loss of the security of the replevin bond, is governed by the same standard and subject to the same limitations.⁴ But if the

¹ *Biddinger v. Pratt*, 50 Ohio St. 719, 35 N. E. Rep. 795.

² *O'Donnell v. Colby*, 153 Ill. 324, 38 N. E. Rep. 1067.

³ *Peffley v. Kenrick*, 4 Ind. App. 570, 31 N. E. Rep. 40, citing the text; *McAlester v. Suchy*, 1 Ind. Ty. 666, 43 S. W. Rep. 952; *McKey v. Lauflin*, 48 Kan. 581, 30 Pac. Rep. 16; *Branscombe v. Scarborough*, 6 Q. B. 13; *Gainsford v. Griffith*, 1 Williams'

Saund. 58, n. 1; *Hunt v. Round*, 2 Dow. P. C. 558; *Ward v. Henley*, 1 Y. & J. 285; *Hefford v. Alger*, 1 Taunt. 218; *Gould v. Wenner*, 3 Wend. 54; *Gibbs v. Bartlett*, 2 W. & S. 33; *McCabe v. Morehead*, 1 id. 513; *Arnold v. Bailey*, 8 Mass. 145; *Fraser v. Little*, 13 Mich. 195; *Balsley v. Hoffman*, 13 Pa. 603.

⁴ *Evans v. Brandon*, 2 H. Bl. 548; *Baker v. Garratt*, 3 Bing. 56; *Jeffrey*

party for whose benefit the bond is made be entitled to only the possession of the property, the title being in the opposite party, such obligee is not entitled to recover the value of the property, but only of his possessory right.¹

§ 500. **The condition for return of property.** As replevin is a form of action to enable a plaintiff to recover specific personal property, if he fails to maintain his right to the possession after it has been delivered to him, there is fairness and equality in allowing a defendant at least an election to have it restored. Accordingly, instead of leaving to him a mere claim of damages, assessable on the broken condition to prosecute to effect, the law has wisely provided for a judgment of return as well as a specific condition to the same effect in the bond. Such judgment imposes the duty on the plaintiff to restore the property; and if not complied with the condition for such return, when adjudged, is also violated. If the plaintiff does not voluntarily execute the judgment for return the defendant may, but is not obliged to, avail himself of the writ of return to compel its execution. He may at once sue on the bond, unless a preliminary resort to the writ is required by statute.²

This provision for return of the same goods and chattels is intended for the benefit of the defendant.³ Thus construed, according to the import of the transaction of which the bond is a part, it is an indirect undertaking by the plaintiff, in consideration of being able of his own motion to get possession of the property in dispute at once, to return it if return be adjudged, and to pay the defendant from whom he has wrested it such sum as ought to be assessed for damages by rea- [45] son of the premises, if he neglects to prosecute the suit, or it appears by an adverse judgment that he was not entitled to the property. Any such default is an event on the happening of which he in form acknowledges himself bound to pay the penalty, but as the court will not allow the obligee to

v. Barnard, 4 A. & E. 823; Paul v. Goodluck, 2 Bing. N. C. 220; Murdoch v. Will, 1 Dall. 341.

¹ Hawley v. Warner, 12 Iowa, 42. See Buck v. Rhodes, 11 id. 348; Hayden v. Anderson, 17 id. 158; Smith v. Whiting, 100 Mass. 122; Schweer v. Schwabacher, 17 Ill. App. 78; Crabbs

v. Koontz, 69 Md. 59, 13 Atl. Rep. 591.

² Wright v. Quirk, 105 Mass. 44; Turnor v. Turner, 2 Brod. & B. 107; Sevey v. Blacklin, 2 Mass. 511. See as to the practice in Missouri, Morrison v. Yancey, 23 Mo. App. 670.

³ Gibbs v. Bartlett, 2 W. & S. 33.

take more than in conscience he ought, damages assessed for the breaches are made to embrace the full redress to which such defendant, secured by such bond is entitled.¹ The act of 11 George II. contained a clause that the court where such action shall be brought may by rule give such relief to the parties upon such bond as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeasance of the bond.²

§ 501. The condition required by modern statutes. Modern legislation on this subject has the merit of prescribing substantially equivalent conditions which are more precise and direct. In some, if not in most, of the states there are three conditions: first, to prosecute the suit to effect or to final judgment; second, to return the property if return be adjudged; and third, to pay such sum as the defendant may recover judgment for in the replevin suit. The action for breach of the condition to prosecute to final judgment proceeds in the absence of any determination of the merits of the replevin suit, and for failure to prosecute to judgment; but the breach of the condition to prosecute to effect, as we have seen, may consist not only of such neglect, but also of an adverse judgment on the merits.³

¹ Wright v. Quirk, 105 Mass. 44.

²Turnor v. Turner, 2 Brod. & B. 107.

³See § 499.

The legal effect of the dismissal of the suit is a judgment of restitution. If that cannot be had, the defendant is entitled to a *feri facias* for the value of the property. He is not forced to bring an action on the bond. Marshall v. Livingston, 77 Ga. 21.

In Mills v. Gleason, 21 Cal. 274, Cope, J., said: "A dismissal stands on the same footing as a nonsuit, leaving the parties to settle in an account upon the undertaking those matters which, if the suit were prosecuted, it would be necessary to determine in the first instance. Such matters include, of course, the right

of the defendant to a return of the property; and as the opportunity to obtain a return is taken away by the failure to prosecute, he is entitled to compensation in damages. A failure to prosecute is a breach of the undertaking, and the legal and necessary result is that the sureties to the undertaking are liable for whatever injury the defendant has sustained." Persse v. Watrous, 30 Conn. 139; Ladd v. Prentice, 14 Conn. 109.

Where there is a breach of the condition to prosecute to effect and no judgment is entered for the return of the property, an officer who is defendant and has a special interest in or title to the property is entitled to retain the custody of it; but in the absence of an order awarding him such custody, he

In Tennessee the defendant in an attachment suit may replevy the property upon giving bond either in double the amount of the plaintiff's demand, conditioned to pay the same, or in double the value of the property attached, conditioned to pay such value if he is cast in the suit. A bond which did not conform to the statute, being conditioned to account for the property, was regarded as coming under the latter clause — a bond in double the value of the property attached, conditioned to pay its value and interest if the defendant failed in the suit. The proper judgment was for the penalty of the bond, which could be satisfied by the delivery of the property or payment of its value.¹ A bond given under that statute did not clearly show whether it was given for double the amount of the demand or double the value of the property, the condition being to secure the delivery of the property or its value. This language was given controlling effect, and a personal decree for the amount of the recovery could not be rendered against the sureties.²

The bond is intended to give the defendant in replevin [46] complete indemnity for the property being taken out of his possession, and for the necessity imposed of active measures for the defense of his right to it. He is not entitled to indemnity if he had no title or right of possession, and the possession is taken by one who has the right; and he can recover nothing beyond costs and nominal damages, even if the plaintiff fails to prosecute.³ And where the suit is prosecuted to judgment, if the defendant recovers, and the plaintiff performs the judgment, the bond is satisfied.⁴ The purpose of indemnity is accomplished, if, when the defendant succeeds in the replevin suit, whether it is tried on its merits or not, the property is

must affirmatively show in an action on the bond that the demand upon which he acquired possession of the property has not been satisfied, otherwise it cannot be determined how or to what extent he has been damaged. *Imel v. Van Deren*, 8 Colo. 40, 5 Pac. Rep. 893.

¹ *Kuhn v. Spellacy*, 3 Lea, 278.

² *Chattanooga, etc. R. Co. v. Evans*, 11 C. C. A. 116, 66 Fed. Rep. 809.

³ *Little v. Bliss*, 55 Kan. 94, 39 Pac. Rep. 1025; *Cobbey on Repl.*, § 1355.

⁴ *Chambers v. Waters*, 7 Cal. 390; *Pettygrove v. Hoyt*, 11 Me. 66; *Hovey v. Coy*, 17 Me. 266; *Smallwood v. Norton*, 21 Me. 83; *Millett v. Hayford*, 1 Wis. 401; *Claggett v. Richards*, 45 N. H. 360; *Clark v. Norton*, 6 Minn. 412; *Balsley v. Hoffman*, 13 Pa. 603; *Ginaca v. Atwood*, 8 Cal. 446.

returned to him, the damages paid, whether they arise from deprivation of the use, deterioration, or decrease of market value, and the costs incident to making a defense. Where these damages have not been, and could not be, determined in the replevin suit, they may be determined in the action on the bond if there is a breach of either of the conditions. There is no breach of the condition to prosecute to final judgment if the case is tried on the merits, though judgment be rendered for the defendant; then, if the other conditions are fulfilled by performance or execution of the judgment, the bond is satisfied. But the recovery of judgment by the defendant, whether on the merits or not, as well as the neglect of the plaintiff to prosecute the replevin suit with diligence, is a breach of the condition to prosecute to effect, and then the defendant may sue on the bond and rely on the breach, although in the former case the condition to return when adjudged may also be broken.¹ The plaintiff may accept a delayed tender of the property, but is not bound to do so. After the defendant has refused to return the property the breach of his obligation is complete, and if the plaintiff has elected to sue for damages he cannot be compelled to accept the property.² The party by virtue of whose process property is attached remains the real party in interest in subsequent replevin proceedings brought against the officer who levied the attachment as sole defendant, and such party may sue upon the replevin bond although not a formal party to it.³

§ 502. **Assessment of damages in suit on bond.** The [47] obligee is entitled to recover damages for the taking and detention in the action on the bond. The omission of the defendant in the replevin suit to have the damages assessed in that action, he being at liberty to have them there assessed, is no renunciation of them if the judgment there rendered remains unsatisfied.⁴ This rule has been applied when the

¹ *Brown v. Parker*, 5 Blackf. 291; *Gibbs v. Bartlett*, 2 W. & S. 33; *Roman v. Stratton*, 2 Bibb, 199. But compare *Wall v. Humphries*, 4 Dana, 209.

² *Bradley v. Reynolds*, 61 Conn. 271, 283, 23 Atl. Rep. 923.

³ *Quinnipiac Brewing Co. v. Hackbarth*, 74 Conn. 392, 50 Atl. Rep. 1023.

⁴ *Quinnipiac Brewing Co. v. Hackbarth*, 74 Conn. 392, 50 Atl. Rep. 1023.

only breach assigned was of the condition to return the property if adjudged; for it is said the statute contemplates that the property will be returned when such is the judgment, and the damages are then assessed upon that expectation. But where it is not returned and there is a breach of the bond, the statute does not prescribe how the damages shall be assessed. The general rule of law would give in such a case as an indemnity the value of the property at the time it was taken, and interest from that time to the time of trial.¹ If the defendant's damages are assessed in the replevin suit he may, in a subsequent action on the bond, recover such as resulted from the failure to return the property;² but he cannot main-

¹ *McKey v. Lauflin*, 48 Kan. 581, 30 Pac. Rep. 16; *Ward v. Hood*, 124 Ala. 570, 27 So. Rep. 245; *Bradley v. Reynolds*, 61 Conn. 271, 286, 23 Atl. Rep. 928, citing the text; *Manning v. Manning*, 26 Kan. 98; *Treman v. Morris*, 9 Ill. App. 237; *Yelton v. Slinkard*, 85 Ind. 190; *Smith v. Dillingham*, 33 Me. 384; *Thomas v. Spofford*, 46 Me. 408; *Tuck v. Moses*, 58 Me. 461; *Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Hall v. Smith*, 10 Iowa, 45. Compare *Swift v. Barnes*, 16 Pick. 194.

If the statutory damages are recovered the defendant cannot recover interest upon the value of the property. *Treman v. Morris*, *supra*.

² *Miltimore v. Bottom*, 66 Vt. 168, 28 Atl. Rep. 872.

The statute of Maine provides that "if it appears that the defendant is entitled to a return of the goods he shall have judgment and a writ of return accordingly, with damages for the taking and costs." It was contended that the words "damages for the taking" mean all damages resulting from the taking and detention of the goods; that if the defendant in replevin recovers judgment for a return, he may, at his election, have the damages which he has sustained by reason of the

taking and detention of them to the time of such judgment assessed in the replevin suit, or he may recover them in a suit on the bond, but cannot pursue both remedies; that if he elects, as he did in this case, to have the assessment made in the replevin suit, he cannot in a subsequent suit on the bond, founded on a failure to return the goods, recover any damages which accrued prior to the judgment in the replevin action, and therefore cannot recover for any depreciation in the value of the goods which occurred between the time of the taking and the date of the judgment of return. In answer the court said: "This point seems to us, at best, to be altogether technical, and not to be founded on any sound principle. By the terms of the bond it was made enforceable against the principal and sureties if the principal should not pay such damages and costs as W. should recover against it, and should not also return and restore the goods replevied in like order and condition as when taken. Under the condition of the bond the sureties were liable to pay the damage recovered against the principal in case the principal had not paid them as he did. By the judgment in the present suit they are only made lia-

tain a subsequent action to recover vindictive damages because of the bringing of the replevin suit.¹ If a successful intervenor, entitled to the value or the return of the property from the plaintiff, elects to take the property without claiming damages, he cannot maintain a separate action on the bond to recover for injuries to the property caused by the plaintiff while it was in his possession.²

Where the plaintiff neglects to prosecute his action, there is a difference of opinion concerning the defendant's remedy. In Rhode Island it is held that he is not required to make complaint and obtain judgment for the return of the property before bringing a suit on the bond. The purpose of the bond is not merely to secure to the defendant the execution of the judgment which he may recover, but rather as an indemnity to him for taking the property out of his possession.³ It is held by the federal supreme court that the defendants in a suit on the bond cannot avail themselves of the omission of the trial court to render the alternative judgment provided for by statute, for the return of the property or its value.⁴ This is the rule in several states.⁵ In Maine, California and Vermont the rule is contrary to that which prevails in Rhode Island.⁶ In Kansas, in the absence of any judgment for damages, if the bond describes and itemizes the property and

ble according to their obligation, that their principal shall return and restore the goods in like order and condition as when taken." *Washington Ice Co. v. Webster*, 125 U. S. 426, 437, 8 Sup. Ct. Rep. 947.

If attached property is replevied and, before the execution of the replevin bond and without the knowledge of the sureties therein or the officer, is adjudged to be sold, such bond is not thereby made void, but only its condition, and a present debt arises unaffected by the condition. *Ward v. Hood*, 124 Ala. 570, 27 So. Rep. 425.

¹ *Kapischke v. Koch*, 79 Ill. App. 233, 180 Ill. 44, 54 N. E. Rep. 179.

² *Newton v. Round*, 109 Iowa, 286, 80 N. W. Rep. 391.

³ *Gardiner v. McDermott*, 12 R. I. 206.

⁴ *Sweeney v. Lomme*, 22 Wall. 208.

⁵ *Cox v. Sargent*, 10 Colo. App. 1, 50 Pac. Rep. 201; *Pittsburgh Nat. Bank v. Hall*, 107 Pa. 583; *Berghoff v. Heckwolf*, 26 Mo. 511; *Little v. Bliss*, 55 Kan. 94, 39 Pac. Rep. 1025; *Hall v. Smith*, 10 Iowa, 45; *Presse v. Watrous*, 30 Conn. 139; *Cobbey on Repl.*, § 1253 *et seq.*; *Capital Lumbering Co. v. Learned*, 36 Ore. 544, 59 Pac. Rep. 454, 78 Am. St. 792.

⁶ *Pettygrove v. Hoyt*, 11 Me. 66; *Smallwood v. Norton*, 20 id. 83, 37 Am. Dec. 39; *Collamer v. Page*, 35 Vt. 387; *Mitchum v. Stanton*, 49 Cal. 302.

places a value on each article, the return of any part of the property reduces the obligation of the sureties *pro tanto* at the valuation designated in the bond.¹ In Arkansas the sureties on a bond executed to the sheriff for the release of a defendant arrested on a *capias* in replevin are not liable for the judgment against the defendant, unless an execution against his body has been returned not found.²

§ 503. When sureties not liable for judgment in replevin suit. If there be no condition to pay any judgment that may be recovered in the replevin suit a judgment there obtained for such damages, it has been held in Illinois, is not evidence against the sureties in an action on the bond. The non-payment of such a judgment would be no breach of the bond; nor would it measure the damages on any breach. The surety is not a party to an assessment in such a case, and as to him it is wholly inoperative. While, under the general breach assigned upon the bond, evidence of damages suffered by the detention prior to the order of return is admissible, it must be evidence of what the damages in fact were, without reference to any former assessment.³ In Maine the damages recovered by an attaching officer in replevin, being recovered in trust, are not conclusive upon the sureties in a suit on the bond.⁴ But in Pennsylvania it is held that the damages and costs for which the defendant in the replevin suit obtained judgment may be recovered in an action on the bond.⁵ These damages and interest, however, are not invariably the value. As was said by Mr. Justice Rogers, "it would be anything but an act of justice to permit a person who has wrongfully deprived another of his goods, and retained them in his possession until they were nearly destroyed by time and use. [48] afterwards, when judgment was rendered against him for his wrongful act, to save a forfeiture of his bond by an offer to return the article in its depreciated condition. Nor can the sureties be placed in any better condition."⁶ Interest will compensate for delay to return mere merchandise; but if,

¹ Larabee v. Cook, 8 Kan. App. 776, 61 Pac. Rep. 815.

² Shepard v. Butterfield, 41 Ill. 76.

³ Howe v. Handley, 28 Me. 241.

⁴ Duncan v. Owens, 47 Ark. 388, 1

⁵ Miller v. Foutz, 2 Yeates, 418;

S. W. Rep. 698; Eddings v. Boner, 1

Balsley v. Hoffman, 13 Pa. 603.

Ind. Ty. 173, 38 S. W. Rep. 1110.

⁶ Gibbs v. Bartlett, 2 W. & S. 20, 34.

while the owner is deprived of possession, it deteriorates by use or lapse of time, or by fall of the market, he is entitled to compensation for that loss.¹ If the deterioration is assessed in the action of replevin and collected or paid, it cannot again be collected on the bond.² And where the use of the property is valuable, the value of such use, rather than interest, is allowed as damages.³ The plaintiff cannot claim damages for depreciation while he has possession, for he may always convert the property into money.⁴ And undoubtedly the same principle would be applied to a defendant having possession. Damages resulting to the good will of a business cannot be recovered.⁵

It is the rule in Massachusetts that the party who is adjudged to return the property in controversy should, on general principles, be charged, in case of default, with its value at the date when the duty to return it attaches. If it is of less value then than when taken, the difference should be compensated in damages, and they are recoverable on the bond as a breach of its conditions.⁶ In some courts the value of the property at the time it was taken and where it was situ-

¹ *Stevens v. Tuite*, 104 Mass. 328; *Howe v. Handley*, 28 Me. 241; *Parker v. Simonds*, 8 Met. 211; *Leighton v. Brown*, 98 Mass. 515; *Swift v. Barnes*, 16 Pick. 194; *Bank of Brighton v. Smith*, 12 Allen, 243, 90 Am. Dec. 144; *Whitwell v. Wells*, 24 Pick. 34; *Crabb v. Mickle*, 5 Ind. 145; *Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Schrader v. Wolfen*, 21 Ind. 238; *Walls v. Johnson*, 16 Ind. 374; *Hopkins v. Ladd*, 35 Ill. 178; *Story v. O'Dea*, 23 Ind. 326; *Lutes v. Alpaugh*, 23 N. J. L. 165; *Caldwell v. West*, 21 id. 411; *Cohen v. State*, 34 Miss. 179; *Ormsbee v. Davis*, 18 Conn. 555; *Emerson v. Booth*, 51 Barb. 40; *Mattoon v. Pearce*, 12 Mass. 406; *Rowley v. Gibbs*, 14 Johns. 385; *Yelton v. Slinkard*, 85 Ind. 190; *Treman v. Morris*, 9 Ill. App. 237; *Dalby v. Campbell*, 26 id. 502.

² *Rowley v. Gibbs*, 14 Johns. 385.

³ *Allen v. Fox*, 51 N. Y. 562; *Dorsey*

v. Gassaway, 2 H. & J. 402, 3 Am. Dec. 557; *Butler v. Mehring*, 15 Ill. 488. See § 1144.

In *Tibbles v. O'Connor*, 28 Barb. 538, it was held that the sureties were responsible not only for the costs of the suit in the trial court, but also for costs of an appeal to the general term. And in *Letson v. Dodge*, 61 Barb. 121, that parties in an undertaking in a justice's court are responsible for the final result in the court of last resort.

It is held in New Hampshire that the replevin bond prescribed by the statute does not extend to a judgment on a review of the action. *Bell v. Bartlett*, 7 N. H. 178.

⁴ *Gordon v. Jenny*, 16 Mass. 465; *Bradley v. Reynolds*, 61 Conn. 271, 286, 23 Atl. Rep. 928.

⁵ *Dalby v. Campbell*, 26 Ill. App. 502.

⁶ *Swift v. Barnes*, 16 Pick. 194; *Parker v. Simonds*, 8 Met. 211.

ated, for any lawful use to which it could be put, is the measure of liability.¹ In Iowa the value is to be determined as of the time of the trial.²

§ 504. **Evidence of the value.** The value of the prop- [49] erty is sometimes established, as against the plaintiff and his sureties, by permitting the obligee to put in evidence the estimate of it stated in the bond, the obligors being bound by it. The plaintiff is held bound because it is his own valuation, and the sureties, by executing the bond, admit the same.³ The other party, however, is not so bound; and if the value is greater at the time when judgment for return is pronounced he may show its actual value at that time.⁴ In some courts

¹ *Washington Ice Co. v. Webster*, 125 U. S. 426, 443, 8 Sup. Ct. Rep. 947, 68 Me. 449, 462.

² *Clement v. Duffy*, 54 Iowa, 632, 7 N. W. Rep. 85.

³ *Washington Ice Co. v. Webster*, 125 U. S. 426, 8 Sup. Ct. Rep. 947, 62 Me. 341, 16 Am. Rep. 462; *Marshall v. Livingston*, 77 Ga. 21; *Huggeford v. Ford*, 11 Pick. 223; *Middleton v. Bryan*, 3 M. & S. 155; *Swift v. Barnes*, 16 Pick. 194; *Howe v. Handley*, 28 Me. 241; *Parker v. Simonds*, 8 Met. 211; *Gordon v. Jenny*, 16 Mass. 469; *Tuck v. Moses*, 58 Me. 461; *Leighton v. Brown*, 98 Mass. 515; *Wright v. Quirk*, 105 Mass. 44; *Gibbs v. Bartlett*, 2 W. & S. 33; *Butts v. Woods*, 4 N. M. 343, 16 Pac. Rep. 617 (by statute); *Capital Lumbering Co. v. Learned*, 36 Ore. 544, 59 Pac. Rep. 454, 78 Am. St. 592.

⁴ *Id.*

In *Parker v. Simonds*, 8 Met. 211, Hubbard, J., referring to *Swift v. Barnes*, 16 Pick. 194, said: "In that case a quantity of sperm oil was replevied, and there was judgment for a return, and a writ of restitution issued, and a demand was made of the property, but it was not redelivered. The question made by the parties was whether the valuation in the bond should be the meas-

ure of damages, or whether judgment should be rendered for the actual value of the oil at the time of the service of the writ of replevin, or when the verdict was given, or on the rendition of judgment, or at the date of the demand upon the writ of restitution. The oil having risen in value after it was replevied, it was argued by the plaintiff that the value of the oil at the time of the rendition of judgment, or at the time of the demand made on the writ, was the rule to be adopted; while it was contended by the defendant that the value of the oil at the time of the original taking should determine the amount of damages, and that the circumstance that a bond had been given should make no difference. The court, after a review of the authorities cited, was of opinion that the value of the property replevied, at the time it was demanded on the writ of restitution, was the true measure of damages; and Mr. Justice Wilde, who gave the opinion, referred to the general rule of damages on all contracts to deliver goods on demand, and expressed the opinion that there was no essential difference between this contract and the common one to deliver goods. And the court

either party may show the actual value of the property, the amount stated in the affidavit being only *prima facie* evidence thereof. It is said that the other rule would sometimes operate harshly, it being common knowledge that the statement of value in the affidavit is usually made without a very nice attention to the real value of the property, but is made largely as an estimate, based somewhat upon the amount of the plaintiff's claim, lest under some circumstances the jury might not be at liberty to give him more than the value he had himself estimated.¹ If the value has increased in the post-[50] session of the obligor by an advance in the market price since the time of default in complying with the judgment of return the obligee is entitled to the benefit of the enhanced value.² But if the value has been increased by the labor bestowed upon it in good faith by the party who retained the

further held that the party who made the bond and fixed the value might well be bound by it, as was decided in *Gordon v. Jenny*, 16 Mass. 465; and that it did not follow that the other party, who had no agency in fixing the amount, should be concluded by it because the property had risen in value. But a leading feature in that decision is this, namely, that the party injured was entitled to an indemnity, and could not receive it unless the actual value of the goods at the time of the demand made was adopted as the rule to fix the measure of damages. But though the court state the rule by which the damages are to be ascertained in strong and general terms, yet it does not embrace every case arising under the process of replevin; and the case at bar is one of those which are to be excepted from its operation. The goods replevied consisted of household furniture, horses, cattle, wagons, etc., which had been more or less used. At the time of the demand some of them had been sold, and others were deteriorated and much depreciated in value by further use. They were not all of

them goods, like oil or other articles of merchandise, of a current market price; and some having been sold, and others thus deteriorated, the value at the time of the demand could not be ascertained; nor would that value be the measure of damages without a proper allowance for the depreciation, which, under the circumstances of this case, could not be computed upon any accurate data. The only mode, therefore, to give the plaintiff the indemnity to which he is entitled is to take the estimate of the value as set out in the replevin bond. To this is to be added six per cent. on such value from the time of the judgment in the action of replevin. It not sufficiently appearing but that the plaintiff might have had his writ of return immediately, or have put his bond in suit, he is not entitled to the penal damages since that time." But see *West v. Caldwell*, 23 N. J. L. 736.

¹ *Farson v. Gilbert*, 85 Ill. App. 364; *Gibbs v. Bartlett*, 2 W. & S. 29. Compare *O'Donnell v. Colby*, 55 Ill. App. 112.

² *Tuck v. Moses*, 58 Me. 461.

possession it is otherwise.¹ If the bond is insufficient as a statutory obligation, but good as a common-law bond, the sheriff's appraisal of the value of the property, as evidenced by his indorsement upon the writ, is incompetent as against the sureties. Their liability must be established by evidence known to the common law.² In an action to recover for the non-performance of the condition to return the property it may be shown what it would cost to buy similar property, or, if that is impossible, what has been lost by not being able to do so.³ The value of reapers and mowers is determinable by their fair cash market value at the time and place when and where they were replevied, without considering the guaranties of the manufacturer or other person as to their efficiency, the supply of parts if there should be breakage, or any guaranty which might add to their value.⁴

§ 505. **Damages recoverable.** Exclusive of the value of the goods, in default of or in place of a return, the damages secured by the bond ordinarily consist of interest upon the money value of the goods, if fixed at the time of the taking, computed up to the time of the verdict, and in addition any special damage shown to result directly from the taking.⁵ The expenses actually incurred in procuring teams and appurtenances for the purpose of removing the property, which were rendered useless by the wrongful suing out of the replevin, may be included in such damages.⁶ The costs of the defendant in the replevin suit for which he is liable may be recovered,⁷

¹ *Single v. Schneider*, 30 Wis. 570; *Hungerford v. Redford*, 29 Wis. 345; *Herdie v. Young*, 55 Pa. 176, 93 Am. Dec. 739.

² *Jacobs v. Daugherty*, 78 Tex. 682, 15 S. W. Rep. 160.

³ *Miltimore v. Bottom*, 66 Vt. 168, 28 Atl. Rep. 872.

⁴ *Plano Manuf. Co. v. Downey*, 100 Ill. App. 36.

⁵ *Pace v. Neal*, 92 Ill. App. 416; *Stevens v. Tuito*, 104 Mass. 328; *Davis v. Crow*, 7 Blackf. 129; *Brewster v. Silliman*, 38 N. Y. 423; *Pettit v. Allen*, 64 App. Div. 579, 72 N. Y. Supp. 287.

In North Carolina, if delivery of the property cannot be had, the

statute limits the recovery to such sum as may be recovered for the value of the property at the time of the unlawful taking or detention, with interest thereon. *Hall v. Tillman*, 110 N. C. 220, 14 S. E. Rep. 745.

⁶ *Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462.

⁷ *Kellar v. Carr*, 119 Ind. 127, 21 N. E. Rep. 463; *Morrill v. Daniel*, 47 Ark. 316, 1 S. W. Rep. 702; *Mills v. Hackett*, 65 Tex. 580; *Carlton v. Dixon*, 14 Ore. 293, 12 Pac. Rep. 394; *Hall v. Tillman*, 110 N. C. 220, 14 S. E. Rep. 745 (liability extends to the entire costs of prosecuting the action involving the title to the property);

but not those made by the other party.¹ In some jurisdictions the liability for costs turns upon the language of the bond,² the non-assumption of it therein being regarded as sufficient reason for not extending the liability of the sureties. In Texas the question does not appear to have been authoritatively settled, though it has been ruled by one of the courts of civil appeals that the sureties do not make themselves parties to the suit, by becoming such, so far as to be liable for the costs.³ In Illinois there may be a recovery for attorneys' fees,⁴ but not unless property is taken under the writ; if the plaintiff avails himself of the statutory right to proceed in trover, he cannot recover such fees.⁵ Their recovery has been sanctioned in Alabama,⁶ but not under a bond conditioned merely for the return of the property.⁷ In Indiana and Kentucky there cannot be a recovery of attorneys' fees paid in the suit on the bond and in the replevin action.⁸ There can be no recovery for time and money expended in procuring sureties or in attending the trial of the original action.⁹ The recovery cannot exceed the penalty of the bond,¹⁰ except in jurisdictions where interest may be recovered.¹¹ If property which has been seized on an attach-

Ingram v. Cox, 5 Pa. Dist. Rep. 617; Tibbal v. Cahoon, 10 Watts, 232; Balsley v. Hoffman, 13 Pa. 609.

¹ Kellar v. Carr, 119 Ind. 127, 21 N. E. Rep. 463.

² If the obligation of the sureties is merely to pay any "damages" that may be awarded against the defendant, they are not liable for costs. Brock v. Bolton, 37 S. C. 40, 16 S. E. Rep. 370. But it is otherwise if their obligation is to return the property when adjudged and also to pay whatever sum should be recovered. Rhodes v. Burkart, 28 S. C. 155, 5 S. E. Rep. 347; Katz v. American Bonding & Trust Co., 86 Minn. 168, 90 N. W. Rep. 376.

If the terms of a bond given to replevy land in a sequestration proceeding do not include liability for costs the sureties are not liable therefor. Collier v. Myers, 14 Tex. Civ. App. 312, 37 S. W. Rep. 183.

³ Henderson v. Brown, 16 Tex. Civ. App. 464, 41 S. W. Rep. 406.

⁴ Dalby v. Campbell, 26 Ill. App. 502; Pace v. Neal, 92 id. 416; Edwin v. Cox, 61 id. 567 (if they are specially declared for).

⁵ Reno v. Woodyatt, 81 Ill. App. 553.

⁶ Miller v. Garrett, 35 Ala. 96; Ferguson v. Baber, 24 id. 402; Hudson v. Young, 25 id. 376; Garrett v. Logan, 19 id. 344; Foster v. Napier, 74 id. 393.

⁷ Heard v. Hicks, 101 Ala. 102, 13 So. Rep. 256.

⁸ Davis v. Crow, 7 Blackf. 129; Kenley v. Commonwealth, 6 B. Mon. 583.

⁹ Id.; Foster v. Napier, 74 Ala. 393.

¹⁰ Kellar v. Carr, 119 Ind. 127, 21 N. E. Rep. 463; Dalby v. Campbell, 26 Ill. App. 502. See ch. 9.

¹¹ Carlon v. Dixon, 14 Ore. 293, 12 Pac. Rep. 394; §§ 477, 478.

ment against a third person is replevied the sureties' liability is not to be measured by the value of the interest of the attachment debtor for whose debt it was seized by the sheriff. The value of the property at the time it was replevied, limited by the debt still due on the attaching creditor's judgment and the penalty of the bond, are the elements to determine the damages in the suit on the bond.¹ But if the defendant holds the property under a contract of sale and is in default in payments, the title being in the vendor, the value of the property should be fixed as of the time he acquired possession, because it was said, "his refusal to meet the payments and perform the conditions attaching to the purchase place him, in contemplation of law, in the same position as if the original taking had been wrongful."² Under a bond conditioned for the performance of the judgment in the action the surety is responsible for only the amount of property the defendant retained by virtue of the bond, and the proportionate amount of damages resulting from the detention thereof, and not for the value of property of which the defendant never had possession.³ If the plaintiff is nonsuited and a return of the property is not awarded the surety's liability is limited to the damages resulting from the failure to prosecute the suit with effect.⁴

§ 506. Effect of the judgment in replevin suit. As has been stated, in many states the bond or undertaking is conditioned for the payment of any judgment which the defendant may recover against the plaintiff in the action of replevin. The liability assumed has regard to the power of the court to do any and all things within the scope of its authority which may be done in the ordinary and regular prosecution of the suit,⁵ and has special reference to the judgment which may be rendered in that action, and nothing short of full satisfaction of the judgment against the principal will satisfy the obliga-

As against sureties interest on the penalty cannot be included. *Milwaukee v. Bottom*, 66 Vt. 168, 28 Atl. Rep. 872.

¹ *Bradley v. Reynolds*, 61 Conn. 271, 23 Atl. Rep. 928; *Sweeney v. Lomme*, 22 Wall. 208.

² *Hall v. Tullman*, 110 N. C. 220, 14

S. E. Rep. 745, 115 N. C. 500, 20 S. E. Rep. 726.

³ *Board v. Moore*, 12 Ky. L. Rep. 682 (Ky. Super. Ct.).

⁴ *Fellheimer v. Hamline*, 65 Ill. App. 384.

⁵ *Clark v. Dreyer*, 9 Colo. App. 453, 49 Pac. Rep. 818.

tion.¹ If there is an assessment of damages in the replevin suit, it constitutes, with the costs adjudged therein, a substantive item to be recovered in the action on the bond, and interest thereon will be computed from the date of that judgment.² Under a bond conditioned to abide by the judgment, the sureties are bound by a judgment confessed by their principal without their knowledge, no fraud or collusion being shown, and nothing being confessed outside the indebtedness involved in the replevin suit.³ Where the plaintiff was in possession and judgment was originally entered for the defendant for costs, and the latter, without notice to the sureties, obtained a judgment, *nunc pro tunc*, for the return of the property or its value, at a sum named, the sureties were bound by such judgment.⁴ The principal in the bond is the agent of the sureties to such an extent that he may bind them by compromising the plaintiff's claim for damages, and such compromise being made, though without the knowledge or consent of the sureties, the court may render judgment in accordance with it.⁵ When the right of the property and its value is put in issue, and determined by final judgment, it is *res judicata*, and cannot, on general principles, be again inquired into between the same parties; and the sureties in the bond are also concluded by it when their obligation is to return the property if it is so adjudged, and to pay any judgment recovered. If, however, the right has not been tried, nor the value adjudged to the defendant, the extent of his interest and the amount he is entitled to recover on account of it are, of course, open questions in an action on the bond.⁶ The sureties are represented in the

¹ Hicks v. McBride, 3 Phila. 377.

² Swift v. Barnes, 16 Pick. 194; Hopkins v. Ladd, 35 Ill. 178; Caldwell v. West, 21 N. J. L. 411; Washington Ice Co. v. Webster, 62 Me. 341, 16 Am. Rep. 462, 125 U. S. 426, 8 Sup. Ct. Rep. 947; Leighton v. Brown, 98 Mass. 515; Mattoon v. Pearce, 12 Mass. 406; Ormsbee v. Davis, 18 Conn. 555.

³ Bradford v. Frederick, 101 Pa. 445.

⁴ Clark v. Dreyer, *supra*.

⁵ Minocks v. Pope, 117 N. C. 315, 23 S. E. Rep. 269.

⁶ Kennedy v. Brown, 21 Kan. 177; O'Loughlin v. Carr, 9 Kan. App. 818, 30 Pac. Rep. 478; Richardson v. People's Nat. Bank, 57 Ohio St. 299, 48 N. E. Rep. 1100; Cox v. Hartranft, 154 Pa. 457, 26 Atl. Rep. 304; McCoslin v. David, 22 Tex. Civ. App. 53, 54 S. W. Rep. 404; Smith v. Mosby, 98 Ind. 445; McFadden v. Ross, 108 id. 512, 8 N. E. Rep. 161; Boom v. St. Paul F. & Manuf. Co., 33 Minn. 253, 22 N. W. Rep. 538; Woods v. Kessler, 93 Ind. 356; Wallace v. Clark, 7 Blackf. 298; Clark v. Norton, 6 Minn.

replevin suit by the plaintiff therein. If the question of the value of the property was essential to the verdict, they are bound by the finding, although no formal issue was made concerning it.¹ A judgment for return, even upon a nonsuit not complied with, will sustain an action on the bond for at least nominal damages; for to that extent it is imperative and conclusive.² The judgment for the return of the property authorized by statute to be rendered upon the withdrawal of a replevin suit, cannot estop the surety from showing, in mitigation of damages, that his principal owned the property replevied but not returned.³

§ 507. What may be shown in defense. Where a judgment for the value in lieu of a return, by the election of the defendant, is regularly taken; or in the alternative in case return cannot be had, it is absolute, whether rendered on the

412; *Chambers v. Waters*, 7 Cal. 390; *Wall v. Humphreys*, 4 Dana, 209; *Kimmell v. Kint*, 2 Watts, 431. This view is favored in Delaware, though the court did not apply it because of deference to a former decision to the contrary. *Harmon v. Collins*, 2 Pennewill, 36, 45 Atl. Rep. 541, following *Mellvaine v. Holland*, 5 Harr. 10.

The sureties are liable to the party or parties to whom the final determination of the issue has awarded a recovery, though they were not all the parties plaintiff in the suit. *Pilger v. Marder*, 55 Neb. 113, 75 N. W. Rep. 559.

In *Warner v. Matthews*, 18 Ill. 83, *Skinner, J.*, thus discussed the effect of judgment for the defendant in replevin, rendered on the trial of an issue denying the plaintiff's title: "The judgment in the action of replevin necessarily determined that the plaintiff in that (the defendant in this action) was not entitled to the possession of the property, and that the defendant in that action (the plaintiff in this action) was entitled to a return thereof; and to that extent, and no further, are the rights of the parties concerning the prop-

erty, and the ownership thereof, conclusively adjudged and determined. Whatever was in issue in that action, and essential to be found to authorize the judgment, and was in fact determined as between the parties, is *res judicata* and conclusive upon them. The defendant in that action was entitled to judgment upon either of the issues asserting property in himself, and denying the plaintiff's right; and to prove these issues on the part of the defendant it was only necessary to show that the plaintiff had not the right of possession, or that the defendant had a special interest in the property entitling him to the present possession. The general ownership of the property was not therefore necessarily determined. *Anderson v. Talcott*, 6 Ill. 365; *King v. Ramsey*, 13 Ill. 619; 1 Greenl. Ev., § 332." *Hawley v. Warner*, 13 Iowa, 42.

¹ *Washington Ice Co. v. Webster*, 125 U. S. 126, 8 Sup. Ct. Rep. 947.

² *Buck v. Rhodes*, 11 Iowa, 318; *Hayden v. Anderson*, 17 id. 158.

³ *Fielding v. Silverstein*, 70 Conn. 605, 40 Atl. Rep. 454.

merits or not.¹ But a mere judgment for return, without the trial of an issue of such scope as to embrace a determination of the extent or value of the defendant's interest, will not preclude inquiry upon that subject in an action on the bond. In the suit thereon the obligors may avail themselves of any fact which the plaintiff in replevin is not estopped by the judgment therein from setting up, in order to limit the sum for which recovery shall be had.² The fact that the replevin suit was defeated because prematurely brought;³ that the plaintiff is a mere trustee, representing claims not sufficient to absorb the entire value;⁴ that he has been fully compensated for the value of the property;⁵ that since the taking under the writ the plaintiff's interest in the property has been extinguished in whole or in part;⁶ that it has been delivered and accepted pending the suit;⁷ that the property has been restored to the

¹ *Buck v. Rhodes*, 11 Iowa, 348; *Hayden v. Anderson*, 17 id. 158; *Davis v. Harding*, 3 Allen, 302; *Williams v. Vail*, 9 Mich. 162, 80 Am. Dec. 76; *Ryan v. Akeley*, 42 Mich. 216, 4 N. W. Rep. 207; *Pearl v. Garlock*, 61 Mich. 419, 1 Am. St. 603, 28 N. W. Rep. 155.

² *Leonard v. Whitney*, 109 Mass. 265; *Denny v. Reynolds*, 24 Ind. 248; *Wallace v. Clark*, 7 Blackf. 298; *McKelvey v. McLean*, 34 Up. Can. C. P. 635; *Walter v. Warfield*, 2 Gill, 216; *Mason v. Sumner*, 22 Md. 312; *Ormsbee v. Davis*, 18 Conn. 555; *Pacaud v. McEwan*, 31 Up. Can. Q. B. 328; *Stockwell v. Byrne*, 22 Ind. 6; *Belt v. Worthington*, 3 Gill & J. 252; *Dugan v. Tyson*, 6 id. 458; *Cumberland Coal Co. v. Tilghman*, 13 Md. 74.

While a judgment in a replevin suit against a member of a partnership determines that the defendant was such member and that his interest in the tangible property of the firm had been lawfully attached, the amount or extent of that interest may be shown in an action on the replevin bond. *Hannon v. O'Dell*, 71 Conn. 698, 43 Atl. Rep. 147.

³ *Davis v. Harding*, 3 Allen, 302; *Martin v. Bailey*, 1 id. 381.

⁴ *Howe v. Handley*, 38 Me. 241.

⁵ *Vinton v. Mansfield*, 48 Conn. 474.

The sale on a *fi. fa.* of goods replevied in an action for rent is a defense to the sureties only to the extent of the proceeds of the sale. *Krumbhaar v. Stetler*, 20 Phila. 341; *Shell v. Hummel*, 1 Pearson, 19.

The recovery of judgment against the assigned estate of the principal in a replevin bond, to be paid on the settlement of such estate, does not merge the bond in the judgment, and, so far as the surety is concerned, the bond is satisfied only to the extent of the actual payments. *Schott v. Youree*, 142 Ill. 233, 31 N. E. Rep. 591. It is not a defense to the surety that his principal failed to file a claim on the bond against the assigned estate of the real plaintiff in the replevin suit, there being only mere passive delay. *Id.*

⁶ *Tuck v. Moses*, 58 Me. 462.

Under the Illinois statute the principal in the bond can prove property in himself only in mitigation of the damages. *Holler v. Coleson*, 23 Ill. App. 324.

⁷ *Conroy v. Flint*, 5 Cal. 327.

defendant by means of legal proceedings;¹ that a substantial portion of the property has been tendered in the same condition in which it was when the writ issued;² that other goods of like character and value had been substituted for those sold, and that the stock so replenished had been accepted by the plaintiff as the equivalent of the goods described in the bond, and as full satisfaction of the judgment in the replevin action;³ that the sureties hold a mortgage upon the property in suit;⁴ that the defendant has the title to the property, when the decision of that question was not involved in the replevin suit,⁵ or any other fact which would show that the replevin was defeated on some technical ground, or that the defendant had but a temporary or partial right, may be shown, and the [53] amount recoverable for the value will be limited accordingly.⁶ If the defendant was possessed of the property under a con-

¹ *Rinker v. Lee*, 29 Neb. 783, 46 N. W. Rep. 211; *Otto v. Burch*, 50 Neb. 894, 70 N. W. Rep. 513; *Harrow v. Ryan*, 31 Iowa, 156.

² *Johnson v. Mason*, 64 N. J. L. 258, 45 Atl. Rep. 618; *Harts v. Wendell*, 26 Ill. App. 274.

The plaintiff may return a part of the goods if they are separable from and not dependent upon the others for use or value, and are in the same condition as when taken. *Edwin v. Cox*, 61 Ill. App. 567.

³ *Union Stove & Machine Works v. Breidenstein*, 50 Kan. 53, 31 Pac. Rep. 703.

⁴ *Ringgenberg v. Hartman*, 124 Ind. 186, 24 N. E. Rep. 987; *McFadden v. Ross*, 108 Ind. 512, 8 N. E. Rep. 161; *Henry v. Ferguson*, 55 Mich. 399, 21 N. W. Rep. 381.

⁵ *Jones v. Smith*, 79 Me. 452, 10 Atl. Rep. 256; *Crabbs v. Koontz*, 69 Md. 59, 13 Atl. Rep. 591; *Pearl v. Garlock*, 61 Mich. 419, 1 Am. St. 603, 28 N. W. Rep. 155; *Ernst v. Hogue*, 86 Ala. 502, 5 So. Rep. 738; *Magerstadt v. Harder*, 95 Ill. App. 303; *Wallace v. Clark*, 7 Blackf. 298; *Belt v. Worthington*, 2 Gill & J. 247; *Lyon v. Pease*, 86 Ill. App. 251; *Weber v. Hertz*, 87 id. 601;

Easter v. Foster, 173 Mass. 39, 53 N. E. Rep. 132, 73 Am. St. 257.

⁶ *Simpson v. McFarland*, 18 Pick. 427, 29 Am. Dec. 602; *Wheeler v. Train*, 4 Pick. 168; *Flagg v. Tyler*, 6 Mass. 33; *Mattoon v. Pearce*, 12 id. 406; *Bartlett v. Kidder*, 14 Gray, 449; *Ware River R. v. Vibbard*, 114 Mass. 458; *Leonard v. Whitney*, 109 id. 265; *Witham v. Witham*, 57 Me. 447, 99 Am. Dec. 787; *Walter v. Warfield*, 2 Gill, 216; *Hacker v. Johnson*, 66 Me. 21; *Hayden v. Anderson*, 17 Iowa, 158; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Russell v. Butterfield*, 21 Wend. 30; *De Witt v. Morris*, 13 id. 496; *Wallace v. Clark*, 7 Blackf. 298; *Jackson v. Bry*, 3 Ill. App. 586; *Dehler v. Held*, 50 Ill. 491.

In *Mason v. Samner*, 22 Md. 312, *Bowie, C. J.*, said: "The first and second exceptions raise the question of how far the judgment in the action of replevin concludes the obligors in the bond. The appellant contends that wherever the title to property is in issue, or might have been in issue, in the original proceedings, that question becomes *res adjudicata*, and cannot afterwards, in any subsequent proceedings, be

ditional title and it has been placed beyond the court, pursuant to irregular judicial proceedings, and the proceeds of it have been paid to the plaintiff and credited upon the irregular judgment, the purchase-money will be credited as of the date

inquired into; he assimilates this to a case of *sci. fa.*, where any defense which might have been pleaded to the original action cannot be set up against the *sci. fa.* In the case of *Belt v. Worthington*, 3 Gill & J. 252, Archer, J., declared that 'the object of the law in prescribing that a replevin bond shall be entered into by a plaintiff before he should have the benefit of the writ was only to give indemnity to the defendant. If, in truth, he had no right to the property at the time of the institution of the suit, the rejection of the evidence, by putting it in his power to recover the value of the goods, would enable him to overreach a just measure of indemnity, and inflict a penalty which the law never contemplated.' Repudiating the analogies sought to be established in that case to judgments by default in actions on appeal bonds and money contracts, he said the action of replevin was '*sui generis*,—the recovery on the replevin bond ought to be moulded in such manner as will best subserve the principles of justice.

. . . The question (of the admissibility of evidence) must always be regulated by reference to the rights decided in the action and the nature and character of the bond.' In this case the obligors in the replevin were permitted, after nonsuit in replevin and judgment by default on the bond, to show, in mitigation of damages, that they had title to the articles replevied. The same general principle is announced by Stephen, J., in the case of *Dugan v. Tyson*, 6 G. & J. 458. This principle is exemplified most strongly in the case of *Walter*, for use of

Walter, v. Warfield et al., 2 Gill, 216, where, after judgment upon verdict rendered on pleas of *non cepit*, and property in the defendant, and judgment for return of the property in the action of replevin, upon an action on the replevin bond against the obligors, the plaintiffs in the action of replevin, as defendants in the action on the bond, were permitted to show in mitigation of damages that the property was not in the defendant in the first action and plaintiff in the second. This case was argued before Archer, Dorsey, Chambers and Spence, JJ., and affirmed without dissent. In the more recent case of *the Cumberland Coal Co. v. Tilghman*, 13 Md. 74, the same doctrine is forcibly expressed. The theory of the action of replevin is thus defined by the learned judge, who, delivering the opinion of the court in this case, says: 'In this state the action is most generally resorted to for the purpose of trying the right of possession at the time of issuing the writ, and not to determine necessarily the *absolute* title to the property for all time. And this being so, it follows that if the plaintiff at the time of bringing the suit has the right to the possession, he must succeed; or, if he have it not, that his action must be defeated. Whoever is entitled to the possession, whatever may be his title in other respects, may maintain or defeat the action of replevin. His right to success in the action of replevin depending entirely on his right of possession, in reason it follows that his title to damages must be confined to the extent of interference with that possession. If the right to possession covers all time, or is limited

of the sale.¹ The accidental destruction of property wrongfully replevied will not release the sureties from their liability, it not appearing the loss was caused by the act of God.² In some jurisdictions the sureties may take advantage of the

to a determinate period, the damages will be accordingly graduated, as the case may be. In the case now before this court, the effort on the part of the defendants was to show, as alleged by them, in mitigation of damages, title in the Cumberland Coal & Iron Co. Now, this they could not do because that question was decided in the replevin suit. It was, however, competent to them to show that, although the defendant in the replevin suit had title to the possession of the boat at the time of the judgment rendered in his favor, yet that title was of but short duration, and terminated by contract in a short time after that judgment. No such evidence was offered to the court below. It is obvious from the theory and illustration given in the above extract that the judgment in replevin does not conclude the obligors in the bond from proving by the proceedings in the cause, or *aliunde*, the character of the possessory right upon which the plaintiffs in the action on the bond recovered in the replevin suit. If from these it appears that the relation between the parties to the action in replevin was that of landlord and tenant, cultivating or renting on shares, and that the subject of replevin was the crop then growing upon the farm of the landlord, such evidence shows a qualified property, or joint right of possession, which would defeat the action of re-

plevin by the tenant, and at the same time diminish the claim of damages on the part of the landlord founded on his *prima facie* right to the value of the appraisement, showing that he was entitled to but a moiety of the same. Such evidence was proper to rebut the '*prima facie*' case of the plaintiff on the bond. His right to damages must be confined to the extent of his ownership over the property replevied. If as joint owner of the property he was entitled to such possession as precluded his tenant from replevying, and secured him a judgment of *retorno habendo*, yet his title was not so absolute and entire as to entitle him to recover of the principal and surety the full value of the property, or more than the value of his share of the crops. If we are correct in these premises, it necessarily follows that the prayer offered on the part of the appellant was not proper, since it required the court to instruct the jury that the appraisement was the measure of damages: this, we have seen, was but *prima facie* evidence, subject to be rebutted by such testimony as was offered on the part of the appellee."

In *Smith v. Lisher*, 23 Ind. 500, the proceedings in the action of replevin were put in evidence, and in that action the court found "the property mentioned in said complaint and writ of replevin in said defendant,

¹ *Hall v. Tillman*, 115 N. C. 500, 20 S. E. Rep. 726.

² *Suppiger v. Gruaz*, 137 Ill. 216, 27 N. E. Rep. 22; *Heard v. Hicks*, 101 Ala. 102, 13 So. Rep. 256; *Carr v. Houston Guano & Warehouse Co.*,

105 Ga. 268, 31 S. E. Rep. 178; *George v. Hewlett*, 70 Miss. 1, 12 So. Rep. 855, 35 Am. St. 626, overruling *Whitfield v. Whitfield*, 44 Miss. 254; *McPherson v. Acme Lumber Co.*, 70 Miss. 649, 12 So. Rep. 857. See § 1151.

neglect of the court to render the alternative judgment required by the statutes for a return of the property or its value if a return cannot be had.¹ There can be no recovery for a failure to return without proof of a judgment awarding it;² notwithstanding the attorneys of the parties stipulate that the property cannot be returned, the sureties may show the contrary.³ The rule established by the supreme court of the United States precludes the sureties from taking advantage of the omission of the trial court to render an alternative judgment.⁴ They are not bound for any liability of their principal not involved in the replevin suit;⁵ nor for the damages sustained by one who has been substituted as defendant in his stead.⁶ If such suit is dismissed as to one of the defendants and proceeds to judgment against the other the sureties are released.⁷

In an action for the equitable reduction of damages on a replevin bond given by one partner who has taken from his copartner some of the firm property, the rule is full indemnity for the obligee, and the obligor must establish not merely the apparent interest of the other in the property replevied upon a numerical division of it among the members of the firm, but go further and show that as between the obligee and himself the former will have had more of the property and funds of the firm than himself if full damages are given, or that the obligee is indebted to the firm, and his equitable interest in the property does not equal the value of that replevied and not returned.⁸ In Pennsylvania, though set-off is not allowed in

and that he have possession thereof:" and it was held that the finding and judgment was conclusive between the parties to the suit on the bond as to the right of property, and precluded any proof of title thereto in a stranger in mitigation; but in *Stockwell v. Byrne*, 22 Ind. 6, it was held that, if the title was not tried in the replevin suit, title in a stranger may be shown to reduce the recovery to nominal damages.

¹ *Lee v. Hastings*, 13 Neb. 508, 14 N. W. Rep. 476.

² *Citizens' State Bank v. Morse*, 60 Kan. 526, 57 Pac. Rep. 115; *Swartz v.*

English, 4 Kan. App. 509, 44 Pac. Rep. 1004; *Vinyard v. Barnes*, 124 Ill. 346, 16 N. E. Rep. 254; *Thomas v. Irwin*, 90 Ind. 557.

³ *Lee v. Hastings*, 13 Neb. 508, 14 N. W. Rep. 476.

⁴ *Sweeney v. Lomme*, 22 Wall. 208; *Katz v. American Bonding & Trust Co.*, 86 Minn. 168, 90 N. W. Rep. 376.

⁵ *Lee v. Hastings*, *supra*.

⁶ *Vinton v. Mansfield*, 48 Conn. 474. But see *Hanna v. International Petroleum Co.*, 23 Ohio St. 622, stated in first note to the next section.

⁷ *Tyler v. Davis*, 63 Miss. 345.

⁸ *Clapham v. Crabtree*, 72 Me. 473.

replevin, the sureties for the defendant in the replevin suit may "defalk" the amount of a counter-claim against the plaintiff which they bought of their principal.¹

§ 508. **Damages when plaintiff recovers as special [54] owner; effect of change in statute.** The cases in which a defendant in replevin will be limited to the value of his special interest are those in which the other party is the general owner or represents him, or has made reparation to him.² In [55] replevin brought by a mere stranger to the title, who never had possession until he obtained it by the writ, on a judgment for return, or in an action on his bond for breach of the condition to return the property, recovery may be had for its full value, although the party so recovering, as between him and the general owner, has but a possessory right.³ Where the property replevied from a sheriff was held by him under several executions the sureties were liable for such sum as would put the sheriff in the position he occupied before the replevin and give him the power to perform his duty in the way he would have done if the property had remained in his custody.⁴

¹ *Snyder v. Frankenfield*, 4 Pa. Dist. Rep. 767.

² *Atkins v. Moore*, 82 Ill. 240; *Broadwell v. Paradise*, 81 id. 474; *Dilworth v. McKelvey*, 30 Mo. 149; *Rhoades v. Woods*, 41 Barb. 471; *Seaman v. Luce*, 23 Barb. 240; *Noble v. Epperly*, 6 Ind. 468; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Weaver v. Darby*, 42 Barb. 441; *Buck v. Remsen*, 34 N. Y. 383.

³ *Bradley v. Reynolds*, 61 Conn. 271, 287, 23 Atl. Rep. 928, citing the text; *Broadwell v. Paradise*, 81 Ill. 474; *Atkins v. Moore*, 82 Ill. 240; *Bennet v. Gilbert*, 94 Ill. App. 505; *Russell v. Butterfield*, 21 Wend. 30; *First Nat. Bank v. Crowley*, 24 Mich. 492; *Woodman v. Nottingham*, 49 N. H. 387; *Littlefield v. Biddeford*, 29 Me. 310; *Fallon v. Manning*, 35 Mo. 271; *Frei v. Vogel*, 40 Mo. 149; *White v. Webb*, 15 Conn. 302; *Ingersoll v. Van Bokkelin*, 7 Cow. 670; *Green v. Clark*, 12 N. Y. 343; *Brizeo*

v. Maybee, 21 Wend. 144; *Kennedy v. Whitwell*, 4 Pick. 466; *Van Baalen v. Dean*, 27 Mich. 104; *Stanley v. Gaylord*, 1 Cush. 536, 48 Am. Dec. 643; *Farnham v. Moor*, 21 Me. 508; *Mattoon v. Pearce*, 12 Mass. 406; *Flagg v. Tyler*, 6 id. 33.

In *Hanna v. International Petroleum Co.*, 23 Ohio St. 622, it was held in replevin brought against a party having possession of the property as agent, that the principal might be substituted in his place without releasing the sureties in the replevin bond—that they stand bound for the indemnity of the new party equally as though he had been the original and only defendant—it is no prejudice to the plaintiff in the replevin suit. Compare *Walter v. Warfield*, 2 Gill. 216; *Vinton v. Mansfield*, 48 Conn. 474; *Tyler v. Davis*, 63 Miss. 345, stated in last section.

⁴ *Tanton v. Slyder*, 93 Ill. App. 455.

Where a bond in accordance with the practice prescribed by statute is conditioned to return the property if adjudged, and to pay any judgment that the defendant may recover against the plaintiff in the replevin suit, it obviously extends and will be limited to such judgment as the statute then in force pro-[56] vides for. Then, if the statute gives a defendant who recovers judgment by nonsuit or discontinuance an absolute right to a return, or in lieu thereof, at his election, a judgment for the value, in addition to damages for detention, the bond will cover any judgment recovered for the value, and especially if the statute provides that in a suit on the bond the amount for which judgment is recovered in replevin shall be the measure of damages, these cannot be reduced or increased by proof of any facts antecedent to the judgment.¹ But if, under the code practice, a judgment for return is rendered, and there is no adjudication of the value to be paid or collected in case delivery of the property cannot be had, the obligee is, nevertheless, entitled to recover the value on the undertaking or bond.² The

¹ *Williams v. Vail*, 9 Mich. 162, 80 Am. Dec. 76.

² *Whitney v. Lehmer*, 26 Ind. 503. In this case Frazer, J., said: "It is clearly not a void judgment; and the question is, what are the liabilities of the obligors in the replevin bond, who undertook that the plaintiff in that suit would return the property if such a return should be adjudged, as it has been. Is the defendant in that suit precluded from recovering the actual damages which resulted to him merely because the jury in that case failed to find the value of the property? . . . In the absence of any direct authority, the case must find its solution in such general rules of the law as seem to be applicable to it. It will be noticed that the statute under examination contains no negative words, nor does it purport to prescribe a mode by which a remedy may be obtained upon the bond, or the tribunal where that remedy shall be sought. It does not even regulate the prac-

tice in a suit upon the bond; it is the practice in the replevin suit only which it prescribes. We have, then, a valid bond; its conditions broken; what is the measure of damages for breach of the condition to return the property? The answer furnished in all the cases ever decided, when no statute interfered, is the value of the property at least; this value to be shown as in ordinary cases involving an inquiry as to value. The case is not one where the statute creates a new right, giving a particular remedy therefor. In such a case the statutory remedy is the only one. But this is a right of action arising by the common law out of a breach of the contract; and if the statute gives a remedy without negative words, the common-law remedy still remains and may be pursued at the plaintiff's option. An assessment of the value of the property in the replevin suit, and a judgment in the alternative for its return or its value, would, as evidence, undoubtedly

condition is absolute to return the property, if adjudged, [57] and damages may be assessed on it unless it is satisfied by performance of other conditions. Where, however, a judgment regulated by the code is rendered absolutely for the value and not as an alternative, if delivery of the property cannot be had the liability of the sureties for that judgment is not so clear.¹ In Minnesota a party has no election to take a money judgment only for the value of the property. The bond must be read and construed in connection with the provisions of the statute, which enter into and become a part of it. Thus read and construed, the obligation of the sureties to pay the value of the property was not absolute, but only conditional in case a return could not be had. The expression, "such sum as for any cause may be recovered against the defendant," in a bond given for the return of the property, means such sum as may, in connection with a judgment for a delivery of the property, be recovered as damages for its detention, or, perhaps, for an injury to it, and also, conditionally, the value of the property in case a return cannot be had.²

have bound the parties upon the question of value, for the reason that it would have been a judicial determination of that question by a tribunal having that authority, putting it at rest forever. But it does not follow that the absence of such assessment and judgment shall have the practical effect of a finding and judgment that the property was of no value, or that no other tribunal shall examine the question. Common justice, as well as reason, would be shocked by the announcement of such a doctrine. The statute does not so declare, either in terms or by any implication which the recognized rules of construction will warrant. Grant that the plaintiffs had the right to have the verdict of the jury which tried the replevin suit upon the question of the value of the property. They should have asserted the right, and failing to do

so then, when they should have acted, shall they do so now when it is impossible for their adversary to obtain that verdict? Nor can the surety . . . be deemed to be in any better position than his principals. His liability is co-extensive with theirs. Nothing has been done to work his discharge, if it be conceded that his principals are yet bound." *Yelton v. Slinkard*, 85 Ind. 190; *Sweeney v. Lomme*, 22 Wall. 203.

¹*Gallarati v. Orser*, 27 N. Y. 324; *Ashley v. Peterson*, 25 Wis. 621; *Nickerson v. Chatterton*, 7 Cal. 568; *Clary v. Rolland*, 24 Cal. 147; *Mason v. Richards*, 12 Iowa, 74; *Lomme v. Sweeney*, 1 Mont. 584; *Sweeney v. Lomme*, 22 Wall. 203.

²*New England Furniture & Carpet Co. v. Bryant*, 64 Minn. 256, 66 N. W. Rep. 974, referring to *Gallarati v. Orser*, 27 N. Y. 324; *Dwight v. Enos*,

§ 509. **Bond by defendant to retain the property.** The defendant is permitted in many jurisdictions to prevent the delivery of replevied property to the plaintiff by giving a bond substantially like that required of the latter, except the condition to prosecute the suit. The measure of damages, of course, will be the same for breach of like conditions.¹ The costs of the action of replevin cannot be recovered on this bond;² nor the damages to the property while in the defendant's possession, if accepted by the officer on the writ of return, unless the bond is conditioned to pay any judgment recovered against the defendant, and a judgment is recovered for such damages.³ If the defendant's undertaking admits that the plaintiff has taken the property described in his affidavit and requisition from his possession he cannot afterward deny that he had possession of such property or any part of it at the commencement of the action, or show that it was different or other property from that described.⁴ The defendant cannot set up in defense of an action on his bond any issue which he could with reasonable diligence have set up or interposed in the replevin suit. It is a defense *pro tanto* if the property has been sold by a receiver and after the trial of such suit the plaintiff therein applied to the court for and received a portion of the proceeds of the sale, the remainder being held to abide the result of the action in which the receiver was appointed.⁵ The liability of the sureties ceases when the proceeding in sequestration is quashed.⁶

9 N. Y. 470, and *Fitzhugh v. Winan*, 9 N. Y. 559, and disapproving *Mason v. Richards*, 12 Iowa, 73, and *Robertson v. Davidson*, 14 Minn. 422. See *Katz v. American Bonding & Trust Co.*, 86 Minn. 168, 90 N. W. Rep. 376.

¹ In *Tibbal v. Cahoon*, 10 Watts, 232, the plaintiff gave a bond with surety to prosecute the suit to effect and without delay, and to return the property if adjudged; the defendant gave a counter bond, and retained the property. Afterwards, arbitra-

tors awarded no cause of action. It was held that the plaintiff's sureties were liable for the costs in the replevin suit.

² *Lutes v. Alpaugh*, 23 N. J. L. 165.

³ *Douglass v. Douglass*, 21 Wall. 98.

⁴ *Martin v. Gilbert*, 119 N. Y. 298, 16 Am. St. 823, 23 N. E. Rep. 813, 24 id. 460; *Diossy v. Morgan*, 74 N. Y. 11.

⁵ *Boyd v. Huffaker*, 39 Kan. 525, 18 Pac. Rep. 508.

⁶ *London v. Miller*, 19 Tex. Civ. App. 446, 47 S. W. Rep. 734, and local cases cited.

SECTION 6.

ATTACHMENT AND FORTHCOMING BONDS.

§ 510. Attachment bonds; when cause of action accrues.

Attachment bonds and undertakings are statutory obligations, differing somewhat in form in the several states, but not substantially in legal effect. They are generally conditioned that the obligors will pay all damages which the defendant in the suit may sustain by reason of the attachment, if the plaintiff shall fail to recover judgment, or because of the wrongful suing out of the writ. By "wrongful," as used in the statutes and in obligations made under them, is meant unjustly, injuriously, tortiously, in violation of right.¹ The condition of the bond is violated if the causes alleged for attachment do not exist, although the party suing it out may have believed in their existence;² but not if the alleged ground is true in fact, though the party who made the allegation had no knowledge of its truth.³

In Iowa the plaintiff in an action on the attachment bond must allege and prove that the attachment plaintiff had no reasonable grounds for believing that the allegations in his

¹ *Raver v. Webster*, 3 Iowa, 502, 66 Am. Dec. 96; *Smith v. Eakin*, 2 Sneed, 456, 462; *Carothers v. McIlhenny Co.*, 63 Tex. 138; *Woods v. Huffman*, 64 id. 98.

There must be a debt due or to become due, and the existence of one of the statutory grounds for suing out the writ. *McLane v. McTighe*, 89 Ala. 411, 8 So. Rep. 70; *Bliss v. Heasty*, 61 Ill. 338; *Steen v. Ross*, 22 Fla. 480.

"When only actual damages are sought, and the fact of indebtedness is not denied, the complaint in an action on the bond should negative the existence of any statutory ground for suing out the attachment, since the bond is not broken unless the attachment was wrongfully sued out, and the non-existence of the particular ground averred in the af-

fidavit, or of any particular ground does not render the attachment wrongful." *Painter v. Munn*, 117 Ala. 322, 23 So. Rep. 83, 67 Am. St. 170.

² *Mobile Furniture Commission Co. v. Little*, 108 Ala. 399, 19 So. Rep. 443; *Hundley v. Chadick*, 109 Ala. 575, 19 So. Rep. 845; *Troy v. Rogers*, 113 Ala. 131, 20 So. Rep. 999; *Birmingham Dry Goods Co. v. Finley*, 122 Ala. 534, 26 So. Rep. 138; *Jerman v. Stewart*, 12 Fed. Rep. 266; *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519; *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Jackson v. Smith*, 75 id. 97; *Pettit v. Mercer*, 8 B. Mon. 51. But see *Mahnke v. Damon*, 3 Iowa, 107.

³ *McCormick Harvesting Machine Co. v. Collier*, 75 Iowa, 559, 29 N. W. Rep. 832; *Calhoun v. Hannan*, 87 Ala. 277, 6 So. Rep. 291.

affidavit for the writ were true; it is not enough to show that they were not true.¹ The original case was ruled under a statute which did not vary materially from the statutes of other states; the later cases were decided under a statute like that of Washington, the court of which has taken issue with the view held in Iowa, which latter court, it is said, stands alone in holding that the actual damages are not recoverable if the attachment was issued without cause. "To say that a debtor may be deprived of the use of his property, not for any fault of his own, but because he believes that his creditor has been in fault, is to make his rights depend upon a matter which the law cannot, and does not pretend to, regulate, viz., the nature and condition of the creditor's mind; and is to put him, upon the trial of his suit for damages, to proof of facts which he can get positively from no other source but the creditor himself, which would be entirely unreasonable. Moreover, different creditors whose rights to have an attachment are equal when a cause exists, would be placed upon an entirely different footing if the writ should be discharged for want of actual cause. When one creditor attaches, others are likely to, deeming that the affidavit of the first one on file is sufficient information to lead a prudent person to act, but in a suit for damages the first one would escape, under the Iowa rule, because he had credible information, while the second would pay the full penalty. The language of the statute is, "and that there was no reasonable cause to believe the ground . . . to be true.' The 'ground' in this case was that respondent had disposed of its property with intent to defraud its creditors, and that it was about to do so; but the cause for believing that ground to be true was not the statement of any one that there was a cause, but a fact, or facts, as, for example, a sham sale to a third person, without consideration, with the understanding that he was to hold it or sell it for the benefit of the respondent, or a plan or scheme devised for that purpose but not yet executed. This cause the law requires the plaintiff to prove to be non-existent."² If the other conditions giving the right to sue on the bond exist, it is imma-

¹ *Burton v. Knapp*, 14 Iowa, 196, Wash. 302, 33 Pac. Rep. 650, 36 Am. following earlier cases. St. 156.

² *Seattle Crockery Co. v. Haley*, 6

terial that the attachment defendant had no property except such as was exempt.¹

The principal and his sureties are liable for the wrongful suing out of an attachment by an agent, though it was done without directions.² If an attachment is dissolved after notice and hearing because the allegations in the affidavit were false and the case is not one in which the writ might issue, this is conclusive in an action upon the bond that it was wrongfully obtained, the ruling not being reversed.³ If a suit is abandoned under circumstances which show that it was not instituted in good faith, the plaintiff is liable. "Suitors who try experiments without hope of success must take the consequences. They cannot be considered in good faith."⁴ If the issue in the attachment is disposed of without determining whether it was wrongfully obtained that question may be adjudicated in the suit on the bond.⁵ A judgment in the original suit, fixing the damages, is not a condition precedent to an action against the sureties.⁶ It is held in Kentucky that mere failure to succeed in the attachment suit will not forfeit the attachment bond, but it must be shown that it was wrongfully obtained; that is, without just cause; and in case of a nonsuit or an abandonment of the suit this would not necessarily appear.⁷ If the defendant files a bond for the restitution of the property, and it is restored, there is a waiver of the right to resort to an action on the attachment bond.⁸

¹ Union Mercantile Co. v. Chandler, 90 Iowa, 650, 57 N. W. Rep. 595; Troy v. Rogers, 113 Ala. 131, 20 So. Rep. 999. See Crofford v. Vassar, 95 Ala. 548, 10 So. Rep. 350, holding that the levy of an attachment for rent on property not subject to it is an abuse of the process for which the sureties are not liable.

² Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 Pac. Rep. 650, 36 Am. St. 156; Jackson v. Smith, 75 Ala. 97.

³ Hoge v. Norton, 22 Kan. 374; Trentman v. Wiley, 85 Ind. 33; Sannes v. Ross, 105 id. 558, 5 N. E. Rep. 699; State v. McKeon, 25 Mo. App. 667.

⁴ Littlejohn v. Wilcox, 2 La. Ann. 620; Blum v. Gaines, 57 Tex. 135.

⁵ Renkert v. Elliott, 11 Lea, 235; Sloan v. Langert, 6 Wash. 26, 32 Pac. Rep. 1015.

⁶ Boatwright v. Stewart, 37 Ark. 614.

⁷ Pettit v. Mercer, 8 B. Mon. 51; Cooper v. Hill's Adm'r, 3 Bush, 219. See Young v. Broadbent, 23 Iowa, 539.

If the plaintiff has a good cause of action on which an attachment might issue, a dissolution of the attachment for some irregularity is not ground for recovering on the bond under a statute which imposes liability for "improperly" suing out the writ. Steen v. Ross, 22 Fla. 480.

⁸ Beck v. Lang, 15 Ind. App. 503, 41 N. E. Rep. 555.

§ 511. Who may sue. Under the federal statutes¹ the right of action in a bankrupt for the wrongful attachment of his chattels passes to his assignee so far as compensation is claimed for injuring, detaining or converting the property. The right to compensation for injury to the bankrupt's business, reputation and credit and to vindictive damages for maliciously suing out the attachment or abusively using the process remains in him. Hence separate actions may be maintained, the liability of the sureties being limited to the penalty of the bond.² A bond payable to a named defendant "*et al.*" inures to the benefit of each and all of several defendants. If one alone is aggrieved he may sue in his own name or in the names of all for his use. The obligors are liable to each defendant severally if each has a several interest, and the sureties for each of their principals severally as well as jointly.³ Only a party to the bond may sue upon it. It does not inure to the benefit of the assignee of one of the attachment defendants, although he was a party to the attachment proceedings, and had possession of the property levied on.⁴ All the obligees in the bond must be joined as plaintiffs, in the capacity in which they are named, for the use of such as claim to have been injured.⁵ Recovery may be had in one suit for damages to both the joint and individual property of the obligees.⁶ Under a statute providing that the bond shall be conditioned for the payment of all damages which may be awarded against the plaintiff or sustained by any person, by reason of the attachment, if the effects of the defendant generally are attached, he only can sue on the bond, and if the attachment is of specific property only the owner of it or the defendant can sue.⁷ Under such statute the defendant may sue on the bond to recover, in addition to the damages awarded against the plaintiff, other damages sustained by

¹ § 5046, R. S.

² Doll v. Cooper, 9 Lea, 576.

³ Renkert v. Elliott, 11 Lea, 235.
See Watts v. Rice, 75 Ala. 289, stated
in § 513.

⁴ Hopewell v. McGrew, 50 Neb. 789,
70 N. W. Rep. 391.

⁵ Painter v. Munn, 117 Ala. 322, 67

Am. St. 170, 23 So. Rep. 83; King v.
Kehoe, 91 Iowa, 91, 58 N. W. Rep.
1071.

⁶ Sloan v. Langert, 6 Wash. 26, 32
Pac. Rep. 1015; Boyd v. Martin, 10
Ala. 700.

⁷ Davis v. Commonwealth, 13
Gratt. 139.

reason of the wrongful attachment.¹ Where it is provided that the bond shall be conditioned to pay any claimant of any property seized, a claimant of such property may sue on the bond without having recovered damages in an independent suit against the plaintiff in the attachment.²

§ 512. **Damages recoverable.** In the absence of statutes authorizing the recovery of exemplary damages the obligor and his sureties are not liable for anything beyond such actual damages as are the direct result of the attachment.³ The question of malice is not an issue.⁴ If an attachment has been obtained without just cause, the terms of the bond secure to the defendant all costs and damages that he has sustained in consequence thereof. The condition is satisfied and its terms substantially complied with, by awarding him damages adequate to the injury to the property attached and the loss arising from the deprivation of its use, together with the [59] costs and actual expenses incurred. It is considered that the legislature did not intend to impose on the sureties in the bond a more extensive liability. The plaintiff is not bound to show malice, nor can the defendant rely for defense on probable cause.⁵ The actual damages have generally been stated to be the injury to the plaintiff by being deprived of the use of his property, or its loss, destruction or deterioration, together with the costs and expenses incurred by him in the defense of the suit.⁶ On its being established that no cause existed for the

¹ *Offterdinger v. Ford*, 92 Va. 636, 21 S. E. Rep. 246.

² *Totten v. Henry*, 46 W. Va. 232, 33 S. E. Rep. 119.

³ *Crofford v. Vassar*, 95 Ala. 548, 10 So. Rep. 350; *Offterdinger v. Ford*, 92 Va. 636, 24 S. E. Rep. 246; *Elder v. Kutner*, 97 Cal. 490, 32 Pac. Rep. 563; *Commonwealth v. Magnolia Villa Land & Imp. Co.*, 163 Pa. 99, 29 Atl. Rep. 793; *Fidelity & Deposit Co. v. Bucki Lumber Co.*, 189 U. S. 135, 23 Sup. Ct. Rep. 582; *Bucki Lumber Co. v. Fidelity & Deposit Co.*, 109 Fed. Rep. 393, 48 C. C. A. 436.

If property wrongfully attached is taken from the possession of the plaintiff's mortgagees who are sell-

ing it under a mortgage, and independent proceedings are brought by the attachment creditor under which, instead of the attachment, the property is sold by consent, nominal damages only can be recovered on the attachment bond. *Schwartz v. Davis*, 90 Iowa, 324, 57 N. W. Rep. 849.

⁴ *Elder v. Kutner*, *supra*.

⁵ *Goodbar v. Lindsley*, 51 Ark. 380, 14 Am. St. 54, 11 S. W. Rep. 577; *Marqueze v. Sontheimer*, 59 Miss. 430; *McClendon v. Wells*, 20 S. C. 514; *Pettit v. Mercer*, 8 B. Mon. 51; *Commonwealth v. Magnolia Villa Land & Imp. Co.*, 163 Pa. 99, 29 Atl. Rep. 793.

⁶ *Blaul v. Tharp*, 83 Iowa, 665, 49 N. W. Rep. 1044, citing the text;

attachment, the plaintiff is a wrong-doer *ab initio*; and if the attached property is destroyed by fire while in the possession of the officer, the plaintiff is liable for its value, although the loss occurred without fault of the officer.¹ If property has been taken the owner is entitled to its fair cash value at the time it was taken² with interest at the statutory rate;³ he is not bound by the price for which it was sold under an order of the court.⁴

If the attachment causes the appointment of a receiver and a sale of the property by him, and such sale is made for less than the fair market value of the property when it was taken, the sureties are liable for such sum, in addition to what it brought at the sale, as will make such value.⁵ If a second attachment does not deprive the defendant therein of the possession of the attached property nor force the sale of it because of proceedings under the prior attachment, and the plaintiff only secures, to the extent of his claim, the surplus remaining after satisfying that attachment, the recovery on his bond cannot exceed the interest on such surplus during the time it was wrongfully withheld.⁶ Interest is not recoverable upon the value of the property or upon the expenses incurred in the suit until the property has been seized and liability for the expenses has attached.⁷ But an undertaking providing that

Ruthven v. Beckwith, 84 Iowa, 715, 45 N. W. Rep. 1073, 51 id. 153; State v. Gage, 52 Mo. App. 464; Stanley v. Carey, 89 Wis. 410, 62 N. W. Rep. 188, citing the text; Hundley v. Chadick, 109 Ala. 575, 583, 19 So. Rep. 845; Reidhar v. Berger, 8 B. Mon. 160; Pettit v. Mercer, id. 51; Campbell v. Chamberlain, 10 Iowa, 337; Frankel v. Stern, 44 Cal. 168; Bruce v. Coleman, 1 Handy, 515; Alexander v. Jacoby, 23 Ohio St. 358; Boatwright v. Stewart, 37 Ark. 614; Lowenstein v. Monroe, 55 Iowa, 82, 7 N. W. Rep. 406; Sanford v. Willetts, 29 Kan. 647; Marquee v. Sontheimer, 59 Miss. 430; Porter v. Knight, 63 Iowa, 365, 19 N. W. Rep. 282.

¹ Stanley v. Carey, 89 Wis. 410, 62 N. W. Rep. 188.

² State v. Ryley, 76 Mo. App. 412.

³ Norman v. Fife, 61 Ark. 33, 31 S.

W. Rep. 740, citing the text; Marchand v. York, 10 Ky. L. Rep. 777 (Ky. Super. Ct.); Pearce v. Maguire, 17 R. I. 61, 20 Atl. Rep. 98; Porter v. Knight, 63 Iowa, 365, 19 N. W. Rep. 282.

The damages for wrongfully sequestering a homestead are not confined to the value of the rent during the time its owner was unable to occupy it; his removal to another home and the inconvenience resulting are the natural and proximate results of its seizure and elements of actual damage. Blum v. Gaines, 57 Tex. 135.

⁴ Trentman v. Wiley, 85 Ind. 33.

⁵ Union Mercantile Co. v. Chandler, 90 Iowa, 650, 57 N. W. Rep. 595.

⁶ Emerson v. Converse, 106 Iowa, 330, 76 N. W. Rep. 705.

⁷ Trentman v. Wiley, 85 Ind. 33.

the maker will, on demand, pay the amount of any judgment that may be recovered, with interest, bears interest from the date of the recovery, and not from the date of its execution, and, upon demand, becomes payable, with interest, from that date.¹ If a fund deposited in bank is levied upon its owner is entitled to recover such sum as represents the excess of interest which he could have obtained for it over the amount allowed by the bank holding the fund.² If shares of stock are attached interest is recoverable on them, and also on dividends thereon subsequently declared, these being bound by the attachment.³

The expense which the owner of horses incurs by hiring others to do the work of those taken from him in order that he may perform a contract previously entered into may be recovered; and the recovery may be for such sum as the use of the property was worth to him though that is in excess of the market value.⁴ If by reason of the attachment the owner of property is unable to dispose of it, a depreciation of its value by reason of a change in the market is as much a ground of damage as though it resulted from any other cause.⁵ But it has been ruled in New York, on an appeal from an order denying defendant's application for an increase in the amount of the undertaking, that where an attachment has been made upon stocks the fact that during the continuance of the suit the shares have depreciated in price does not render the sureties upon the undertaking liable for the loss.⁶ Where a stock of goods is attached damages for interruption of the owner's business may be recovered, as well as reasonable costs and ex-

¹ *Sooy Smith v. American Surety Co.*, 28 App. Div. 346, 51 N. Y. 313. One judge dissented.

² *Fourth Nat. Bank v. Mayer*, 96 Ga. 728, 24 S. E. Rep. 453; *Vannatta v. Vannatta*, 21 Ky. L. Rep. 1464, 55 S. W. Rep. 685; *Northampton Nat. Bank v. Wylie*, 52 Hun, 146, 4 N. Y. Supp. 907.

³ *Jacobus v. Monongahela Nat. Bank*, 35 Fed. Rep. 395.

⁴ *State v. McKeon*, 25 Mo. App. 667.

⁵ *Fleming v. Bailey*, 44 Miss. 132; *Horn v. Bayard*, 11 Rob. (La.) 259.

⁶ *Miller v. Ferry*, 50 Hun, 256, 2 N. Y. Supp. 863. This case is based upon *McBride v. Farmers' Branch Bank*, 7 Abb. Pr. 347, in which an attachment was levied on money on deposit. The defendant made an unsuccessful defense, but did not procure a dissolution of the attachment by giving security, neither did he apply for an order directing the sheriff to collect the money. While the litigation was pending the holder of the fund failed. The attachment plaintiff was not liable for the loss.

penses incurred in procuring the discharge of the attachment and restoration of the property; but injury to the reputation of goods, caused by the levy of an attachment thereon, are too vague and uncertain to be capable of legitimate proof.¹ But the Mississippi court has no doubt that it is proper to allow the damages proved to have arisen from a loss of business with respect to the goods seized, in so far as their seizure suspended business and caused a loss as to those goods.²

Where property held for use and not for sale — buildings, machinery, etc., — is wrongfully attached damages may be recovered for the loss of its use and for any injury to it by wear or tear, or negligent care while in the hands of the officer; but, no malice being shown, there cannot be a recovery for supposed loss of profits from the interruption of business, nor, under the guise of depreciation in value, for injuries to business, credit, and reputation resulting from bankruptcy.³ Where the attachment interrupted the business of the defendant, a lumber company, and the attachment plaintiff thereafter refused to deliver materials to such company, evidence was properly received to show the net profits of the business for a few months prior to the levy of the attachment, not for the purpose of establishing the measure of damages, but as tending to show the damage done by the brief interruption of the defendant's business. The sureties were not liable for any damage done by the plaintiff's refusal to deliver material after the attachment was dissolved.⁴

[60] Generally injury to the credit and reputation of the party proceeded against by attachment has been held too remote and speculative;⁵ though it is otherwise in Nebraska and

¹ *Oberne v. Gaylord*, 13 Ill. App. 30, approving the text; *Alexander v. Jacoby*, 23 Ohio St. 358; *Moore v. Schultze*, 31 Md. 418.

² *Marqueze v. Sontheimer*, 59 Miss. 430, 442.

³ *Union Nat. Bank v. Cross*, 100 Wis. 174, 75 N. W. Rep. 992.

⁴ *Fidelity & Deposit Co. v. Bucki Lumber Co.*, 189 U. S. 135, 23 Sup. Ct. Rep. 582; *Bucki Lumber Co. v. Fidelity & Deposit Co.*, 109 Fed. Rep. 394, 48 C. C. A. 436.

⁵ *Elder v. Kutner*, 97 Cal. 490, 32 Pac. Rep. 563; *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. Rep. 650, 36 Am. St. 156; *Union Nat. Bank v. Cross*, 100 Wis. 174, 75 N. W. Rep. 992, citing the text; *Mocerf v. Stirman*, 16 Ky. L. Rep. 587, 29 S. W. Rep. 324; *Campbell v. Chamberlain*, 10 Iowa, 337; *Pettit v. Mercer*, 8 B. Mon. 51; *Heath v. Lent*, 1 Cal. 410; *Lowenstein v. Monroe*, 55 Iowa, 82, 7 N. W. Rep. 406; *Oberne v. Gaylord*, 13 Ill. App. 30; *State v. Thomas*, 19

in Alabama, if the writ was sued out on allegations of fraud.¹ Where malice is properly charged, however, such damages have been allowed.² Mental suffering resulting from the wrongful and malicious suing out of an attachment is not an element of damages in an action on the bond.³ To enhance the damages it is admissible to show that the property attached was designed for a special use which, being thwarted by the attachment, has been materially lessened in value.⁴ Depreciation of the attached personal property while in the officer's hands is a legitimate subject of inquiry with a view to damages therefor;⁵ though such depreciation be due to the negligence of the sheriff in not properly caring for the property. "In serving the writ, the sheriff is the agent of the attachment plaintiff, and for many purposes the acts of the officer are, in legal effect, the acts of the plaintiff. He is given possession and control of the attached property by the act of the plaintiff, and is, to a considerable extent, subject to his direction. Although he may be liable to the plaintiff for his negligence, yet we are of the opinion that, as between the plaintiff and the owner of the property, he should be treated as the agent

Mo. 613, 61 Am. Dec. 580; *Holliday v. Cohen*, 34 Ark. 707; *De Goey v. Van Wyck*, 97 Iowa, 491, 66 N. W. Rep. 787.

In case of the stoppage of business the damages must be limited to the probable profits during the time it is suspended. Injury to credit and loss of prospective profits is too remote and speculative. *Holliday v. Cohen*, *supra*. See *Lawrence v. Hagerman*, 56 Ill. 68.

¹ *Marx v. Leinkauff*, 93 Ala. 453, 460, 9 So. Rep. 318; *Meyer v. Fagan*, 34 Neb. 184, 51 N. W. Rep. 753; *Birmingham Dry Goods Co. v. Finley*, 122 Ala. 534, 538, 26 So. Rep. 138. See *Alabama State Land Co. v. Reed*, 99 Ala. 19, 13 So. Rep. 43.

² *Mayer v. Duke*, 72 Tex. 445, 10 S. W. Rep. 565; *Goldsmith v. Picard*, 27 Ala. 142; *Flournoy v. Lyon*, 70 id. 308 (although there was no levy); *Donnell v. Jones*, 11 id. 689.

In Tennessee the recovery is to be

had on the same principles as in the common-law action for malicious suits, modified by the nature of the case. The modification would be, in the case of a merchant, injury to his reputation and credit as a business man, and the wrong done by the wrecking of his business caused by his being thrown into bankruptcy on a false and unfounded claim, with, perhaps, other elements, such as the costs of the wrongful suits. *Doll v. Cooper*, 9 Lea, 576, 586.

³ *Tisdale v. Major*, 106 Iowa, 1, 75 N. W. Rep. 663.

⁴ *Knapp v. Barnard*, 78 Iowa, 347, 43 N. W. Rep. 197; *Carpenter v. Stevenson*, 6 Bush, 259.

⁵ *Crofford v. Vassar*, 95 Ala. 548, 551, 10 So. Rep. 350; *Lowenstein v. Monroe*, 55 Iowa, 82, 7 N. W. Rep. 406; *Frankel v. Stern*, 44 Cal. 168; *Mesheke v. Van Doren*, 16 Wis. 319; *Fleming v. Bailey*, 44 Miss. 132.

of the former, so far as liability for his negligence is sought to be enforced. There is no good reason for requiring the owner of the property in such a case to split his cause of action, and proceed against the plaintiff for a part, and against the sheriff for the remainder."¹ There can be no recovery for a depreciation of real estate while subject to the attachment,² if there was no change of possession.³ The impairment of the credit of an attachment debtor whose realty has been levied on, and his inability to sell or mortgage the same, are not the proximate consequences of the attachment, and it is immaterial, so far as the sureties are concerned, that the attachment was malicious.⁴ The sureties are not liable either for the failure of the officer to perform his duty under the writ, or for a trespass committed by him.⁵ It is not the natural or proximate result of a wrongful levy on property that inability to insure it shall result — a very doubtful proposition — or that the sale of a mortgage on it shall be prevented.⁶ The plaintiff cannot recover for losses alleged to have resulted from his inability to consummate the purchase of land for which he had bargained, or for his being prevented from sowing a crop thereon. Such damages were regarded as too remote and speculative. The court said: It is not at all certain that the purchase in Mississippi would have been completed, and the defendant have removed there, even though no attachment had been levied on his property. If the Mississippi arrangement had been fully consummated, it cannot be presumed that it would have inured to defendant's benefit. Whether or not the purchase would have proved a profitable investment is a matter purely speculative. So, also, the claim that defendant, if not prevented by these

¹ *Blaul v. Tharp*, 83 Iowa, 665, 94 N. W. Rep. 1044 (one judge dissented); *Ruthven v. Beckwith*, 84 Iowa, 715, 45 N. W. Rep. 1073, 51 *id.* 153.

² *Heath v. Lent*, 1 Cal. 410.

³ *Tisdale v. Major*, 106 Iowa, 1, 75 N. W. Rep. 663; *Brandon v. Allen*, 28 La. Ann. 60; *Trawick v. Martin-Brown Co.*, 79 Tex. 460, 14 S. W. Rep. 564.

⁴ *Elder v. Kutner*, 97 Cal. 490, 32 Pac. Rep. 563.

⁵ *Berwald v. Ray*, 165 Pa. 192, 30 Atl. Rep. 727; *Offterdinger v. Ford*, 92 Va. 636, 650, 24 S. E. Rep. 246; *Crow v. National Bank*, 62 Ill. App. 24. Compare *Blaul v. Tharp*, 83 Iowa, 665, 49 N. W. Rep. 1044, stated *supra*.

⁶ *King v. Kehoe*, 91 Iowa, 91, 58 N. W. Rep. 1071.

attachments, would have been sowing oats in the sunny South, is a matter so devoid of certainty as not to be a proper element of damages.¹

§ 513. *Same subject.* As we have seen, there are cases which deny the right to recover damages on account of the loss of profits because they are too remote. On this theory it has been held that a plaintiff in a suit on the bond cannot prove that by reason of the attachment and the interruption of his business he lost advances which he had made and the opportunity to dispose of property which came to him as the result of the advances made to others.² In a Kansas case³ a herd of cattle was attached and taken from the range where they had been kept and placed on another range. The jury found that by reason of the inferiority of the latter the cattle did not increase in weight as they should have done; that they did not depreciate in value, but that they did not grow as they would if they had not been removed. Brewer, J., said: "It is a case of gain prevented rather than of loss sustained, and the questions are whether such gain prevented is proximate and certain — directly the result of the removal and inferior care — and the amount thereof susceptible of reasonably certain measurement. Both these questions the jury, by their verdict, answered in the affirmative, and we cannot say that the testimony did not fully warrant the answers. Of course, absolute certainty is not attainable, as in casting up the figures of an account; but nevertheless there are certain laws of feeding and growth, well understood among cattle men, and whose results work out with sufficient certainty for business calculations and judicial investigations. The raising of cattle for market has been an extensive and oftentimes profitable business in this state, and it would be strange if one could wrongfully take from the owner a herd of cattle, remove them to a poorer range, feed them on inferior food, and so treat them that during the growing season they do not grow at all, and then at its end return them, saying, as did the unfaithful servant in the parable who returned the single

¹ *De Goey v. Van Wyck*, 97 Iowa, 491, 66 N. W. Rep. 787.

² *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519.

³ *Hogo v. Norton*, 22 Kan. 374. See § 62 for some analogous cases.

talent without increase, 'Lo! there thou hast that is thine,' and still be under no liability to respond in damages to such owner. We do not think the law is so deficient. It seems clear that the owner is damaged, that the damage may be determined to a reasonable certainty, and that the wrong-doer is bound to make good the damages."

The rule that consecutive wrongs done independently by different persons cannot be joined to increase the responsibility of one wrong-doer applies to an action on an attachment bond. Hence the defendant is not liable for injury resulting from the sale of the attachment defendant's property under executions levied by his creditors simultaneously with the former's attachment, although they were issued sooner than they would have been if the attachment had not been levied.¹ The attachment defendant cannot recover damages which would not have been sustained but for his own voluntary act.² Sureties are not bound beyond the letter of their contract; hence if a bond is payable to a partnership in the firm name and conditioned to pay all such damages as they may sustain, there is no liability to one of the members of the firm for damages resulting to him by reason of the wrongful levying of the attachment on his individual property.³ The usual bond does not hold the sureties responsible for the act of their principal in intervening after the levy and inducing the officer to sell the goods in unreasonably large quantities, thereby diminishing the sum realized.⁴

§ 514. **Exemplary damages.** The code of Alabama permits the recovery of vindictive damages on attachment bonds where the attachments have been maliciously and wrongfully sued out. A case is within the statute if there is no reasonable foundation for believing that a statutory ground for the attachment exists, or if the process be sued out wantonly or recklessly without probable cause; or if it be resorted to in a mere race of diligence to obtain a first lien when no ground exists in fact, or is reasonably believed to exist.⁵ But if one

¹ Goodbar v. Lindsley, 51 Ark. 380, 14 Am. St. 54, 11 S. W. Rep. 577; Mar-
queze v. Sontheimer, 59 Miss. 430; Blum v. Davis, 56 Tex. 423.

² Charles City Plow & M. Co. v. Jones, 71 Iowa, 234, 32 N. W. Rep. 280.

³ Watts v. Rice, 75 Ala. 289.

⁴ Jefferson County Bank v. Eborn, 84 Ala. 529, 4 So. Rep. 386.

⁵ City Nat. Bank v. Jeffries, 73 Ala.

of the grounds for issuing an attachment exists exemplary damages cannot be recovered on account of the motive which prompted the plaintiff to issue it.¹ If the elements of wrong and malice exist the attachment defendant may recover for injury to his feelings.² Corporations are liable for the acts of their agents in maliciously obtaining attachments.³ The mere fact that the plaintiff failed to establish the indebtedness of the defendant to him is not proof of malice in suing out the writ.⁴ Whether the attachment plaintiff acted with malice in suing out the writ is to be determined by the jury from all the circumstances; he cannot testify that he entertained no ill will or malice toward the defendant when the writ was sued out.⁵ The amount of exemplary damages is within the discretion of the jury, subject to reasonable limitations. The plaintiff is not required to furnish the *data* for them to ascertain with reasonable certainty the amount of such damages.⁶

The code of Washington also provides for exemplary damages if the attachment was maliciously sued out.⁷ Such damages are not to be allowed as punishment, but as compensation for injury to reputation, feelings and other damage of an intangible nature.⁸

In Iowa exemplary damages are recoverable if the attachment was sued out maliciously. To bring a case within this condition it must be shown that the writ was procured without reasonable ground to believe the truth of the matters stated in the affidavit, and with the intention, design or set purpose of injuring the defendant.⁹ But exemplary damages

¹ City Nat. Bank v. Jeffries, *infra*.

If it is sought to recover exemplary damages the complaint must show that the attachment was wrongfully sued out and must negative the ground on which it was issued, and aver that it was sued out without probable cause for believing such ground to be true. Painter v. Munn, 117 Ala. 322, 67 Am. St. 170, 23 So. Rep. 83; Schloss v. Rovelsky, 107 Ala. 596, 18 So. Rep. 71; Hamilton v. Maxwell, 119 Ala. 23, 24 So. Rep. 769.

² City Nat. Bank v. Jeffries, 73 Ala. 183.

³ Jefferson County Bank v. Eborn, 84 Ala. 529, 4 So. Rep. 386.

⁴ Hilfrich v. Meyer, 11 Wash. 186, 39 Pac. Rep. 455.

⁵ Hamilton v. Maxwell, 119 Ala. 23, 24 So. Rep. 769.

⁶ Mobile Furniture Commission Co. v. Little, 108 Ala. 399, 19 So. Rep. 443.

⁷ Sloan v. Langert, 6 Wash. 26, 33 Pac. Rep. 1015.

⁸ Levy v. Fleischner, 12 Wash. 15, 40 Pac. Rep. 394.

⁹ Nordhaus v. Peterson, 54 Iowa, 68, 6 N. W. Rep. 77.

do not follow merely nominal damages.¹ Punitive damages are also awarded in Tennessee. It is settled there "that all such damages as might be recovered in an action on the case at common law, as well as vindictive damages, in case the wrongful suing out the attachment was also malicious, are recoverable in the action on the bond."² Texas is, apparently, an exception to the rule that vindictive damages are not recoverable unless authorized by statute. There, such damages are allowed to the extent of attorney's fees and injury to credit;³ but not against the sureties. It seems to be the practice in that state for the verdict to state separately the compensatory and punitive damages, and when that is done, it is proper to render judgment against the sureties for the former and against their principal for the latter.⁴

In Alabama and Texas a principal is not responsible for the malice of his agent in suing out an attachment unless he was the cause of or participated in it,⁵ or ratified his act with knowledge of facts showing the agent's state of mind.⁶ In Washington liability for exemplary damages results if the person whose direct act caused the attachment to be issued was actuated by malicious motives, although the principal for whom he acted as agent knew nothing of the transaction,

¹ *Schwartz v. Davis*, 90 Iowa, 324, 330, 57 N. W. Rep. 849; *Hilfrich v. Meyer*, 11 Wash. 186, 39 Pac. Rep. 455; *Levy v. Fleischer*, 12 Wash. 15, 40 Pac. Rep. 384. See § 406.

In *Union Mill Co. v. Prenzler*, 100 Iowa, 540, 69 N. W. Rep. 876, while the plaintiff, who had dealt with the defendant for years, was seriously ill, the latter fearing that the former might die, and that they would have to wait a year for the payment of their claim, endeavored, by intimidation and threats of legal process, to induce the plaintiff's wife and daughter to turn over some of the property, and failing to succeed, sued out a writ of attachment on the ground that the plaintiff was about to convert the property into cash for the purpose of placing it beyond the reach of creditors. The court

sustained a verdict for \$5,000 as exemplary damages.

² *Smith v. Story*, 4 Humph. 172; *Smith v. Eakin*, 2 Sneed, 461; *Doll v. Cooper*, 9 Lea, 576, 585; *Jerman v. Stewart*, 12 Fed. Rep. 266.

³ *Hughes v. Brooks*, 36 Tex. 379; *Wallace v. Finberg*, 46 id. 47; *Landes v. Eichelberger*, 2 Tex. Civ. Cas. 127; *Schwartz v. Burton*, 1 id. 698; *Tynburg v. Cohen*, 67 Tex. 220, 2 S. W. Rep. 734.

⁴ *Emerson v. Skidmore*, 7 Tex. Civ. App. 641, 25 S. W. Rep. 671.

⁵ *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519; *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Jackson v. Smith*, 75 id. 97.

⁶ *Tynburg v. Cohen*, *supra*; *Alabama State Land Co. v. Reed*, 99 Ala. 19, 10 So. Rep. 238; *Baldwin v. Walker*, 94 Ala. 514, 10 So. Rep. 391.

unless it is shown that the agent had no authority to attach under any circumstances, and that his act in doing so was affirmatively repudiated as soon as knowledge of it was received.¹ This general question is discussed in the chapter on exemplary damages, as is also the advice of counsel as evidence to rebut the charge of malice.² It is sufficient to add here that such advice must be given after a full and fair statement of the facts,³ and after the exercise of due diligence to ascertain all the facts.⁴ It is held in Iowa that the advice of an attorney not in actual practice, although he was a stockholder in the corporation which was plaintiff in the attachment proceedings, may be proven for what it is worth.⁵

§ 515. What may be shown in defense. If the attachment defendant has recovered against the plaintiff the general damages arising from loss of credit, impaired reputation and injured feelings, he cannot subsequently sue on the bond to recover for the expense and loss of time in defending the attachment and the loss of or injury to the attached property.⁶ If the latter is taken out of the hands of the attachment defendant, and an action on the bond accrues, the obligors are, *prima facie*, liable for its value.⁷ The return of it, however, or its subsequent lawful seizure by the same officer on execution or other authority against the owner, and its appropriation to pay his debt for which the officer was empowered to make seizure, will go in mitigation.⁸ The Alabama court accepted this view,⁹ but has receded from it. In a case ruled in 1895 it was said: To hold, in case of a suit on the attachment bond, counting upon the wrongful suing out of an attachment,

¹ *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. Rep. 650, 36 Am. St. 156.

² Ch. 9.

³ *Porter v. Knight*, 63 Iowa, 365, 19 N. W. Rep. 282; *Sloane v. Langert*, 6 Wash. 26, 32 Pac. Rep. 1015; *Levy v. Fleischner*, 12 Wash. 15, 40 Pac. Rep. 334.

⁴ *Baldwin v. Walker*, 94 Ala. 514, 10 So. Rep. 391.

⁵ *Charles City Plow & M. Co. v. Jones*, 71 Iowa, 234, 32 N. W. Rep. 280.

⁶ *Hall v. Forman*, 82 Ky. 505.

⁷ *Dunning v. Humphrey*, 24 Wend. 31.

⁸ *Earle v. Spooner*, 3 Denio, 246; *Bennett v. Brown*, 31 Barb. 158, 20 N. Y. 99; *Boatwright v. Stewart*, 37 Ark. 614; *Trentman v. Wiley*, 85 Ind. 33; *Empire Mill Co. v. Lovell*, 77 Iowa, 100, 14 Am. St. 272, 41 N. W. Rep. 583; *Mayer v. Duke*, 72 Tex. 445, 10 S. W. Rep. 565. See *Warramaker v. Bowers*, 36 Md. 42; *Norman v. Fife*, 61 Ark. 34, 31 S. W. Rep. 740.

⁹ *City Nat. Bank v. Jeffries*, 73 Ala. 183.

that the measure of damages is the value of the property taken, but only that, less the amount of the attaching creditors' demand, would be to offer inducement for the unlawful substitution, and to make it answer the ends of a most unwarranted trespass, to secure a preference of payment over other creditors, and to deprive the debtor of his property otherwise than by due process of law. We are aware that there are respectable authorities to the contrary of the conclusion we announce, but we decline to follow them. In one of our own cases¹ the expression occurs, as embodied in the ninth head-note, "If it be shown that the property attached has yielded its full value, this may be considered in mitigation of damages. It can go no further." This is relied on to support the proposition that if the property brought its fair value the proceeds of the sale, applied to the payment of the defendant's debt, for which judgment was rendered in the case, may be pleaded in mitigation of the damages for the wrongful suing out of the attachment. . . . It was possibly made without due consideration, and we disapprove it as being incorrect in principle.²

Where the possession of the attachment defendant has not been disturbed, he is still entitled to recover on the bond for any intermeddling with it.³ Damages for being deprived of the use of property do not embrace consequential and secondary losses. Thus, where a lot of merchandise was levied on, but, on the failure of the case, restored, it was held in an action on the bond that a loss to the plaintiff resulting from the attachment on his license to vend goods, and the services of himself and wife during the pendency of the suit, should have been excluded from the consideration of the jury: that the inquiry in regard to the injury which the party sustained by being deprived of the use of his property should be limited to the actual value of the use; as, for example, the rent of the real estate, the hire or services of slaves, or the value of the use of any other species of property in itself productive. If not of that character, the injury from being deprived of the use should be restricted to interest upon

¹ City Nat. Bank v. Jeffries, *supra*.

³ Dunning v. Humphrey, 24 Wend.

² Hundley v. Chadick, 109 Ala. 575, 31. Compare Groat v. Gillespie, 25 Wend. 383.

the value.¹ And where an attachment was levied upon a house which was being taken to pieces for removal to and erection upon other premises, damages were not permitted to be recovered on the bond for injury to furniture by exposure in consequence of the plaintiff being prevented or delayed from rebuilding the house; nor for the additional expense of reconstructing it. The value of the use, it was said, must be predicated upon the condition of the property when it was attached, and not upon what its condition was before or what it was intended to be in the future.² A very restricted rule of liability was here announced and applied; and it is certain that unless considerably expanded it would often prevent the recovery of reasonable and fair compensation. Suppose an important part of a mill to be detached for some temporary purpose, necessitating its stoppage and the work of all the laborers and all the other dependencies; and when it is about to be put in place again it is taken under an attachment; is the value of its use to be estimated according to its condition when attached, without regard to what it had been, or what it was intended to be in the future? If the attached property is replevied by the defendant, who sells it, and pays his debt with the proceeds, the liability of the sureties on the attachment is mitigated accordingly.³ In New York if the plaintiff in attachment has been made a party to the action he may plead as an offset an independent counter-claim existing in his favor and not available to the sureties.⁴ It is not a defense to an action on a bond that the suit in which it was given was predicated on a void contract.⁵

§ 516. Cost and expenses; attorneys' fees; loss of time. The costs and expenses of defending against the attachment, procuring its discharge, and the restoration of the property, may be recovered as part of the damages on such a bond.⁶

¹ *Reidhar v. Berger*, 8 B. Mon. 160.
See *Alexander v. Jacoby*, 23 Ohio St. 358.

² *Plumb v. Woodmansee*, 34 Iowa, 116.

³ *Painter v. Muun*, 117 Ala. 322, 23 So. Rep. 83, 67 Am. St. 170.

⁴ *Kinney v. Reid Ice Cream Co.*, 57 App. Div. 206, 68 N. Y. Supp. 325.

⁵ *State v. Fargo*, 151 Mo. 280, 52 S. W. Rep. 199.

⁶ *Fourth Nat. Bank v. Mayer*, 96 Ga. 728, 24 S. E. Rep. 453; *W. P. Green Fruit Co. v. Pate*, 99 Ga. 60, 24 S. E. Rep. 455; *Gonzales v. De Funiak*, *Havana Tobacco Co.*, 41 Fla. 471, 26 So. Rep. 1012; *Union Mill Co. v. Prenzler*, 109 Iowa, 540, 69 N. W. Rep. 876;

But a defendant who owned none of the property attached as his cannot, after defeating a recovery on the issue of indebtedness, recover from the sureties the expenses incurred in defending the suit on the attachment issue.¹ The damages for which the sureties are liable also include costs upon a *certiorari* on which a judgment for the plaintiff in the attachment was reversed.² The right to recover for reasonable attorney fees paid or incurred in obtaining a discharge of the attachment rests upon the same principle as the other costs and expenses incurred for the same purpose,³ and is not defeated

Dunning v. Humphrey, 24 Wend. 31; Groat v. Gillespie, 25 id. 383; Pettit v. Mercer, 8 B. Mon. 51; Burton v. Smith, 49 Ala. 293; Alexander v. Jacoby, 23 Ohio St. 358; Schuyler v. Sylvester, 28 N. J. L. 487; Bruce v. Coleman, 1 Handy, 515; Northrup v. Garrett, 17 Hun, 497; Raymond v. Green, 12 Neb. 215, 41 Am. Rep. 763, 10 N. W. Rep. 709; State v. Shobe, 23 Mo. App. 474 (plaintiff's traveling expenses in attending the attachment suit were allowed); State v. McHale, 16 id. 478 (cash paid for the examination of the defendant's books and for a transcript of the record was allowed for; compensation for a stenographer's services was refused); Damron v. Sweetzer, 16 Ill. App. 339; Flournoy v. Lyon, 70 Ala. 308 (if there was an actual levy); Dothard v. Sheid, 69 id. 135 (while such damages are the proximate, they are not the necessary result of suing out the attachment, and therefore must be specially claimed).

¹ Tebo v. Betancourt, 73 Miss. 868, 19 So. Rep. 833, 55 Am. St. 573; Pinson v. Kirsh, 46 Tex. 29.

² Bennett v. Brown, 20 N. Y. 99, 31 Barb. 158.

³ Fourth Nat. Bank v. Mayer, 96 Ga. 728, 24 S. E. Rep. 453; Union Mill Co. v. Prenzler, *supra*; W. P. Green Fruit Co. v. Pate, 99 Ga. 60, 24 S. E. Rep. 455; Marchand v. York, 10 Ky. L. Rep. 777 (Ky. Super. Ct.); Mc-

Clure v. Renaker, 21 Ky. L. Rep. 360, 51 S. W. Rep. 317; Buckley v. Van Diver, 70 Miss. 622, 12 So. Rep. 905, citing the text; State v. Gage, 52 Mo. App. 464, 471; State v. Immer, id. 536; State v. Goodhue, 74 id. 162; Territory v. Rindskopf, 5 N. M. 93, 20 Pac. Rep. 180, quoting the text; Gonzales v. De Funiak Havana Tobacco Co., 41 Fla. 471, 26 So. Rep. 1012; Barton v. Smith, 49 Ala. 293; Northrup v. Garrett, 17 Hun, 497; Seay v. Greenwood, 21 Ala. 491; Swift v. Plessner, 39 Mich. 178; Ah Thae v. Quan Wan, 3 Cal. 216; Prader v. Grim, 13 Cal. 585; Tyler v. Safford, 31 Kan. 608; Higgins v. Mansfield, 62 Ala. 267.

In the last case it was held the reasonable amount paid or promised to be paid to attorneys for defending the attachment suit, and the value of time lost, and expenses incurred in attending court for the trial, may be recovered in an action on the bond for the wrongful and vexatious suing out of the attachment. And also that damage resulting from the demoralization of the plaintiff's workmen while he was absent from his farm and procuring attorneys to defend the suit; or from his being compelled to stop a double plow while he was absent, are too remote, and should not be estimated in fixing the value of the plaintiff's services. *Morris v. Price*, 2 Blackf. 457;

because the aggregate recovery exceeds the penalty of the bond.¹ In some jurisdictions, however, the right to such costs and expenses is denied.² As a rule the fees and other expenses incident to the defense of the principal suit on the merits are not recoverable.³ In Indiana if the action and the attachment have both been defeated the reasonable attorneys'

Plumb v. Woodmansee, 34 Iowa, 116.

In Iowa attorneys' fees are expressly allowed by statute, where there was no reasonable cause to believe the ground upon which the writ was issued to be true. *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428. They are limited, however, to the services rendered in the auxiliary proceeding. *Porter v. Knight*, 63 Iowa, 365, 12 N. W. Rep. 282.

Such fees are not recoverable if no defense was made, although services were rendered by the attorney in filing cross-interrogatories, requiring proof of the debt, etc. *Baldwin v. Walker*, 94 Ala. 514, 10 So. Rep. 391.

Nor when counsel is not employed until after a default judgment has been rendered, and then only to make a motion for a new trial which is unsuccessful. *Trammell v. Ramage*, 97 Ala. 666, 11 So. Rep. 916.

Such fees cannot be recovered under an allegation that the plaintiff engaged an attorney to represent him in the attachment suit, and incurred attorney's fees in a sum stated. *Elder v. Kutner*, 97 Cal. 490, 32 Pac. Rep. 563.

And where payment of such fees is not required to authorize their recovery, it must be alleged that a sum stated was incurred or promised. *Crofford v. Vassar*, 95 Ala. 518, 10 So. Rep. 350.

¹ *Union Mercantile Co. v. Chandler*, 90 Iowa, 650, 57 N. W. Rep. 595.

² *Stringfield v. Hirsch*, 94 Tenn. 425, 45 Am. St. 733, 29 S. W. Rep. 699;

Goodbar v. Lindsley, 51 Ark. 380, 14 Am. St. 54, 11 S. W. Rep. 577; *Littleton v. Frank*, 2 Lea, 300.

The federal courts usually deny such fees unless the law is settled otherwise by statute or the appellate court of the state in which the cause of action originated. *Jacobus v. Monongahela Nat. Bank*, 35 Fed. Rep. 395; *Insurance Co. v. Conard*, Baldwin, 138.

If such liability exists under state law it cannot be gotten rid of by removing a case to a federal court. *Fidelity & Deposit Co. v. Bucki Lumber Co.*, 189 U. S. 135, 23 Sup. Ct. Rep. 582.

In Pennsylvania the policy concerning such fees in other actions is so firmly established that it is reasonably certain they cannot be recovered. *Good v. Mylin*, 8 Pa. 51, 49 Am. Dec. 493; *Haverstick v. Gas Co.*, 20 Pa. 254; *Stopp v. Smith*, 71 id. 285.

In Texas they are not recoverable when compensatory damages only are claimed; they are allowed when exemplary damages are recovered, and are regarded as an element thereof. See cases cited in note 3, p. 1410.

³ *Hilfrich v. Meyer*, 11 Wash. 186, 39 Pac. Rep. 455; *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. Rep. 650, 36 Am. S. 156; *McChine v. Renaker*, 21 Ky. L. Rep. 360, 51 S. W. Rep. 317; *Vannatta v. Vannatta*, 21 Ky. L. Rep. 1461, 55 S. W. Rep. 685; *State v. Heckert*, 62 Mo. App. 427; *Adam v. Gomila*, 37 La. Ann. 479; *Damron v. Sweetzer*, 16 Ill. App. 339; *Northampton Nat. Bank v.*

fees of the defendant in both may be recovered.¹ In Missouri and Mississippi if the attachment is not dissolved until final judgment upon the merits, and a contest upon them was necessary to procure its dissolution, there may be a recovery of the whole costs and expenses.² But where the defendant gives bond to pay whatever judgment may be rendered, and the attachment is dissolved, the case resulting in a judgment for the defendant, he cannot, in a suit on the bond, recover for attorneys' fees, costs and expenses incurred in the defense of the suit upon its merits after the attachment was dissolved.³ Under a bond conditioned as the statute requires "to pay all costs that may be awarded to the defendant, and all damages that he may sustain by reason of the attachment," the sureties are liable for all costs awarded to the defendant in the action, and not merely such as resulted from the attachment.⁴ In New York, while sureties are not ordinarily liable for general counsel fees incurred in the action,⁵ a non-resident defendant whose property has been attached may, after failing to have the attachment vacated, and then obtaining judgment, recover the counsel fees incurred in the action, they being "damages which the defendant may sustain" within the meaning of the bond.⁶ Where a motion to vacate an attachment was granted, but such action was reversed on appeal, though apparently not on the merits, and on the trial of the action the complaint was dismissed, the sureties were liable for the costs and expenses of the proceedings to vacate the attachment as well as for those of defending the action.⁷ The attaching

Wylie, 52 Hun, 146, 4 N. Y. Supp. 907; *Flournoy v. Lyon*, 70 Ala. 308; *Frost v. Jordan*, 37 Minn. 544, 36 N. W. Rep. 713 (although jurisdiction was obtained by attaching the property).

¹ *Wilson v. Root*, 43 Ind. 486.

² *State v. McHale*, 16 Mo. App. 478; *State v. Thomas*, 19 Mo. 613, 61 Am. Dec. 580; *State v. Beldsmeier*, 56 Mo. 226; *State v. Stark*, 75 id. 566; *Buckley v. Van Diver*, 70 Miss. 622, 12 So. Rep. 905.

³ *State v. Fargo*, 151 Mo. 280, 52 S. W. Rep. 199, overruling *State v.*

O'Neill, 4 Mo. App. 221, and *State v. Coombs*, 67 id. 199.

⁴ *Drake v. Sworts*, 24 Ore. 198, 33 Pac. Rep. 563; *Greaves v. Newport*, 41 Minn. 240, 42 N. W. Rep. 1059; *Lee v. Homer*, 37 Hun, 634; *Bing Gee v. Ah Jim*, 7 Fed. Rep. 811, 7 Sawyer, 117; *Stauffer v. Garrison*, 61 Miss. 67 (including attorneys' fees).

⁵ *Northampton Nat. Bank v. Wylie*, 52 Hun, 148, 4 N. Y. Supp. 907.

⁶ *Tyng v. American Surety Co.*, 48 App. Div. 240, 62 N. Y. Supp. 843.

⁷ *S. C.*, 69 App. Div. 137, 72 N. Y. Supp. 1132.

creditor is liable for the rent of premises leased by the defendant for carrying on the business of selling the attached stock of goods from the time of taking the goods into custody. He is also liable for the defendant's loss of time on the basis of its value in the business in which he was engaged, and not on the basis of his earning capacity in other employments or on what he could have earned as wages.¹

§ 517. *Forthcoming bonds.* These are usually conditioned for the delivery of the property to the officer to satisfy the judgment or execution which the plaintiff in an attachment may obtain in the cause, or when and where the court may direct. Sometimes the alternative is embraced of the delivery of the property or the satisfaction of the judgment recovered.² The right of action is complete on the failure to deliver at the stipulated time,³ unless the property attached is in the hands of a third person and the bond is conditioned for its delivery "when and where the court shall direct," in which case an action cannot be begun until an order is made for its delivery.⁴ If the obligor was not the general owner of the goods at the time the bond was given he and his sureties are liable thereon, notwithstanding the invalidity of the levy.⁵ If the condition to return is unqualified the bond is not satisfied by a tender of other property of the same kind and value, though that attached was perishable in its nature.⁶ The whole property released must be returned.⁷ If the condition is to deliver or pay the appraised value performance is not excused by the accidental destruction of the property by fire originating through human agency, without the obligor's fault;⁸ but it is otherwise if delivery is prevented by an act of God.⁹ A surety may exonerate himself by delivering the property to the officer at any time before judgment is rendered against him on the bond.¹⁰ The bond does not affect the lien on the property

¹ *Lord v. Wood*, — Iowa, —, 94 N. W. Rep. 842.

² *Drake on Attach.*, § 327.

³ *Naynant v. Dodson*, 12 Iowa, 22.

⁴ *Brotherton v. Thompson*, 11 Mo. 94.

⁵ *Eisenbud v. Gellert*, 26 N. Y. Misc. 367, 55 N. Y. Supp. 952.

⁶ *Pearce v. Magnire*, 17 R. I. 61, 20 Atl. Rep. 98.

⁷ *Metrovich v. Jovovich*, 58 Cal. 341.

⁸ *Doggett v. Black*, 40 Fed. Rep. 439.

⁹ *Carr v. Houston Guano & Warehouse Co.*, 105 Ga. 268, 31 S. E. Rep. 178; *Phillipi v. Capell*, 38 Ala. 575; *Haralson v. Walker*, 23 Ark. 415.

¹⁰ *Reagan v. Kitchen*, 3 Martin, 418;

resulting from the levy; hence it is immaterial, so far as the sureties' liability is concerned, that the attachment was not sustained on the ground on which it was obtained, but on a ground first presented after the bond was filed.¹ Such a bond given in a justice's court will be construed to cover the time until a final adjudication is made although that be in an appellate court, if that can be done without violence to its terms.²

§ 518. **Same subject; measure of damages.** The measure of damages is the value of the property stipulated to be forthcoming, with interest from the time delivery became due, not exceeding the amount of the judgment in the attachment suit.³ But this value should be computed subject to any paramount [63] lien.⁴ Where a seizure was made under an attachment of property upon which the party having it in possession had a lien, and he procured a release of it by giving a forthcoming bond, it was held his lien was not thereby divested, and he was responsible on the bond only for the balance that remained

Hansford v. Perrin, 6 B. Mon. 595.
See Payne v. Joyner, 7 Ark. 462.

¹ Hobson v. Hall, 13 Ky. L. Rep. 109, 14 S. W. Rep. 958.

² Conard v. Ehrinan, 61 Ill. App. 128.

³ Mullally v. Townsend, 119 Cal. 47, 50 Pac. Rep. 1066; Curtin v. Harvey, 120 Cal. 620, 52 Pac. Rep. 1077; Keeler v. Ricker, 3 Northampton Co. Rep. 48; Jolley v. Rutherford, 112 Ga. 342, 37 S. E. Rep. 358; Schneider v. Wallingford, 4 Colo. App. 150, 34 Pac. Rep. 1109; Stevenson v. Palmer, 14 Colo. 565, 20 Am. St. 295, 24 Pac. Rep. 5; Whelchel v. Duckett, 91 Ga. 132, 16 S. E. Rep. 643; Hammond v. Starr, 79 Cal. 556, 21 Pac. Rep. 971; Collins v. Mitchell, 3 Fla. 4; Moon v. Story, 2 B. Mon. 351; Weed v. Dills, 34 Mo. 483; Jones v. Hays, 27 Tex. 1; Marshall v. Bailey, 27 Tex. 686; Pearce v. Maguire, 17 R. I. 61, 20 Atl. Rep. 98; Reger v. Manhattan Brass Co., 6 Pa. Super. Ct. 375. See Anthony v. Comstock, 1 R. I. 454.

Where the subject-matter of an

action of bail-trover was promissory notes which the defendant had pledged as collateral to the plaintiff and afterwards placed in the defendant's hands for collection, and the plaintiff had, in a former suit, recovered judgment on the debt thus secured, the measure of the plaintiff's damages was the amount due on the judgment rendered in such suit, at the date of the trial of the trover action, provided the value of the notes equaled or exceeded that amount, and if their value was less than the amount due on the judgment, the measure of damages was the value of the notes. The judgment was conclusive on the sureties as to the amount for which it was rendered, notwithstanding they were not parties to the action. Holmes v. Langston, 110 Ga. 861, 36 S. E. Rep. 251.

⁴ Hayman v. Hallam, 79 Ky. 389; Canfield v. McLaughlin, 10 Martin. 48; Metrovich v. Jovovich, 58 Cal. 341.

in his hands after paying himself.¹ If the value be stated in the bond it will be conclusive on the obligors; otherwise it must be proved.² A recital that the value of the property does not exceed a sum named, while conclusive against a claim for a larger value, does not prove value.³ Neither is the value proven by the judgment in the attachment suit.⁴ The attaching creditor is not concluded by a statement as to the value of the property in the officer's return.⁵ It is no defense that the property was not the defendant's.⁶ The condition of the bond requires the property to be returned in such a state that it may be taken and disposed of in satisfaction of the judgment. A mere physical return of it is not sufficient if it be incumbered after the execution of the bond.⁷ If the property returned was wantonly injured or negligently allowed to go to waste or deteriorate while in the hands of the defendant or other custodian, the sureties must answer for its diminished value,⁸ to the extent that may be necessary to satisfy so much of the judgment as is unpaid.⁹ If the identical property is returned the sureties may have it sold and the proceeds applied on the judgment. The acceptance of the property by the officer in a damaged condition does not affect the plaintiff's right to sue on the bond to recover the lessened value of the property. If it is duly sold under the statute and the proceeds applied on the judgment, as between the parties the price for which it sold is conclusive of its value.¹⁰

§ 519. Conditions to pay the judgment. A bond to satisfy the judgment is not discharged by a surrender of the property attached;¹¹ nor by pointing out property of the judgment debtor from which the judgment could be collected, even though money to pay the expenses and charges of the proceed-

¹ Canfield v. McLaughlin, *supra*.

Gray v. McLeal, 17 Ill. 404; Dorr v.

² Moon v. Story, 2 B. Mon. 354;

Clark, 7 Mich. 310.

Weed v. Dills, 34 Mo. 483.

³ Schuyler v. Sylvester, 28 N. J. L.

⁴ Smith v. Packard, 39 C. C. A. 294, 98 Fed. Rep. 793.

487; Mullally v. Townsend, 119 Cal. 47, 50 Pac. Rep. 1066.

⁵ Bruck v. Feiner, 26 N. Y. Misc. 724, 56 N. Y. Supp. 1025.

⁶ Creswell v. Woodside, 8 Colo. App. 514, 46 Pac. Rep. 842.

⁷ Eisenbud v. Gellert, 26 N. Y. Misc. 367, 55 N. Y. Supp. 952.

⁸ S. C., 15 Colo. App. 468, 63 Pac. Rep. 330.

⁹ Sartin v. Weir, 3 Stew. & P. 421; Waterman v. Frank, 21 Mo. 108;

¹⁰ *Id.*

¹¹ Dorr v. Kershaw, 18 La. 57.

ings is tendered.¹ It is no defense to show that the property attached did not then belong to the defendant;² or that it was not subject to attachment;³ or was worth less than the judgment.⁴ The sureties on a bond given to dissolve an attachment are not released by the principal's discharge in a composition with creditors, the action having gone to judgment before the composition proceedings were begun.⁵ The judgment is the measure of damages irrespective of the value or the ownership of the property.⁶

SECTION 7.

INJUNCTION BONDS.

[64] § 520. *Scope of obligation.* These are statutory obligations, and though various in their phraseology have a general similarity of purpose and effect, binding the obligors to pay all such damages, or costs and damages, as the party enjoined shall sustain in consequence of the injunction if it shall be dissolved, or if the court shall finally decide that the plaintiff was not entitled to it. When an action accrues there is a right to damages, first, for costs and expenses incurred in defending against the writ and in procuring its dissolution; and second, for losses or injuries from its operation in respect to the subject to which it refers. Subject to an exception presently to be noticed, the defendant's only remedy for damages resulting from the wrongful suing out of an injunction, unless the plaintiff obtained the writ maliciously or without probable cause, is an action upon the bond.⁷ A bond voluntarily given, although not in compliance with the statute, is binding as a voluntary obligation according to its terms.⁸

¹ *Hill v. Merl*, 10 La. 108.

² *Dorr v. Clark*, 7 Mich. 310; *Beal v. Alexander*, 1 Rob. (La.) 277; *Hazelrigg v. Donaldson*, 2 Met. (Ky.) 445.

³ *McMillan v. Dana*, 18 Cal. 339.

⁴ *Phanstieshl v. Vanderhoof*, 22 Mich. 296.

⁵ *Bernheimer v. Charak*, 170 Mass. 179, 49 N. E. Rep. 81; *Tapley v. Goodsell*, 122 Mass. 176, 182.

⁶ *Phanstieshl v. Vanderhoof*, *supra*; *Morange v. Edwards*, 1 E. D. Smith, 412.

⁷ *Lawton v. Green*, 64 N. Y. 326; *Hayden v. Keith*, 32 Minn. 277, 20 N. W. Rep. 155; *St. Louis v. St. Louis Gas Light Co.*, 82 Mo. 349; *Sturgis v. Knapp*, 33 Vt. 486; *Russell v. Farley*, 105 U. S. 433; *Palmer v. Foley*, 71 N. Y. 106.

⁸ *Wanless v. West Chicago Street R. Co.*, 77 Ill. App. 120; *Barrett v. Bowers*, 87 Me. 185, 32 Atl. Rep. 871. See § 475.

§ 521. **Power of a court of equity.** After an injunction has been granted without requiring a bond or other undertaking, a court of equity has no power to award damages to the party injured thereby except so far as it may do so by a decree awarding costs, or by virtue of a statute.¹ Before the writ is granted a federal circuit court, in the absence of any statutory or other authority except such as is inherent in a court of equity, may impose terms, and may relieve therefrom as the equities make it proper to do so. Whenever the question of the right to damages arises under the order of the court, its action in passing upon it approaches so nearly to the exercise of discretion that it will not be reversed unless a clear showing is made.² The obligation entered into under such an order is not in the nature of a contract with the opposite party, but is wholly between the obligor and the court.³ The right to damages does not depend at all upon the motive, suppression or default of the plaintiff, but solely on the fact that he was not entitled to the injunction.⁴

§ 522. **Right of action, when it arises; who may sue.** If the bond is conditioned to pay damages if it shall finally be decided that the injunction ought not to have been granted, an action on it is prematurely brought if there has not been a final determination of the suit in which the injunction was obtained.⁵ In a suit brought for a perpetual injunction a right of action does not accrue on an undertaking given on the issue of a temporary injunction or restraining order until a final

¹ Under a statute providing that on the dissolution of an injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting the nature and amount thereof, the court shall hear evidence and assess such damages as the case may require, and to equity appertain, to the party damaged, the right to assess is wholly irrespective of the existence of a bond, or of the amount or penalty of it if one has been given. The assessment may be for such sum as will compensate the injured party for losses directly occasioned

to him and such expenditures as necessarily resulted from the wrongful suing out of the injunction. *Kohlsaat v. Crate*, 144 Ill. 14, 32 N. E. Rep. 481; *Crate v. Kohlsaat*, 44 Ill. App. 274.

² *Russell v. Farley*, 105 U. S. 433.

³ *Smith v. Day*, 21 Ch. Div. 421.

⁴ *Griffith v. Blake*, 27 Ch. Div. 474. *Jessel, M. R.*, expressed a contrary opinion in *Smith v. Day*, 21 id. 421; *Cotton, L. J.*, differed with him.

⁵ *Dougherty v. Dore*, 63 Cal. 470; *Gray v. Veers*, 33 Md. 159; *Penny v. Holberg*, 53 Miss. 567; *Bemis v. Gannett*, 8 Neb. 236.

judgment in the suit in which it was issued is rendered.¹ A dismissal of the petition for want of prosecution is a final determination of the suit.² If the injunction is dissolved after a hearing upon the pleadings and upon affidavits, and the action is subsequently dismissed for want of prosecution, the right to damages is perfected.³ Any order of the court relieving a part of the subject-matter of the injunction from its operation is as to such part a dissolution.⁴ The right of action is perfect where the dismissal is made at the plaintiff's request, although without prejudice to a future action;⁵ and where the injunction has been dissolved and a demurrer to the complaint sustained on the ground that the latter did not state facts sufficient to constitute a cause of action;⁶ and where an order is entered, by the plaintiff's consent, vacating the injunction, and subsequently another order, pursuant to his *ex parte* motion, is made discontinuing the action;⁷ and on the granting of an order discontinuing the action in which the injunction was issued, the motion therefor being opposed by the defendant.⁸ But it is otherwise where the discontinuance of the suit is by agreement,⁹ or for some other reason which arose after the injunc-

¹ *Brown v. Galena Mining & Smelting Co.*, 32 Kan. 528, 4 Pac. Rep. 1013; *New York Security & Trust Co. v. Lipman*, 83 Hun, 569, 32 N. Y. Supp. 65.

² *Pugh's Adm'r v. White*, 78 Ky. 210; *De Berard v. Prial*, 34 App. Div. 502, 54 N. Y. Supp. 531.

³ *Manufacturers' & Traders' Bank v. C. W. F. Dare Co.*, 67 Hun, 44, 21 N. Y. Supp. 806; *Granger v. Smyth*, 70 Hun, 9, 23 N. Y. Supp. 934; *Kane v. Casgrain*, 69 Wis. 430, 34 N. W. Rep. 241; *Jesse French Piano & Organ Co. v. Porter*, 134 Ala. 302, 32 So. Rep. 678.

⁴ *Keith v. Henkleman*, 173 Ill. 137, 50 N. E. Rep. 692, 68 Ill. App. 623; *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. Rep. 53, 21 L. R. A. 611; *Tullock v. Mulvane*, 184 U. S. 497, 509, 22 Sup. Ct. Rep. 372.

⁵ *Frahm v. Walton*, 130 Cal. 396, 62 Pac. Rep. 618; *Asevado v. Orr*, 100 Cal. 299, 34 Pac. Rep. 777; *Tullock v.*

Mulvane, 61 Kan. 650, 60 Pac. Rep. 749; *Nansemound Timber Co. v. Roundtree*, 122 N. C. 45, 29 S. E. Rep. 61; *Sharpe v. Harding*, 65 Mo. App. 28; *Gyger v. Courtney*, 59 Neb. 555, 81 N. W. Rep. 437; *Nielsen v. Albert Lea*, — Minn. —, 91 N. W. Rep. 1113; *Mitchell v. Sullivan*, 30 Kan. 231.

⁶ *Bennett v. Pardini*, 63 Cal. 154; *Fowler v. Frisbie*, 37 id. 34; *Wynkoop v. Van Beuren*, 63 Hun, 500, 18 N. Y. Supp. 557; *Alliance Trust Co. v. Stewart*, 115 Mo. 236, 243, 21 S. W. Rep. 793.

⁷ *Pacific Mail Steamship Co. v. Toel*, 9 Daly, 301, 85 N. Y. 646.

⁸ *Manning v. Cassidy*, 80 Hun, 127, 30 N. Y. Supp. 23; *New York Central, etc. R. Co. v. Hastings-on-Hudson*, 9 App. Div. 256, 41 N. Y. Supp. 492.

⁹ *Columbus, etc. R. Co. v. Burke*, 54 Ohio St. 98, 124, 43 N. Rep. 282; *Large v. Steer*, 121 Pa. 30, 15 Atl. Rep. 490; *Palmer v. Foley*, 71 N. Y. 106.

tion was issued.¹ Except as noticed, the dissolution of the writ is *prima facie* evidence that the defendant has sustained damages, and is *res judicata* as to the issues raised.² If the writ is wrongfully issued as to any part of the plaintiff's demand, and is partially dissolved, to that extent the party enjoined will be entitled to such damages, within the limit of the penalty of the bond, as he has sustained.³ It is immaterial, so far as the defendant's right of action is concerned, that the purpose sought to be effectuated by the injunction was accomplished before it was dissolved, and before the efforts of the defendant to be relieved from its restraints were successful, as where he was restrained from doing an act which he could not do after a certain time, and that time has expired.⁴

Where the bond was conditioned for the payment of a sum named, if the court finally decides that the plaintiff was not entitled to the injunction, liability does not follow the making of an order for the punishment of the plaintiff for contempt for interfering to prevent the execution of a commission to take testimony, issued upon the application of the defendant, such order directing, as part of the penalty imposed on the plaintiff, the dismissal of his complaint and the dissolution of the temporary injunction granted at the commencement of the action.⁵ After a temporary injunction was granted the parties stipulated to submit the issues of law and fact to arbitrators, and bound themselves to abide the award, also stipulating that the execution of the award should not impair the liability of the obligors on the undertaking; no provision was made for judicial action on the award, which was in favor of the defendant. After it was made the action was dismissed by consent. It was ruled in an action on the undertaking that such award was not a judicial determination that the injunction ought not to have been granted, and that it would not support an action

¹ Apollinaris Co. v. Venable, 136 N. Y. 46, 32 N. E. Rep. 555; Johnson v. Elwood, 82 N. Y. 362.

² Lemecunier v. McClearley, 41 La. Ann. 411, 6 So. Rep. 233; Schuyler County v. Donaldson, 9 Mo. App. 385; Rice v. Cook, 92 Cal. 144, 38 Pac. Rep. 219; Fowler v. Frisbie, 27 Cal. 34.

³ Rice v. Cook, *supra*; White v. Clay's Ex'rs, 7 Leigh, 68; Walker v. Pritchard, 135 Ill. 103, 25 N. E. Rep. 573, 11 L. R. A. 577. Compare Russell v. Farley, 105 U. S. 103.

⁴ Bush v. Kirkbride, 131 Ala. 405, 20 So. Rep. 780.

⁵ Apollinaris Co. v. Venable, 136 N. Y. 46, 32 N. E. Rep. 555.

on the undertaking.¹ The liability for damages is determinable by the right of the plaintiff to the writ when it was obtained.²

If the undertaking has not been assigned an action on it is maintainable only by the obligees.³ And they should all be joined; but if one defendant has his damages assessed on motion in the injunction suit the assessment is conclusive as to the measure of his damages, and establishes an individual right in him to sue therefor.⁴

§ 523. *Mode of assessing damages.* In so far as the mode of assessing damages upon injunction bonds is regulated by statutes or by local rules of practice, the subject cannot be considered here. Mr. High gives a summary of the cases in several states in the last edition of his standard treatise on injunctions.⁵ That author says there has been much conflict of authority whether, in the absence of express legislation, a court of general equity powers might, upon dissolving an injunction, ascertain by reference or otherwise the amount of damages sustained by the injunction, and decree payment of such amount without a new suit for that purpose. But, while courts of much respectability have insisted upon the exercise of such a jurisdiction, treating it as a cumulative remedy, entirely independent of and distinct from any action which might be brought upon the bond,⁶ the undoubted weight of authority and principle is against the exercise of such a jurisdiction.⁷

§ 524. *Costs and expenses; attorneys' fees.* In cases where the bond or undertaking embraces the payment of

¹ *Columbus, etc. R. Co. v. Burke*, 51 Ohio St. 98, 43 N. E. Rep. 282.

² *Burroughs v. Jones*, 79 Miss. 214, 30 So. Rep. 605; *Taylor Worsted Co. v. Beolchi*, 37 N. Y. Misc. 691, 76 N. Y. Supp. 379.

³ *Smith v. Atkinson*, 18 Colo. 255, 32 Pac. Rep. 425.

⁴ *Jones v. Mastin*, 60 Mo. App. 578.

⁵ Vol. 2 (3d ed.), § 1657.

⁶ *Sturgis v. Knapp*, 33 Vt. 486; *Edwards v. Pope*, 4 Ill. 465. See *Roberts v. Durst*, 4 Ohio St. 502.

⁷ *Phelps v. Foster*, 18 Ill. 309; *Mer-*

ryfield v. Jones, 2 Curt. C. C. 306; *Garcie v. Sheldon*, 3 Barb. 232; *Lawton v. Green*, 64 N. Y. 326; *Bain v. Heath*, 12 How. 168; *Easton v. New York, etc. R. Co.*, 26 N. J. Eq. 359; *Taylor v. Brownfield*, 41 Iowa, 264; *Sartor v. Strassheim*, 8 Colo. 185, 6 Pac. Rep. 215; *Greer v. Stewart*, 48 Ark. 21, 2 S. W. Rep. 251; *Elliott v. Missouri, etc. R. Co.*, 77 Mo. App. 652, 660, citing the text. See *dictum* to the contrary in *Russell v. Farley*, 105 U. S. 433; to the same effect, *Lea v. Deakin*, 11 Biss. 40.

"costs," if the injunction be not sustained, taxable costs are meant, and they are necessarily a part of the damages by the very terms of the contract.¹ They are also part thereof when costs *eo nomine* are not provided for.² And when the stipulation is to pay the damages which may result if the injunction is dissolved, attorneys' fees paid for obtaining a dissolution of it are recoverable in many states.³ Costs paid as a condition

¹ *Nolan v. Johns*, 126 Mo. 159, 28 S. W. Rep. 492; *Gibson v. Reed*, 54 Neb. 309, 75 N. W. Rep. 1085; *State v. Corvin*, — W. Va. —, 41 S. E. Rep. 211; *Corcoran v. Judson*, 24 N. Y. 106; *Derry Bank v. Heath*, 45 N. H. 524; *Troxell v. Haynes*, 49 How. Pr. 517, 16 Abb. Pr. (N. S.) 1; *Moore v. Harton*, 1 Port. 15.

² *Id.*; *Edwards v. Bodine*, 11 Paige, 223; *Coates v. Coates*, 1 Duer, 664; *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282; *Hovey v. Rubber Tip Pencil Co.*, 50 N. Y. 335, 12 Abb. Pr. (N. S.) 360; *Disbrow v. Garcia*, 52 N. Y. 654; *Rose v. Post*, 56 N. Y. 603, 49 How. Pr. 517; *Noble v. Arnold*, 23 Ohio St. 264; *Strong v. Deforest*, 15 Abb. Pr. 427; *Taacks v. Schmidt*, 18 Abb. Pr. 307; *Wilde v. Joel*, 15 How. Pr. 320, 6 Duer, 671; *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 528; *Langworthy v. McKelvey*, 25 Iowa, 48; *Riddle v. Cheadle*, 25 Ohio St. 278; *School Directors v. Trustees*, 66 Ill. 247; *Elder v. Sabin*, 66 Ill. 126; *Misner v. Bullard*, 43 Ill. 470; *Ryan v. Anderson*, 24 Ill. 652; *McRae v. Brown*, 13 La. Ann. 181; *Ah Thaie v. Quan Wan*, 3 Cal. 216; *Wilson v. McEvoy*, 25 Cal. 169; *Prader v. Grimm*, 28 Cal. 11, 13 Cal. 585; *Gear v. Shaw*, 1 Pin. 608.

The elements of damages are attorneys' fees, loss of time, and expense incurred in attending the hearing of and resisting the application for a temporary injunction. *Helmkamp v. Wood*, 85 Mo. App. 227; *Gibson v. Reed*, 54 Neb. 309, 75 N. W. Rep. 1085. See *infra*, note to this section.

But a bond conditioned to pay all damages sustained covers only pecuniary loss arising from the restraint imposed by the injunction, not the expenditure made in defense of the suit. *Thurston v. Haskell*, 81 Me. 303, 17 Atl. Rep. 73; *Barrett v. Bowers*, 87 Me. 185, 32 Atl. Rep. 871.

³ *Id.*; *Belmont Mining & Milling Co. v. Costigan*, 21 Colo. 465, 42 Pac. Rep. 650; *Keith v. Henkleman*, 173 Ill. 137, 50 N. E. Rep. 692; *Colby v. Meservey*, 85 Iowa, 555, 52 N. W. Rep. 499; *Mulvane v. Tullock*, 58 Kan. 622, 50 Pac. Rep. 897; *Tullock v. Mulvane*, 61 Kan. 650, 60 Pac. Rep. 749; *Alliance Trust Co. v. Stewart*, 115 Mo. 236, 21 S. W. Rep. 793; *Neiser v. Thomas*, 46 Mo. App. 47; *Sharpe v. Harding*, 65 id. 28; *Helmkamp v. Wood*, 85 Mo. App. 227; *Creek v. McManus*, 13 Mont. 152, 32 Pac. Rep. 675; *Cook v. Greenough*, 14 Mont. 352, 36 Pac. Rep. 357; *Helena v. Brule*, 15 Mont. 429, 39 Pac. Rep. 456, 852; *Binford v. Grimes*, 26 Ind. App. 481, 59 N. E. Rep. 1085, citing local cases; *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216, 35 Pac. Rep. 651; *Gibson v. Reed*, 54 Neb. 309, 75 N. W. Rep. 1085; *Nielsen v. Albert Lea*, — Minn. —, 91 N. W. Rep. 1113; *Wittich v. O'Neal*, 22 Ill. 592; *Richardson v. Allen*, 74 Ga. 719; *Swan v. Timmons*, 81 Ind. 243; *Ford v. Loomis*, 62 Iowa, 586, 16 N. W. Rep. 193, 17 id. 910; *Aiken v. Lenthers*, 40 La. Ann. 23, 3 So. Rep. 357; *Hammerslough v. Kansas City Building, L. & S. Ass'n*, 79 Mo. 80; *Miles v. Edwards*, 6 Mont. 180, 9 Pac. Rep. 814; *Solomon v. Chesley*, 59 N. H. 24;

for a continuance cannot be recovered as part of the damages,¹ nor attorneys' fees for services in an unsuccessful attempt to dissolve the writ.² Where an injunction has been improvidently granted, or obtained without good cause, the defendant should take seasonable steps, probably, to relieve himself from its operation, and thus prevent damages.³ A party who slept upon his rights and neglected this duty, so that the demand enjoined became barred by the statute of limitations before he finally made a successful motion to dissolve the injunction, was not permitted to recover on the bond for that loss.⁴ It is, therefore, one of the direct effects of a groundless injunction to necessitate exertion and costs to get rid of it. Accordingly, costs and expenses, reasonable in amount, incurred for the single object of obtaining a discharge of the injunction are generally allowed as a part of the damages on such obligations.⁵ The law sanctions a resort to appropriate means, and

Livingston v. Exum, 19 S. C. 223; *Nimocks v. Welles*, 42 Kan. 39, 21 Pac. Rep. 787; *Underhill v. Spencer*, 25 Kan. 71; *Cook v. Chapman*, 41 N. J. Eq. 152; *Randall v. Carpenter*, 88 N. Y. 293; *Lyon v. Hersey*, 32 Hun, 253; *State v. Corvin*, — W. Va. —, 41 S. E. Rep. 211; *Wisconsin Marine & F. Ins. Co. v. Durner*, 114 Wis. 369, 90 N. W. Rep. 435.

Where a statute provides for five per cent. damages on the dissolution of injunctions to stay sales, an attorney's fees cannot be recovered where a sale is not threatened and cannot be made for two years. *Wynne v. Mason*, 72 Miss. 424, 18 So. Rep. 422.

A statute providing that if money or any proceedings for the collection of money shall have been enjoined, the damages thereon shall not exceed ten per cent. of the amount released, exclusive of legal interest and costs, does not limit the damages allowable on the dissolution of an injunction to ten per cent. on the amount released, nor prevent the allowance of an attorney's fee or other expense caused by the injunction.

Wabash R. Co. v. McCabe, 118 Mo. 640, 24 S. W. Rep. 217.

¹ *Bullock v. Ferguson*, 30 Ala. 227. Nor costs on appeal. *Woodson v. Johns*, 3 Munf. 230; *Guilford v. Cornell*, 4 Abb. Pr. 220. But see *infra*.

² *Pollock v. Whipple*, 57 Neb. 82, 77 N. W. Rep. 355; *Garlington v. Copeland*, 43 S. C. 389, 21 S. E. Rep. 317.

³ See § 88; *McDonald v. James*, 47 How. Pr. 474; *Hovey v. Rubber Tip Pencil Co.*, 50 N. Y. 335; *Smith v. Day*, 21 Ch. Div. 421.

⁴ *Dunn v. Davis*, 37 Ala. 95.

⁵ *Montgomery v. Gilbert*, 24 Mont. 121, 60 Pac. Rep. 1038; *State v. Corvin*, — W. Va. —, 41 S. E. Rep. 211, allowing traveling expenses, but disallowing for loss of time.

In *Crounse v. Syracuse, etc. R. Co.*, 32 Hun, 497, the expense of hiring a special train in order to secure a prompt dissolution of an injunction was recovered, the circumstances being peculiar. The defendant's personal expenses were also allowed. But these as well as the defendant's claims for his services are denied in some cases. *Lyon v. Hersey*, 32 Hun,

the employment of counsel is such, for obtaining relief from an injunction; and hence the bond is almost universally construed to include expenses for such service.¹ It is otherwise, however, in Arkansas, Maryland, Texas, Tennessee, Virginia, and in the federal courts.²

253; *Cook v. Chapman*, 41 N. J. Eq. 152; *Galveston, etc. R. Co. v. Ware*, 74 Tex. 47, 11 S. W. Rep. 918.

In *Edwards v. Bodine*, 11 Paige, 223, a sale under a decree of foreclosure was restrained. On the dissolution of the injunction it was held that, under the thirty-first chancery rule, fees were properly allowed for services in relation to the sale which would necessarily have to be performed a second time, and also the expense of re-advertising the sale, counsel fees in procuring a dissolution of the injunction, and taxable costs. It was improper to allow, as the master in chancery had done, fees for commissions on a sale not made, for the personal services, etc., of the parties in attending the sale and going to see and consult with counsel and the charge of the solicitor for attending to advise them at the sale. *Baggett v. Beard*, 43 Miss. 120; *Brown v. Jones*, 5 Nev. 374; *Raupman v. Evansville*, 44 Ind. 392; *Campbell v. Metcalf*, 1 Mont. 379; *State v. Thatcher*, 56 Ill. 257; *Tamaroa v. Southern Illinois University*, 54 Ill. 334; *Willett v. Scoville*, 4 Abb. Pr. 415; *Fitzpatrick v. Flagg*, 12 Abb. Pr. 189; *Bolling v. Tate*, 65 Ala. 417.

Giving notice of motion and attendance upon court for the purpose of being heard are such services as may be compensated for. *Lanphere v. Glover*, 60 Ill. App. 564.

¹ See cases in first three notes to this section.

² *Oliphint v. Mansfield*, 35 Ark. 191; *Wallis v. Dilley*, 7 Md. 257; *Wood v. State*, 66 id. 61; *Galveston, etc. R. Co. v. Ware*, 74 Tex. 47, 11 S. W. Rep. 918; *Browning v. Porter*, 2 McCrary,

581; *Oelrichs v. Spain*, 15 Wall. 211; *Tullock v. Mulvane*, 184 U. S. 497, 22 Sup. Ct. Rep. 372; *Wisecarver v. Wisecarver*, 97 Va. 452, 34 S. E. Rep. 56; *Stringfield v. Hirsch*, 94 Tenn. 425, 29 S. W. Rep. 609, 45 Am. St. 733; *Davenport v. Harbert*, 2 Tenn. Cas. 287.

It is said in the opinion in the last case that counsel fees are not recoverable in Arkansas, Maryland, North Carolina, South Carolina (but see *Garlington v. Copeland*, 43 S. C. 389, 21 S. E. Rep. 317), South Dakota, Texas, Vermont (but see *Barre Water Co. v. Carnes*, 68 Vt. 23, 33 Atl. Rep. 898), and that the question is open in Connecticut, Massachusetts, North Dakota and Rhode Island.

In *Oelrichs v. Spain*, 15 Wall. 211, the bond was required to contain a condition "to pay the defendants such costs and damages as they may respectively sustain," and as executed it substantially conformed to the order. The case was heard on the merits "four years, eight months and sixteen days after the injunction issued"—as the reporter very precisely mentions,—and the decree dissolved the injunction. *Swayne, J.*, delivered the opinion: "Upon looking into the report, we find it clear and able, and we are entirely satisfied with it, except in one particular. We think that both the master and the court erred in allowing counsel fees as part of the damages covered by the bonds. . . . The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to (*Day v. Woodworth*, 13 How. 370), and we think is substan-

But it seems that the federal courts will recognize the rule of liability prevailing in the state courts where cases are removed from the latter to the former, because liability for counsel fees having been assumed by the parties it should be enforced in every court in which an action on the bond is brought.¹

Counsel fees will not be denied in a state court because the bond was given in a suit pending in a federal court. It will not be assumed that, because the federal courts do not allow such fees, the sureties contracted with that rule of law in view.² Nor is it cause for refusing their recovery that the action would have had the same effect as the injunction, the latter being a mere incident.³ The amount recoverable is not [68] limited to the rates at which the fees would be taxed as costs.⁴ On the other hand, the sum to be allowed is not to be controlled by the agreement between the defendant and his attorney; it cannot exceed a reasonable sum for the service

tially determined by that adjudication. In debt, covenant and *assumpsit* damages are recovered; but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. A reference to a master or an issue to a jury might be necessary to ascertain the proper amount, and this grafted litigation might possibly be

more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary. We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law, and sound public policy."

¹ Fidelity & Deposit Co. v. Bucki Lumber Co., 189 U. S. 135, 23 Sup. Ct. Rep. 582.

² Mulvane v. Tullock, 58 Kan. 622, 50 Pac. Rep. 897; Missouri, etc. R. Co. v. Smith, 154 Mo. 300, 55 S. W. Rep. 470; Elliott v. Missouri, etc. R. Co., 77 Mo. App. 652; Mitchell v. Hawley, 79 Cal. 301, 21 Pac. Rep. 833; Aiken v. Leathers, 40 La. Ann. 23, 3 So. Rep. 357; Wash v. Lackland, 8 Mo. App. 122. But see Fidelity & Deposit Co. v. Bucki Lumber Co., *supra*.

³ Elms v. Wright-Blodgett Co., 106 La. 19, 30 So. Rep. 315.

⁴ Wilde v. Joel, 6 Duer, 671.

rendered.¹ The usual and customary fee for like services and the agreement are the elements by which the allowance is to be measured.² The fee agreed upon is a limitation upon the sum recoverable, though the services were worth more; it is the amount of damage sustained.³ Courts will exercise vigilance to keep the liability of the plaintiff within just and reasonable limits.⁴ Hence, if a modification of the injunction is all that a defendant is entitled to and he secures nothing further, there can be no recovery for services in attempting to obtain its dissolution;⁵ and if the petition is insufficient to authorize the issuing of the writ, no allowance will be made for services in preparing affidavits to show that the merits are against the plaintiff.⁶ The amount of the fee is to be fixed by the jury and the right to recover it is not waived by accepting the statutory attorney's fee.⁷ A municipality defending an injunction by its attorney, who is paid a salary for his services, cannot recover counsel fees; it is not damaged.⁸ The allowance for services may be rightfully made in view of the special importance of the litigation to the client, and if fees have been paid to correspond with the interests involved, the facts may be proved, and a hypothetical question put to a witness based thereon. The natural and probable result of the injunction was the employment of attorneys, and payment to them of fees commensurate with the services performed to get it dissolved.⁹ The discontinuance of the injunction proceedings by agreement of the principal parties thereto will not affect the right

¹ Wittich v. O'Neal, 22 Fla. 592; Jesse French Piano & Organ Co. v. Porter, 134 Ala. 302, 32 So. Rep. 678.

² Stinnett v. Wilson, 19 Ill. App. 38; Jevne v. Osgood, 57 Ill. 340, 347; Loinax v. Ragor, 85 Ill. App. 679; Hiff v. School Directors, 45 Ill. App. 419; Elms v. Wright-Blodgett Co., 106 La. 19, 30 So. Rep. 315.

³ Cors v. Tompkins, 51 Ill. App. 315.

⁴ Ady v. Freeman, 90 Iowa, 402, 57 N. W. Rep. 879; Alexander v. Colcord, 85 Ill. 323; Cook v. Chapman, 41 N. J. Eq. 152, 2 Atl. Rep. 286 (setting aside an allowance as excessive).

The amount is largely discretionary with the trial court. An allowance will not be reversed merely because it is less than the sum fixed by any witness. Lichtenstadt v. Fleisher, 24 Ill. App. 92.

⁵ Ford v. Loomis, 62 Iowa, 586, 16 N. W. Rep. 193, 17 id. 910.

⁶ Ellwood Manuf. Co. v. Rankin, 70 Iowa, 403, 30 N. W. Rep. 677.

⁷ Steel v. Gordon, 14 Wash. 521, 45 Pac. Rep. 151.

⁸ Nixon v. Biloxi, 76 Miss. 810, 25 So. Rep. 664; 2 High on Inj., § 1688.

⁹ Tullock v. Mulvane, 61 Kan. 650, 661, 60 Pac. Rep. 749.

of one whose business in relation to others was affected by it from recovering fees paid counsel to secure a modification of the injunction, although he was made a party only because it was necessary to secure a complete adjudication of the controversy.¹

§ 525. *Same subject.* The authorities are not agreed on the point whether the party seeking to recover for attorneys' fees and expenses must have actually paid them, or may recover where he has merely become liable therefor.² But on principle, and according to the general course of decision in analogous cases, the expenses incurred, and for which the plaintiff is liable, should be included.³ No recovery can be had for services gratuitously rendered.⁴ Where, however, the attorneys' fees and expenses are incurred in defeating the action, and the dissolution of the injunction is only incident to that result, they are not damages sustained by reason of the injunction.⁵ The reason is obvious: expenses for another pur-

¹ *London & Brazilian Bank v. Walker*, 74 Hun. 395, 26 N. Y. Supp. 844.

² *Wilson v. McEvoy*, 25 Cal. 169; *Prader v. Grimm*, 28 Cal. 11, 13 Cal. 585; *McRae v. Brown*, 12 La. Ann. 181; *Mills v. Jones*, 9 id. 11; *Wilde v. Joel*, 6 Duer. 671.

³ *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. Rep. 53, 21 L. R. A. 611; *Lawrence v. Traner*, 136 Ill. 474, 488, 27 N. E. Rep. 197; *Patterson v. Rinard*, 81 Ill. App. 80; *Frahm v. Walton*, 130 Cal. 396, 62 Pac. Rep. 618; *Wittich v. O'Neal*, 23 Fla. 592; *Underhill v. Spencer*, 25 Kan. 71; *Garrett v. Logan*, 19 Ala. 344; *Miller v. Garrett*, 35 id. 96; *Brown v. Jones*, 5 Nev. 374; *Noble v. Arnold*, 23 Ohio St. 264; *Steele v. Thatcher*, 56 Ill. 257; *Leisse v. St. Louis, etc. R. Co.*, 2 Mo. App. 105; *Crounse v. Syracuse, etc. R. Co.*, 32 Hun. 497; *Meaux v. Pittman*, 35 La. Ann. 360. See § 85.

⁴ *Schening v. Cofer*, 97 Ala. 726, 12 So. Rep. 414.

⁵ *Jackson v. Millspaugh*, 100 Ala. 285, 14 So. Rep. 44; *Curry v. Ameri-*

can Freehold Land Mortgage Co., 124 Ala. 614, 27 So. Rep. 454; *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. Rep. 53, 21 L. R. A. 611; *Lawrence v. Traner*, 136 Ill. 474, 27 N. E. Rep. 197; *Densch v. Scott*, 53 Ill. App. 33; *Goff v. Eckert*, 65 id. 616; *Bullard v. Harkness*, 83 Iowa, 373, 49 N. W. Rep. 855; *Mulvane v. Tullock*, 58 Kan. 622, 636, 50 Pac. Rep. 897; *Bennett v. Lambert*, 100 Ky. 737, 39 S. W. Rep. 419; *Williams v. Allen*, 21 Ky. L. Rep. 1191, 54 S. W. Rep. 720; *Levert v. Sharpe*, 52 La. Ann. 599, 27 So. Rep. 64; *Brown v. Baldwin*, 121 Mo. 126, 25 S. W. Rep. 863; *Anderson v. Anderson*, 55 Mo. App. 268; *Louisville Banking Co. v. M. V. Monarch Co.*, 68 id. 603; *Creek v. McManus*, 17 Mont. 445, 43 Pac. Rep. 497; *Trester v. Pike*, 60 Neb. 510, 83 N. W. Rep. 676, citing the text; *Whiteside v. Noyac Cottage Ass'n*, 84 Hun. 555, 32 N. Y. Supp. 724; *Phoenix Bridge Co. v. Keystone Bridge Co.*, 10 App. Div. 176, 41 N. Y. Supp. 891, affirmed without opinion, 153 N. Y. 644; *Bock v. Bohn*, 29 N. Y. Misc. 102, 60 N. Y.

pose, and which would have to be incurred whether a preliminary injunction had been granted or not, cannot be set down to the account of the injunction. But where no other relief is asked for but an injunction, the expense to get rid of it on a final hearing, as well as on motion, may be recovered.¹ If a temporary injunction is continued during the pendency of the action, notwithstanding the objection of the defendant, thus obliging him to try the action in order to secure the dissolution of the injunction, counsel fees incurred for the trial may be recovered; but not for services rendered before the entry of an order continuing the injunction.² But in Illinois expenses and attorneys' fees incurred after an injunction has

Supp. 211; *Garlington v. Copeland*, 43 S. C. 389, 21 S. E. Rep. 317; *Barre Water Co. v. Carnes*, 68 Vt. 23, 33 Atl. Rep. 898; *Donahue v. Johnson*, 9 Wash. 187, 37 Pac. Rep. 322; *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216, 35 Pac. Rep. 651; *Walker v. Pritchard*, 135 Ill. 103, 25 N. E. Rep. 573, 11 L. R. A. 577; *Noble v. Arnold*, 23 Ohio St. 264; *Hovey v. Rubber Tip Pencil Co.*, 50 N. Y. 335; *Disbrow v. Garcia*, 52 N. Y. 654; *Langworthy v. McKelvey*, 25 Iowa, 49; *McDonald v. James*, 47 How. Pr. 474; *Bolling v. Tate*, 65 Ala. 417; *Bustamente v. Stewart*, 55 Cal. 115; *Blair v. Reading*, 99 Ill. 600, 615; *Gerard v. Gateau*, 15 Ill. App. 520; *McQuown v. Law*, 18 id. 34; *Moriarty v. Galt*, 23 id. 213; *Swan v. Timmons*, 81 Ind. 243; *New Nat. Turnpike Co. v. Dulaney*, 86 Ky. 516, 6 S. W. Rep. 590; *Burgen v. Sharer*, 14 B. Mon. 497; *Aiken v. Leathers*, 40 La. Ann. 23, 3 So. Rep. 357; *Lemeunier v. McClearly*, 41 La. Ann. 411, 6 So. Rep. 338; *Thurston v. Haskell*, 81 Me. 303, 17 Atl. Rep. 73; *Lamb v. Shaw*, 43 Minn. 507, 45 N. W. Rep. 1134; *Parker v. Bond*, 5 Mont. 1, 1 Pac. Rep. 209; *Newton v. Russell*, 87 N. Y. 527; *Randall v. Carpenter*, 88 id. 293; *Olds v. Cary*, 13 Ora. 362, 10

Pac. Rep. 786; *Hill v. Thomas*, 19 S. C. 230; *Lillie v. Lillie*, 55 Vt. 470.

If, however, extra expense has been occasioned the defendant by reason of the injunction it may be recovered. *Wallace v. York*, 45 Iowa, 81; *Olds v. Cary*, *supra*.

If the matters covered by a deposition are so blended that those which relate to the principal case cannot be separated from those relating to the injunction, the whole expense of taking it may be allowed. *Alliance Trust Co. v. Stewart*, 115 Mo. 236, 21 S. W. Rep. 793.

¹ *Jackson v. Millspaugh*, 100 Ala. 285, 14 So. Rep. 44; *Robertson v. Smith*, 129 Ind. 422, 15 L. R. A. 273, 28 N. E. Rep. 857; *Thomas v. McDanel*, 77 Iowa, 302, 42 N. W. Rep. 301; *Jamison v. Dulaney*, 74 Miss. 890, 21 So. Rep. 972; *Creek v. McManus*, 13 Mont. 152, 32 Pac. Rep. 675; *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282; *Newton v. Russell*, 24 Hun. 40; *Reece v. Northway*, 58 Iowa, 187, 12 N. W. Rep. 258; *Jesse French Piano & Organ Co. v. Porter*, 131 Ala. 302, 32 So. Rep. 678; *Nielsen v. Albert Lea*, — Minn. —, 91 N. W. Rep. 1113.

² *Youngs v. McDonald*, 56 App. Div. 11, 67 N. Y. Supp. 375, affirmed without opinion, 166 N. Y. 699.

been made perpetual cannot be allowed on suggestion of damages filed upon the reinstatement of the cause after the reversal of the decree, although the injunction was the only relief sought.¹ The Indiana appellate court has, admittedly, gone beyond the rule laid down by the supreme court of that state, in holding that attorneys' fees for defending the injunction suit at the trial on the merits may be recovered, although the injunction was not the sole object of the action.²

It was formerly the rule in Alabama that counsel fees in the appellate court were not recoverable, though the appeal was from a judgment sustaining the injunction, and such judgment was reversed;³ the contrary is now well established.⁴ Generally no distinction is made between such fees in the trial and appellate courts;⁵ though an allowance will not be made when the appeal is from the order of dissolution.⁶ In Alabama there may be a recovery for services of counsel in investigating the defendant's status and rights with reference to the injunction and for his advice thereon, and for services in any proceeding or effort for the lifting of the restraint of the writ.⁷ In a case⁸ where the injunction was not disallowed until the final hearing, the party enjoined recovered also the expenses of an unsuccessful motion to dissolve; and on this point Rapallo, J., said: "It (that motion) was not denied on the merits, nor for any irregularity in making the motion, but because the court, in its discretion, thought it more advisable to defer the inquiry into the merits until the final hearing. It was proper that the defendant should move at [69] the earliest opportunity to dissolve the injunction. His motion did not fail through any fault on his part, or any defect

¹ *Malligan v. Nelson*, 188 Ill. 139, 58 N. E. Rep. 938, and local cases cited.

² *Hyatt v. Washington*, 20 Ind. App. 148, 50 N. E. Rep. 402.

³ *Ferguson v. Baber*, 24 Ala. 402; *Bullock v. Ferguson*, 30 id. 227.

⁴ *Bolling v. Tate*, 65 Ala. 417; *Cooper v. Hames*, 93 id. 280, 9 So. Rep. 341; *Jesse French Piano & Organ Co. v. Porter*, 134 Ala. 302, 32 So. Rep. 678.

⁵ *Lambert v. Haskell*, 80 Cal. 611,

22 Pac. Rep. 327; *Porter v. Hopkins*, 63 Cal. 53; *Reece v. Northway*, 58 Iowa, 197, 12 N. W. Rep. 258; *Roberts v. White*, 73 N. Y. 375.

⁶ *Elwood Manuf. Co. v. Rankin*, 70 Iowa, 403, 30 N. W. Rep. 677; *Cors v. Tompkins*, 5 Ill. App. 315.

⁷ *Bush v. Kirkbride*, 131 Ala. 405, 30 So. Rep. 780.

⁸ *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282.

in the merits of his case. The court simply deferred its decision upon the merits until the trial. The result, which, for the purposes of this application, may be assumed to be correct, shows that if the decision had not been thus deferred the motion should have been granted when made." Those expenses were allowed under these exceptional circumstances; for, as Church, C. J., remarked in a subsequent case,¹ "a motion had been made to dissolve the injunction, which was denied upon the ground that, as the motion involved the whole merits of the action which was brought to secure a permanent injunction, it was more appropriate that it should be determined upon a trial. The defendant was, therefore, compelled to go to trial to secure a decision that the party was not entitled to the injunction in order to recover the damages which he had sustained in endeavoring to procure a dissolution."² Generally the costs and expenses of an unsuccessful application to dissolve will not be allowed though the motion is regular, and the court in its discretion continues the injunction to the final hearing, and then dissolves it on the merits.³ This is the rule where a gross sum was paid as counsel fees, no separate charge being made for a futile attempt to procure a dissolution.⁴

Not only are the costs and expenses incurred directly to obtain dissolution of the injunction allowed as damages, but also those which are incident to executing the references that courts of equity in many jurisdictions direct under local statutes or rules of practice to ascertain the damages sustained by the enjoined party in consequence of the injunction,⁵ notwithstanding the damages recovered equal the amount of the undertaking.⁶ Inconvenience and expense resulting from

¹ *Hovey v. Rubber Tip Pencil Co.*, 50 N. Y. 335.

² See comments on the same case in *Troxell v. Haynes*, 16 Abb. Pr. (N. S.) 1; *Langworthy v. McKelvey*, 25 Iowa, 48.

³ *Allen v. Brown*, 5 Lans. 511.

⁴ *Mitchell v. Hawley*, 79 Cal. 201, 21 Pac. Rep. 833.

⁵ *Phoenix Bridge Co. v. Keystone Bridge Co.*, 10 App. Div. 176, 41 N. Y.

Supp. 891, affirmed without opinion, 153 N. Y. 644; *Holcomb v. Rice*, 119 N. Y. 598, 23 N. E. Rep. 1112; *Lawton v. Green*, 64 N. Y. 326; *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Rose v. Post*, 56 N. Y. 603; *Ryan v. Anderson*, 24 Ill. 652; *Wisconsin Marine & F. Ins. Co. v. Durner*, 114 Wis. 369, 90 W. Rep. 435.

⁶ *O'Connor v. New York & Yonkers Land Imp. Co.*, 8 N. Y. Misc. 243,

attending the suit are not elements of damage for which a recovery may be had on the bond.¹ If several defendants release the sureties on the injunction bond from all liability, the fact that one of the defendants, who did not join in such release, had assumed liability for the attorneys' fees of those who had joined in it, the injunction plaintiff not knowing thereof, will not prevent the release from being absolute.²

In Montana a restraining order is regarded as serving much the same purpose and as being subject to the same rules as a temporary injunction, and on the dissolution thereof there may be a recovery of attorneys' fees paid for procuring its dissolution and in resisting the application for the final injunction, notwithstanding the services were rendered after the time fixed in such order for hearing the application for the injunction.³ In Nebraska the rule is that, ordinarily, attorneys' fees are not recoverable for services in an attempt to secure the dissolution of such an order.⁴ But such fees may be allowed if there has been unreasonable delay in hearing the application for a temporary injunction,⁵ though they must be limited to the services rendered in securing the dissolution of the order.⁶ In New York counsel fees incurred in resisting the granting of an injunction after an order to show cause has been granted are not damages resulting from the granting of the injunction, but the result of efforts made to prevent the granting of it; and if no damages resulted from the injunction there cannot be a recovery of such fees.⁷

It is convenient to note in this connection that the liability of sureties in an undertaking to pay the damages which may result from executing an order of arrest is much the same as their liability on an injunction bond. The undertaking does not cover damages claimed for a personal wrong or injury;

23 N. Y. Supp. 544, indicating a change in the code since *Lawton v. Green*, 64 N. Y. 326, was decided.

¹ *Williams v. Allen*, 21 Ky. L. Rep. 1191, 54 S. W. Rep. 720. But see n. 5, p. 1426, and n. 5, p. 1435.

² *Mulvane v. Tullock*, 58 Kan. 622, 50 Pac. Rep. 897.

³ *Miles v. Edwards*, 6 Mont. 180, 9 Pac. Rep. 814.

⁴ *Carnes v. Heimrod*, 45 Neb. 364, 63 N. W. Rep. 809.

⁵ *Gyger v. Courtney*, 59 Neb. 555, 81 N. W. Rep. 437.

⁶ *Trester v. Pike*, 60 Neb. 510, 83 N. W. Rep. 676.

⁷ *Sweet v. Mowry*, 71 Hun, 381, 25 N. Y. Supp. 32; *Whiteside v. Noyac Cottage Ass'n*, 84 Hun, 555, 32 N. Y. Supp. 724.

but covers taxable costs to be awarded in the action and such other legitimate damages as flow from the arrest and are made necessary by it, such as counsel fees, and expense in money to vacate the arrest, and loss of time occasioned the party arrested in getting bail, and in and about moving for his discharge.¹

§ 526. **Damages from restraint of injunction.** The damages which the enjoined party may be entitled to for losses and injuries sustained by the operation of the writ are as various as the subjects which may be affected by its restraint. These damages, however, are ascertained and measured by the principle of giving just and adequate compensation for actual loss, which is the natural and proximate result of the in- [70] junction.² If those for which a claim is made are conjectural, they cannot be recovered for.³ The doctrine of non-liability for avoidable consequences applies to actions on injunction bonds, and any damages resulting from the failure to use reasonable exertion and care are not recoverable.⁴ There cannot be a recovery for the expense resulting from idle men and horses unless it is shown that an effort to find employment for them failed.⁵ But the rule does not require the injunction de-

¹ *Bamberger v. Kahn*, 43 Hun, 411; *Krause v. Rutherford*, 45 App. Div. 132, 60 N. Y. Supp. 1047.

² *Belmont Mining & Milling Co. v. Costigan*, 21 Colo. 465, 42 Pac. Rep. 650; *Rhodes v. Auld*, 5 Kan. App. 225, 47 Pac. Rep. 170; *Sweet v. Mowry*, 71 Hun, 381, 25 N. Y. Supp. 32; *Edmison v. Sioux Falls Water Co.*, 10 S. D. 440, 73 N. W. Rep. 910; *Donahue v. Johnson*, 9 Wash. 187, 37 Pac. Rep. 322; *Coosaw Mining Co. v. Carolina Mining Co.*, 75 Fed. Rep. 860; *Bullock v. Ferguson*, 30 Ala. 227; *Collins v. Sinclair*, 51 Ill. 328; *Hale v. Meegan*, 39 Mo. 272; *Brown v. Tyler*, 34 Tex. 168; *Moulton v. Richardson*, 49 N. H. 75; *Hurd v. Trimble*, 1 Litt. 413; *Galveston, etc. R. Co. v. Ware*, 74 Tex. 47, 11 S. W. Rep. 918.

In *Findlay v. Carson*, 97 Iowa, 537, 66 N. W. Rep. 759, the recovery included, besides attorneys' fees and

loss of profits, expenses, loss of time and for interruption to business.

In Louisiana punitive damages are recoverable under some circumstances. *Conery v. Coons*, 33 La. Ann. 372.

³ *Bullard v. Harkness*, 83 Iowa, 373, 49 N. W. Rep. 855; *Colby v. Meserve*, 85 Iowa, 555, 52 N. W. Rep. 499; *Alliance Trust Co. v. Stewart*, 115 Mo. 236, 21 S. W. Rep. 793; *Coosaw Mining Co. v. Carolina Mining Co.*, 75 Fed. Rep. 860; *San Jose Fruit Packing Co. v. Cutting*, 133 Cal. 237, 65 Pac. Rep. 565; *Elms v. Wright-Blodgett Co.*, 106 La. 19, 30 So. Rep. 315.

⁴ *Alliance Trust Co. v. Stewart*, 115 Mo. 236, 21 S. W. Rep. 793; *Nansmond Timber Co. v. Rountree*, 122 N. C. 45, 29 S. E. Rep. 61.

⁵ *Nansmond Timber Co. v. Rountree*, *supra*.

fendant to enter into a speculation with respect to the property affected by the writ.¹ The damages recoverable by one who has dramatized a copyrighted novel on the dissolution of an injunction restraining him from presenting it should not include the loss of profits on the tour of a dramatic company which was to produce the drama in their repertory, but must be limited to the profits lost on the drama in question.² Although the bond of a receiver appointed in an injunction suit may not cover the damages resulting from his improper appointment, the sureties on the injunction bond are not liable therefor.³ If a fund *in custodia legis* is impounded by a wrongful injunction the taxes thereon accruing during the litigation and paid out of it are not an element of damages against the sureties; neither is the compensation of the receiver for loaning the fund during that time, he having been paid out of the accruing interest.⁴ Where the officers of a street-railway company were enjoined from making repairs necessary to the operation of their road in its entirety, passengers being obliged, before the injunction was issued, to walk around the place where it was sought to make repairs, and, after the writ issued, the running of cars from one end of the line was discontinued and the fare reduced, the damages were composed of the extra expense of operating the cars during the continuance of the injunction in the manner in which they had previously been operated, and also the decrease in tolls arising from diminished travel caused by the prevention of the repairs; but there was no liability for the decrease in tolls caused by stopping the running of the cars at one end of the line, and the reduction of the fare.⁵ One who is restrained from doing unlawful acts cannot recover damages on the bond—as a mortgagor who would have committed a trespass against the mortgagee.⁶

The damages contemplated by the law in requiring a bond

¹ O'Connor v. New York & Yonkers Land Imp. Co., 8 N. Y. Misc. 243, 28 N. Y. Supp. 544; Roberts v. White, 73 N. Y. 375.

² Schlesinger v. Bedford, [1893] W. N. 57, 9 T. L. Rep. 370.

³ Wood v. Hollander, 84 Tex. 394, 19 S. W. Rep. 551.

⁴ Stringfield v. Hirsch, 94 Tenn. 425, 29 S. W. Rep. 609, 45 Am. St. 733.

⁵ Hawthorne v. McArthur, 8 Ky. L. Rep. 526 (Ky. Super. Ct.).

⁶ Dole v. Hickey, 67 N. H. 493, 32 Atl. Rep. 761.

are such as are real; merely nominal damages cannot be recovered.¹ The sum designated is the limit of liability,² except where interest is allowed from the time of the breach.³ Bonds are not to be extended in their operation by liberal construction.⁴ If, however, their terms are clear they will be given effect, though by so doing the obligors are made liable for damages sustained before they executed their obligation.⁵ If the damages are fixed by statute for a class of cases no more than are specified can be recovered;⁶ and if exceptional cases arise to which the statute is not applicable the damages therein provided for are not to be added to those allowed.⁷

The liability of the sureties is confined to responsibility for the direct effects of the injunction. Illustrations of this have been given in the two last preceding sections. The importance of the question merits further consideration. If two persons are enjoined one of them cannot recover on the bond because of the inability of the other to fulfill a pre-existing contract between them, though but for the injunction there might have been no default.⁸ The defendant cannot recover damages

¹ *Grove v. Wallace*, 11 Colo. App. 160, 52 Pac. Rep. 639; *Iliff v. School Directors*, 45 Ill. App. 419, 425; *Foster v. Stafford Nat. Bank*, 58 Vt. 658, 5 Atl. Rep. 890; *Smith v. Day*, 21 Ch. Div. 421.

Where expense was incurred for attorneys' fees nominal damages for preventing the exercise of the right to fish in public waters were allowed. *Dwelle v. Wilson*, 14 Ohio Ct. Ct. 551. The right to recover such damages is recognized independent of any special injury. *Brown v. Cunningham*, 82 Iowa, 512, 48 N. W. Rep. 1012, 12 L. R. A. 583.

² *Grove v. Bush*, 86 Iowa, 94, 53 N. W. Rep. 88; *Nansemond Timber Co. v. Rountree*, 122 N. C. 45, 29 S. E. Rep. 61; *Pacific Mail Steamship Co. v. Toel*, 9 Daly, 301; *Glover v. McGaffey*, 56 Vt. 294.

³ *Perry v. Horn*, 22 W. Va. 381. See §§ 331, 477, 478.

⁴ In Louisiana the liability of an obligor on an injunction bond is

fixed by statute, and not by the terms of the instrument; hence if the latter names an obligee not within the statute his name will be disregarded. *Hays v. Fidelity & Deposit Co.*, 112 Fed. Rep. 872, 50 C. C. A. 569.

⁵ *Meyers v. Block*, 120 U. S. 206, 7 Sup. Ct. Rep. 525; *Block v. Myers*, 35 La. Ann. 220; *Goodrich v. Foster*, 131 Mass. 217; *Dodge v. Cohen*, 14 D. C. App. Cas. 582.

Ordinarily an employer is not entitled to damages because his employee is restrained from prosecuting his business, the bond not including the former and the writ not being effectual to restrain him. *Dunham v. Seiberling*, 12 Ind. App. 210, 39 N. E. Rep. 1044.

⁶ *Nixon v. Seal*, 78 Miss. 363, 29 So. Rep. 399.

⁷ *Williams v. Bank of Commerce*, 71 Miss. 858, 871, 16 So. Rep. 238, 42 Am. St. 593.

⁸ *Livingston v. Exum*, 10 S. C. 223.

caused by a lessee refusing to abide by the terms of his lease because of consequences following an injunction. In a recent case the erection of a building was restrained. The owner sought to recover damages on the ground that he thereby lost a tenant. The court thought that no binding lease had been entered into; but nevertheless considered the case as if it were otherwise. Jessel, M. R., was of the opinion that the damage was the difference between the rent agreed to be paid by the lessee and the value of the expectation of rent to be received from some other tenant. "Is that a kind of damage as to which the court should direct an inquiry? It seems to me that it is not." Brett, L. J., said: "If damages are granted at all, I think the court would never go beyond what would be given if there were an analogous contract with or duty to the opposite party. The rules as to damages are shown in *Hadley v. Baxendale*.¹ If the injunction had been obtained fraudulently or maliciously, the court, I think, would act by analogy to the rule in case of fraudulent or malicious breach of contract, and not confine itself to proximate damages, but give exemplary damages. In the present case there is no ground for alleging fraud or malice. The case then is to be governed by analogy to the ordinary breach of contract or duty, and in such a case the damages to be allowed are the proximate and natural damages arising from such a breach, unless, as in *Hadley v. Baxendale*, notice had been given to the opposite party of there being some particular contract which would be affected by the breach. This doctrine of notice has introduced some difficulty into these cases, and it is not settled what sort of notice is sufficient. Here an alleged agreement for a lease is relied on. In the first place I do not think the existence of such agreement proved. If it did exist, the next question is, whether the injunction so interfered with the erection of the buildings as to entitle the tenant to throw up the agreement. I am not satisfied that it did. But assume that it did, and that the agreement was broken in consequence of the injunction, still I agree with the vice-chancellor in thinking that the breach is not by reason of the injunction, but is a consequence too remote to be regarded. If any one obtains an

¹ 9 Ex. 341.

injunction preventing another from proceeding with a building, he must be taken to have notice of everything in the building contract, and all liabilities which the person stopped incurs to his contractor by reason of the stoppage are a natural and immediate consequence of the injunction. But the fact that the injunction prevents the carrying out of an entirely independent agreement as to the property is too remote." Cotton, L. J., was of the same opinion.¹ There can be no recovery for the mental strain and anxiety resulting from an injunction.²

§ 527. *Same subject.* If the restraint keeps the owner of property out of possession or deprives him of its use, compensation is given upon the same principle as in other cases of wrongful deprivation.³ But the difference between the legal rate of interest on money and the amount it earned cannot be recovered where the custodian of it was merely restrained from distributing it among the individual members of an association as their property.⁴ Where a party was prevented from enjoying the benefit of his real estate by an injunction obtained without cause, the value of the use and occupation was given as damages.⁵ In a recent case the court announced that in awarding damages for depriving the person entitled thereto of the use of his land equitable principles would control. The award made included damages for the loss of the crop.⁶ In a case in which the party suing out the injunction was sought to be charged with the value of land for pasturage, he was allowed the cost of fencing it for such use. If the

¹ *Smith v. Day*, 21 Ch. Div. 421.

² *Cook v. Chapman*, 41 N. J. Eq. 152, 2 Atl. Rep. 286.

³ *Smith v. Atkinson*, 18 Colo. 255, 32 Pac. Rep. 425; *Belmont Mining & Milling Co. v. Costigan*, 21 Colo. 465, 47 Pac. Rep. 650; *Ten Eyck v. Sayer*, 76 Hun, 37, 27 N. Y. Supp. 588; *DeCamp v. Burns*, 33 App. Div. 517, 53 N. Y. Supp. 1035; *Richardson v. Allen*, 74 Ga. 719; *Wood v. State*, 66 Md. 61, 5 Atl. Rep. 476; *Dodge v. Cohen*, 14 D. C. App. Cas. 582; *Post-Boynton Strong Co. v. Williams*, 57 Ill. App. 434. See *Dreyfus v. Peruvian Guano Co.*, 42 Ch. Div. 66.

⁴ *Phoenix Bridge Co. v. Keystone Bridge Co.*, 10 App. Div. 176, 41 N. Y. Supp. 891, affirmed without opinion, 153 N. Y. 644.

⁵ *Rutherford v. Mason*, 24 Ind. 311; *Fleming v. Bailey*, 44 Miss. 132. See *Sturges v. Knapp*, 36 Vt. 439, where damages were assessed and distributed upon peculiar facts; also *Johnson v. Moser*, 72 Iowa, 654, 34 N. W. Rep. 459.

⁶ *Rice v. Cook*, 92 Cal. 144, 28 Pac. Rep. 219; *Edwards v. Edwards*, 31 Ill. 474; *Richardson v. Allen*, 71 Ga. 719; *DeCamp v. Burns*, 33 App. Div. 517, 53 N. Y. Supp. 1035.

land was unfenced when the injunction issued and was fit only for pasture, and the defendant was not intending to use it for that purpose, or was not prepared to do so, he was not entitled to any compensation; if his intention was to use it and inclose it for use, he was entitled to the value of the use, less the expense of inclosing it. If he had procured materials to fence it, and was prevented from doing so, he was entitled to be reimbursed for any loss necessarily resulting. If he was prevented from protecting timber land and the complainant had taken away timber and wood and removed sand, there could be a recovery for the value thereof in the condition they were in before they were converted.¹ There may also be a recovery for waste committed while the owner is kept out of possession.² But an injunction interfering with the collection of rents due does not change the legal relation of landlord and tenant so as to entitle the former to recover for use and occupation; the true basis of recovery is the losses from the insolvency of the tenants during the pendency of the injunction. In a case where a landlord was restrained from interfering with the possession of real estate occupied by tenants, it was held that the inquiry of damages should be, what rent has the defendant lost by reason of the injunction? If the tenants were and are still responsible, then their covenant can be enforced and the rent recovered, and there would be no actual loss. If, however, they have become irresponsible or have abandoned the premises pending the injunction, or the premises, or any part of them, were unoccupied and might have been rented, there may be a claim for the loss of rent. In short, the loss must be ascertained in view of the responsibility of the parties and their several remedies; and also in view of the condition of the premises and the landlord's ability to have leased them or collected rent while the injunction continued, which he is unable now to do by reason of the irresponsibility of the tenants or by reason of the premises being unoccupied; for such items the defendants should recover as legitimate damages sustained by reason of the injunction.³ If

¹ *Alexander v. Colcord*, 85 Ill. Timber Co. v. Rountree, 122 N. C. 45, 323. 29 S. E. Rep. 61.

² *Richardson v. Allen*, 74 Ga. 719; ³ The text is quoted in *Edmison v. De Camp v. Burns*, *supra*; *Nansemond* Sioux Falls Water Co., 10 S. D. 440. 73 N. W. Rep. 910.

the plaintiff, pending the action, collected any rent of the tenants, the amount will form part of the damages.¹ The rent of land, the sale of which has been enjoined, cannot be recovered; the injunction did not prevent the appointment of a receiver and the collection of rent.²

Where the injunction prevented the owner from clearing away certain timber upon agricultural lands, the damages [71] for the delay were held too remote and consequential.³ A party so prevented from working on a lead mine, and thereby kept out of employment, was treated as having a just demand for damages on the basis of a loss of time to be compensated at the usual rate of wages.⁴ But in Nevada it was held that where an injunction was obtained to restrain a party from cutting and drawing wood, neither the loss occasioned by reason of his cattle or wagon being thrown out of employment, the expense of making a road which became useless, nor the injury to his credit could be taken into consideration.⁵ Damages which result from a forced suspension of work and from the inability, as a result of the injunction, to take steps to protect the result of labor performed from injury by the elements are recoverable.⁶ Expenses incurred, in connection with the property affected by the injunction, by order of the court are re-

¹ Rosenthal v. Boaz, 27 Ill. App. 430; McDonald v. James, 47 How. Pr. 474.

² Curry v. American Freehold Land Mortgage Co., 124 Ala. 614, 25 So. Rep. 454.

³ McKenzie v. Mathews, 59 Mo. 99. See Bullard v. Harkness, 83 Iowa, 373, 49 N. W. Rep. 855; Colby v. Meservey, 85 Iowa, 555, 52 N. W. Rep. 499.

⁴ Muller v. Fern, 35 Iowa, 420.

⁵ Brown v. Jones, 5 Nev. 374.

In Gear v. Shaw, 1 Pin. 608, an injunction was granted to restrain parties from mining on a certain lot; some time after its dissolution a new mineral discovery was made on the lot and a large quantity of ore was raised. In assessing damages on the injunction bond it was held that proof, for the purpose of enhancing damages, that the use of the

money for which the mineral might have been sold was worth more than the legal rate of interest should be rejected as ideal and speculative; and so, too, the proof of such subsequent discovery for the purpose of showing what the enjoined parties in the absence of the injunction might have realized.

Where the building of a private road was enjoined, and after dissolution the work was prosecuted, it was held that, had the road been finished after the removal of the injunction at an increased cost, such additional expense would have been a proper subject of damages. Morgan v. Negley, 53 Pa. 153.

⁶ White v. Brooke, 11 Wash. 99, 39 Pac. Rep. 237; Dougherty v. Dore, 63 Cal. 170.

coverable, and the sureties will not be heard to say that they are unnecessarily large if they or their principal took no steps to stop the work which caused the expenses.¹ In Tennessee an injunction plaintiff who is put in possession of property by virtue of a bond is regarded as holding it in the capacity of a receiver, and his sureties are not liable for its destruction, without his fault, pending the litigation.² Losses sustained by delays and laches on the part of the injunction defendant must be borne by him.³

If an owner is deprived of his personal property, he is, *prima facie*, entitled to recover its value; and this measure of redress has been allowed where the party obtaining the writ, during its pendency, took possession of the property, destroyed its identity, and converted it to his own use.⁴ It may admit of some doubt whether the loss of the property in such a case proceeds from the injunction. The writ stayed the defendant, but it vested no possession or right of control in the [72] plaintiff.⁵ His seizure of the property was an independent tort, and not the natural and proximate consequence of the injunction except as the restraint prevented the owner from protecting it.⁶ But it must be confessed that the ground of liability on the bond is stated with force and plausibility

¹ Tyler Mining Co. v. Last Chance Mining Co., 32 C. C. A. 498, 90 Fed. Rep. 15.

² Davenport v. Harbert, 2 Tenn. Cas. 287 (1877).

³ Edmison v. Sioux Falls Water Co., 10 S. D. 440, 73 N. W. Rep. 910.

⁴ Barton v. Fish, 30 N. Y. 166; White v. Brooke, 11 Wash. 99, 39 Pac. Rep. 237, quoting the text, and holding that where a prior mortgagee has been enjoined from foreclosing his chattel mortgage and selling under it, the goods having been sold under the foreclosure of a junior mortgage, he may recover upon the injunction bond the full amount of his claim, the goods being of the value thereof. He was not bound to pursue the party who converted them.

⁵ In Patterson v. Kingsland, 8

Blatchf. 278, P., a mortgagee of real estate, sued K. to recover damages for the removal from the mortgaged premises of a building which K. had erected thereon under an agreement with the owner, and had removed therefrom after the execution of the mortgage. When K. had removed the building to some distance, P. obtained an injunction restraining its further removal. The building was subsequently blown down by the wind. It was held that P. did not, by obtaining such injunction, take control of the building so that he could be charged with its value where it then stood, nor was the obligation imposed on him to assume possession and replace it on the land.

⁶ See Ashley v. Harrison, 1 Esp. 48; Vickers v. Wilcocks, 8 East, 1.

by Denio, C. J.:¹ "This seems to me a very plain case. The plaintiff claiming to be the owner of personal property lying on the defendants' land sued the defendants, who also claimed to own that personal property, to establish his title, and he procured a preliminary injunction forbidding the defendants from asserting their alleged ownership, by suit in court or in any other way, pending the principal suit; but he was finally beaten, the court determining that the property belonged to the defendants and not to the plaintiff. In the meantime, while the defendants' hands were tied, the plaintiff carried off the property, destroyed its identity, and disposed of and converted its proceeds to his own use; and the question is, what damages the defendants have suffered in consequence of this proceeding of the plaintiff. The object and the effect of the judgment manifestly was to allow the plaintiff to carry off and dispose of the property while the defendants, who were, as the event has shown, its owners, were precluded from doing anything whatever, in court or out of court, to protect themselves in its possession. *Prima facie*, the value of the property which the defendants have lost was the measure of the defendants' damages. If the property had remained specifically the same during the litigation, and at its conclusion had been within the defendants' reach, the damages probably would have been such as resulted from their being deprived of its use *pendente lite* and from any depreciation in value. But under the existing facts, it is the same thing as though it had been destroyed while the owners were prevented from extending their hands for its preservation. The plaintiff's argument is that the loss was not occasioned by the injunction but by the tortious act of the plaintiff and his assistant unconnected with that process. This is too narrow a view of the question. [73] If it had been carried off and converted by a stranger while the owners were prohibited from doing anything to protect it, the person who restrained them ought to make recompense for the loss. *A fortiori*, he should make the compensation when he himself carried it off and converted it during the restraint which he had procured to be imposed. The efficient cause of the loss was the inability of the defendants,

¹ Barton v. Fish, 30 N. Y. 166.

caused by the injunction, to take care of and preserve that which was their own." It was said in another case in New York, where a lessor had been enjoined from collecting rents, that if the plaintiff, pending the action, collected rent of the tenants, the amount so collected would form part of the damages.¹ And damages were given in an Illinois case on the same principle.² A lessee of farming lands sued out an injunction against a prior lessee to prevent him from harvesting a crop of rye which he had sown while in possession under a lease requiring him to give one-third of the crop as rent; the plaintiff harvested the rye himself, and the court, at the hearing, having found that two-thirds of the rye belonged to the defendant, dissolved the injunction and assessed as damages the value of the two-thirds, after deducting the expense of harvesting the whole crop.³

§ 528. Same subject. Where the writ does not operate to change the possession and does not result in a loss of the chattels, but only suspends the owner's control, the amount properly recoverable on the bond is the loss in the value during the operation of the injunction, not exceeding the penalty, with interest from the institution of the suit.⁴ This damage is the difference between the value of the property at the time when the bond was given and its value at the time the injunction was dissolved, with interest.⁵ Profits which would have

¹ McDonald v. James, 47 How. Pr. 474.

² Collins v. Sinclair, 51 Ill. 328.

³ Id.

⁴ Levy v. Taylor, 24 Md. 282; Meyersburg v. Schlieper, 48 Mo. 426-440.

If the owner is deprived of the use of property he may recover the rental value of it and the amount paid to an employee who was in charge of it under a subsisting contract, and for the expense of taking care of it while it was idle. Wood v. State, 66 Md. 61, 5 Atl. Rep. 476.

If the sale of real estate has been prevented the damages may be proved by showing the depreciation in its value; but a recovery cannot be had unless there is proof of a

bona fide application to buy, and that the injunction prevented the sale. Sturges v. Hart, 45 Ill. 103; Reece v. Northway, 58 Iowa, 187, 12 N. W. Rep. 258.

⁵ Brandamour v. Trant, 45 Ill. 372; Rubon v. Stephan, 25 Miss. 253; Levy v. Taylor, 24 Md. 282; Mansell v. British Linen Co. Bank, [1892] 3 Ch. 159.

In the last case an injunction was issued restraining the sale of shares of stock. Prior to the dissolution of the injunction the holder asked that the shares might be sold and the proceeds paid into court. The plaintiff successfully resisted that application. His liability was measured not by the difference between

been made if an established business had not been interfered with may be recovered,¹ as where one is enjoined from working a mine.² Where a tenant was enjoined from plowing up a meadow on the demised premises the loss of profits for not being allowed to cultivate the land in corn, keeping a horse idle five months, and loss of sale of hogs, were considered too remote and speculative.³

the value of the shares when the action was dismissed and the highest market price between that time and the issuance of the writ, but by the difference in their value between the time of the restraint and the denial of the motion for their sale.

Where a tenant was enjoined from removing a building on leased premises, the building not being capable of removal as such, his damages were the loss in value of the material of the building between the time the writ issued and the time it was dissolved, with interest on the original value during that time. *Ridpath v. Merriam*, 23 Wash. 311, 60 Pac. Rep. 1120.

¹ *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. Rep. 327.

In *Lehman v. McQuown*, 31 Fed. Rep. 138 (Brewer, J.), personal property sold at a sheriff's sale was bought by the debtor's wife for less than its value. A creditor obtained the appointment of a receiver and an injunction to restrain interference, on the ground that the sale was not *bona fide*. The contrary was

established; the receiver settled his accounts and turned over the property unsold to the purchaser, who sought to recover damages upon the creditor's injunction bond for the interruption of her possession. The property in question was a stock of wall-paper, and possession of it was taken in April and not surrendered until July. The claim for damages embraced, among other items, these: depreciation in value of the stock; injury to credit; loss of custom; the sale by the receiver of portions of a single pattern of the paper so as to leave broken and fragmentary pieces. As to the decline in value of the stock, the court said the claim must have been made "upon the assumption that the property, at the time it was taken possession of, could instantly be converted into money, and the illustration which was very forcibly put by counsel was of wheat. It is taken possession of to-day, when its market value is so much; it is held for four months; its market value goes down. Certainly that diminution in value is something of which the party has a right to complain. But

² *Findlay v. Carson*, 97 Iowa, 537, 66 N. W. Rep. 759.

In *Coosaw Mining Co. v. Carolina Mining Co.*, 75 Fed. Rep. 860, mining operations in a locality were restrained, but were carried on in other regions, and compensation was sought for the loss of profits resulting because of the diminished quality of phosphate rock obtained. It was

demonstrated that on the resumption of mining operations, after the injunction was dissolved, and because of the increased production, the price of phosphate materially declined. The claim for such compensation was disallowed because of the uncertainty as to the amount of loss resulting.

³ *Densch v. Scott*, 58 Ill. App. 33.

An injunction may prejudice a creditor by hindering and delaying the prosecution of a suit until the debtor becomes insolvent, and by the loss or depreciation of property on which his debt is secured by delaying the sale of it, and also by increasing costs and expenses. Such losses are covered by the injunction bond.¹ In one case the principal defendant

it was admitted on the hearing last fall, in reference to the taxation of costs, that the receiver had acted prudently. He had a stock of goods which he had done the best he could to dispose of, and if he had not fully succeeded then it was because it was property which could not be thrown at once on the market and converted into money at anything like its value. As shown by the very result of the sheriff's sale, it was not property for which one could go out on the street and find a purchaser in the open market, and if the receiver has disposed of that property, or so much as he did, in the best manner he could, and in a manner which was commended by both parties, and for cash, it would not be fair to hold that, because he did not succeed in disposing of all the property, the complainant is to be charged with the difference between the value in April and in July of that undisposed of." The testimony concerning the loss of profits was not clear enough to warrant an allowance therefor. The claim on account of the manner in which the receiver made his sales was rejected on the ground that his accounts had been approved and he discharged. A recovery was had of \$250 and costs for damages for the interruption of possession.

¹Dodge v. Cohen, 14 D. C. App. Cas. 582; Bolling v. Tate, 65 Ala. 417.

A partner who has been enjoined from collecting firm assets may recover his share of those which were solvent at the time the injunction issued and subsequently became in-

solvent or barred by the statute while the restraint continued. *Terrell v. Ingersoll*, 10 Lea, 77.

If the enforcement of a decree is enjoined and the debt, the collection of which is thereby stayed, is not the complainant's, damages are not to be measured by the amount named in the decree, but are limited to such as resulted from the delay in its execution. *Moore v. Hallum*, 1 Lea, 511; *Staples v. White*, 88 Tenn. 30, 12 S. W. Rep. 339.

In *Aldrich v. Reynolds*, 1 Barb. Ch. 613, a mortgage foreclosure by advertisement was enjoined; and on a dissolution of the injunction there was a reference to ascertain the amount of damages sustained by the defendant by reason of the injunction. He held a bond and mortgage upon a farm in the possession of the complainant, and advertised a sale to take place on the 5th of June, 1845. It appeared on the reference that on the 5th of June the crops and grass upon the premises, and which were afterwards taken off by the complainant during the continuance of the injunction, were worth \$90.30, exclusive of the labor and expense of protecting, gathering and securing them. There was a deficiency of \$100 when the sale took place soon after the dissolution of the injunction. The master allowed as part of the damages \$90.30, the value of the crop and grass taken by the complainant during the time the sale was stayed. He also allowed the interest upon the amount due from the 5th of June until the in-

had filed his bill in equity and obtained a temporary injunction to stay the plaintiff's action at law against him. He failed to maintain his bill, and thereby became liable on his bond. The reasonable damages which the party enjoined was entitled to recover were the legal taxable costs both in the suit at law and on the bill in equity during the time he was delayed by the injunction, provided he had not or could not realize the same on the original proceedings against such principal defendant; also, his reasonable counsel fees which he was liable to pay in both of the original cases for the same time. He could not recover as damages under his bond the interest accruing on the original note in the suit at law unless it appeared that the debtor had become insolvent since the injunction, or that the creditor had suffered damage equal to such interest without fault.¹

junction was dissolved, and the extra expense of continuing the notice of sale during the time the sale was suspended by the injunction; and the taxable costs of the defendant in obtaining a dissolution of the injunction, and upon the reference as well as \$25 which had been paid by the defendant as an extra counsel fee in obtaining such dissolution. The chancellor held that the crops growing upon the premises would have gone to the purchaser if a sale had been made on the 5th of June, and therefore a sale at that time would have brought \$90.30 more than after they had been removed, and hence would have produced just about the amount of the mortgage, with the interest and costs of foreclosure. "The defendant, therefore, lost not only the difference between what the lot would have brought in June, and that for which it was actually sold after the injunction had enabled the mortgagor to strip it of its crops and grass, but also the interest on the amount which he would have been entitled to receive if the sale had taken place on the 5th of June."

The report of the referee was confirmed.

¹ *Derry Bank v. Heath*, 45 N. H. 524; *Redderburger v. McDaniel*, 38 Mo. 138; *Tryon v. Robinson*, 10 Rich. 160; *Willet v. Scovill*, 4 Abb. Pr. 405; *Edwards v. Pope*, 4 Ill. 465.

In *Jones v. Allen*, 29 C. C. A. 318, 85 Fed. Rep. 523, an injunction restrained the prosecution of an action at law. The equity suit was not disposed of for seven years, this delay being assumed to be by consent of the parties. The principals in the injunction bond became insolvent before the injunction was dissolved or soon afterward. It was determined by a majority of the court (Sanborn and Thayer, Phillips dissenting) that it was immaterial whether the damages sued for were the result of insolvency occurring before the dissolution or so soon thereafter that the plaintiffs could not make their debt.

In *Kennedy v. Hammond*, 16 Mo. 341, A. conveyed to B. a mill and leasehold to secure C. the payment of two notes. After the first and before the second note matured the

Under a bond conditioned to secure the amount or matter to be enjoined, and all damages and costs that may be occasioned by the injunction, if the collection of a judgment is enjoined the amount of it, with the damages assessed upon the

property was advertised and sold pursuant to the deed of trust; D. became the purchaser. After the sale D. tendered to B. the amount of the note which had matured, and produced the receipt of the assignees of the grantor for the balance of his bid and demanded a deed. B. refused to deliver a deed, and when the second note became due again advertised the property for sale. D. applied for and obtained an injunction. When it was dissolved the lease had been declared forfeited and the mill had burned down, so that the mortgaged interest would not have sold for enough to defray the expenses of a sale. Held, upon the dissolution of the injunction, the damages were properly assessed at the whole amount of the notes with interest, etc., even though their makers were solvent.

A statute of Missouri required an injunction bond "to secure the amount, or other matter to be enjoined, and all damages that may be occasioned by such injunction, conditioned that the complainant shall abide the decision which shall be made thereon, and pay all sums of money, damages and costs that shall be adjudged against him if the injunction shall be dissolved." Another provision was that "if money shall be enjoined, the damages thereon shall not exceed ten per cent. on the amount released by the dissolution, exclusive of legal interest and costs." The rule of ten per cent. held not to apply. Ryland, J., said: "Here the complainant did not seek to enjoin and restrain the defendants from the collection of a judgment or of a sum of money, but to

prevent them from proceeding to sell property, the trust fund; and by that act, on the part of the complainant, serious injury may have been committed; no less than the destruction, in a greater or less degree, of the value of the entire fund; and can it be said that ten per cent. is to be the amount of damages to be awarded, on the dissolution of the injunction in such cases? Ten per cent. on what? The original debt, for the payment of which the trust was made? That will not do. Nor can the defendants be compelled to resort to the bond on which that injunction was originally allowed. The condition of the bond is, 'pay all sums of money, damages and costs that shall be adjudged against him, if the injunction shall be dissolved.' Now, before suing on this bond, after dissolution, the damages must be adjudged, and the non-payment of the amount adjudged forms the breach of the bond so far as damages are concerned. . . . At the maturity of the second note steps were taken to sell the trust property; then the complainant steps in and by his bill prevents the sale by injunction. Upon the dissolution of this injunction, the trust property being destroyed partly by fire, and the lease forfeited to the original lessor; the trust property, I may say, lost to the *cestui que trust*; the damages, in consequence, were assessed at the amount of the debt secured and interest, and I think very properly. Let us look at the facts in this case. Hall, Allen & Childs were the proprietors of the lease from Chambers of the steam saw-mill. They gave their deed of

dissolution of the injunction, and costs, is the measure of the sureties' liability, notwithstanding their principal was solvent and able to pay.¹ But under a bond conditioned to pay the damages sustained if the injunction was improperly granted, the

trust on the property to secure two notes. Afterwards Hall sold all his interest in the premises to Childs & Emerson, expressly subject to the debt mentioned in the trust deed. Then Allen sells his interest in the property to Childs & Emerson, in like manner subject to the payment of the debt. Then Childs transfers the property to Emerson subject to the payment of the debt. Lastly, Emerson transfers the property to John Maguire, in the same manner subject to the debt; so that Maguire becomes the owner of the property, and, in respect to the prior parties, is the principal debtor, and they merely his securities to the holder of the trust deed. Maguire procures Kennedy to bid off the property at the trustee's sale, and prosecutes the present suit for his own benefit, using Kennedy's name. Maguire has all along been in possession, receiving a large rent, \$2,000 per year, until the mill was burned down in 1849. The deed of trust contained a stipulation that the premises should be insured, and that the insurance should stand as security to the creditor. Maguire collects the insurance for his own benefit. This, too, pending the injunction. So, too, pending the injunction, the landlord enters into the premises for a forfeiture, and Maguire suffers him to keep possession, and to make leases to other parties. Maguire, after making the trust debt his own, appropriates the security for the debt to his own use, and insists that the original Orris Hall shall look to the makers of the notes individually and not to the trust fund.

"The notes are still due: the trust property was sold; Maguire gets possession through Kennedy's purchase, pays no part of the debt for which the property was sold, rents out this very trust property for \$2,000 a year, and indemnifies Kennedy to prosecute this proceeding, in which the injunction was obtained. Had the second sale proceeded, the debt in all probability might have long ago been made out of the trust property. Pending this proceeding that property has become lost to the *cestui que trust*; and because the original makers of the notes are supposed to be worth \$3,000, Maguire contends that the *cestui que trust* has not been damaged, and that he must look to the notes."

Yates v. Joyce, 11 Johns. 136, was held in the foregoing case not to have any or but slight application to any principle involved in the case under consideration. That was a suit by a judgment creditor whose judgment was a lien on land against a party who pulled down erections which were thereon. The court sustained the action on the principle that, "where the fraudulent misconduct of a party occasions an injury to the private rights of another, he shall be responsible in damages for the same."

In *Lane v. Hitchcock*, 14 Johns. 213, the court say: "This case is supposed to be within the principles of *Yates v. Joyce*, 11 Johns. 136. In the case now before us, proof was offered on the trial that the mortgagor was insolvent, and had no other property than the mortgaged premises out of which the debt of the plaintiff might

¹ *Hunt v. Burton*, 18 Ark. 188.

sureties are not liable for the amount of the judgment the collection of which was enjoined unless it is shown that an opportunity to collect the judgment was lost because of the injunction.¹ Under the Illinois statute the damages to be

be satisfied; but there was no averment in the declaration to warrant such proof. These were material and indispensable facts in order to give the plaintiff a right of action; and to allow this proof without the averment would take the defendant by surprise."

In *St. Louis v. Alexander*, 23 Mo. 484, an injunction was obtained by stockholders to restrain the sale under a trust deed of property, franchise, etc., belonging to the corporation. A statute provided that upon dissolution of an injunction in whole or in part, damages should be assessed by a jury, or, if neither party require a jury, by the court; but if money shall have been enjoined, the damages thereon shall not exceed ten per centum on the amount released by the dissolution, exclusive of legal interest and costs. The court say: "The injunction to stop the proceedings of a trustee to sell property under a deed of trust to pay a debt has not been considered such an injunction upon money as to authorize the assessment by the rule of per cent. laid down in that act alone. In the case of *Kennedy's Ex'r v. Hammond*, 16 Mo. 341, the court held that the damages in such a case were not limited to ten per cent. on the debt, but might extend to the full amount of the debt, if the loss to the creditor by the injunction extended so far. The meaning of the words, 'if money shall have been enjoined,' has been generally supposed to embrace injunctions upon the executions of judgments originated by the debtor therein against his creditor, and not such as restrain other acts whereby

money may in consequence thereof be deferred in payment by the interposition of third parties. Upon an execution against a debtor's estate, the payment of which can be enforced out of all his property, and the justice of which has been settled by the law through the intervention of its officers and tribunals, if there be an interference by injunction, and it turn out to be without proper cause, and is therefore removed, then damages not exceeding ten per cent. upon the amount released from the injunction may be a just penalty for improperly interfering, and a just recompense for the delay which such interference produced to the creditors. But such is not the case when a sale of trust property has been enjoined. Here the debt has been recognized by the parties only; the law has not adjudicated upon it. Then, when a sale is enjoined by a third party, and the court after a hearing dissolves the injunction, it becomes proper to ascertain the damages, not by the rule of per cent., but from the injury the creditor has sustained from the improper act of the party stepping in between the creditor and the debtor, and hindering and delaying the execution of the means provided to enforce payment. Suppose, in this case, that the trust property was not worth half the debt intended to be secured; would the delay in the sale of it, caused by injunction, authorize the court to give ten per cent. damages for the detention and non-payment of the whole debt? What injury has the creditor sustained by enjoining the sale of property not worth one-tenth

¹ *Neal v. Taylor*, 56 Ark. 521, 20 S. W. Rep. 352.

awarded when the collection of a judgment has been restrained are limited to ten per cent. of the amount of the judgment.¹ If, during the time an injunction restraining the enforcement of a judgment is in effect, the property levied on depreciates in value from any cause, the depreciation is an element of damage,² and if the complainant does or permits the doing of injury to the fixtures or buildings on the land levied upon, he must compensate the judgment plaintiff therefor.³ If interest is not recoverable on delinquent taxes it cannot be recovered on an injunction bond restraining proceedings for their collection, the obligation being to pay "all damages" resulting from the wrongful suing out of the injunction.⁴ Interest may be allowed on the damages awarded although the first award was reversed because insufficient.⁵ If several creditors successively impound the same fund and give separate bonds, they are not liable to a joint judgment for the damages.⁶

§ 529. What facts no defense. Want of jurisdiction [77] in the court over the subject-matter of the action does not deprive the defendant of the right to damages on the undertaking.⁷ No matter can be heard on the assessment of damages which constitutes a defense to the action.⁸ Nor will disobeying the writ defeat an action on the bond.⁹ If a bond is con-

of his debt? Again, suppose the injunction had caused the loss of the entire fund in trust; would ten per cent. on the debt be a proper amount of damages—the only amount which the law would recognize, although there be proof amply to show that the fund was in value equal to the debt? No. In all such cases the court or jury should determine the amount of injury by evidence before it or them as to the damages sustained; the probable amount that would have been realized; the value of money at the time, and other circumstances tending to show the damages sustained by the creditor in consequence of the injunction."

¹ *Sturten v. Neustadt*, 50 Ill. App. 378.

² *Dodge v. Cohen*, 14 D. C. App. Cas. 582.

³ *Gibson v. Reed*, 54 Neb. 309, 75 N. W. Rep. 1085.

⁴ *Illinois Central R. Co. v. Adams*, 78 Miss. 895, 29 So. Rep. 996.

⁵ *Kohlsaat v. Crate*, 50 Ill. App. 552.

⁶ *Stringfield v. Hirsch*, 94 Tenn. 425, 29 S. W. Rep. 609, 45 Am. St. 733.

⁷ *Alexander v. Gish*, 88 Ky. 13, 9 S. W. Rep. 801; *Cumberland Coal Co. v. Hoffman Coal Co.*, 15 Abb. Pr. 78; *Hanna v. McKenzie*, 5 B. Mon. 314, 43 Am. Dec. 122. But see § 475.

⁸ *Nansemond Timber Co. v. Roundtree*, 122 N. C. 45, 29 S. E. Rep. 61; *White v. Brooke*, 11 Wash. 94, 39 Pac. Rep. 237; *Terre Haute & I. R. Co. v. Peoria, etc. R. Co.*, 182 Ill. 501, 55 N. E. Rep. 377.

⁹ *Van Hoover v. Van Hoover*, 18 Mo. App. 19; *Colcord v. Sylvester*, 66 Ill. 540.

ditioned to satisfy an execution, the collection of which is enjoined, it is immaterial to the liability of the sureties whether the property released was subject to execution or not, or whether the debt has been lost by reason of the injunction.¹ The legal effect of an injunction bond is not lessened by a statute which continues a levy in force after an execution has been issued.² The sureties on an undertaking in an action to set aside a bond and mortgage cannot include as a payment the sum bid by them for the property on its sale under a foreclosure.³ A defense is not made by showing that after the writ was dissolved another injunction was obtained.⁴ If the defendant is restrained from doing several acts, and the bond is conditioned to pay such damages as he may sustain by reason of the injunction, the sureties are liable, though the restraint is continued as to one act, for all damages except such as were caused by his inability to perform in that particular.⁵ Granting an extra allowance to the defendant upon giving leave to discontinue a suit in which an injunction had been obtained does not bar a recovery of damages upon the bond unless the allowance was so conditioned by the court which gave it.⁶

Where all damages covered by the bond or recoverable must be ascertained in the injunction suit,⁷ and, *a fortiori*, if the bond is conditioned to pay such damages as shall be so ascertained, the sureties are bound by the action of the court in the ascertainment of the damages, and can raise no question as to its correctness in an action on the bond.⁸ If that instrument is in terms for the benefit of persons who are not, but who ought to have been, parties, the sureties cannot deny their liability to them.⁹ If several persons are interested in a suit, and the only

¹ Riggan v. Crain, 86 Ky. 249, 5 S. W. Rep. 561.

² Pugh's Adm'r v. White, 78 Ky. 260.

³ Holcomb v. Rice, 119 N. Y. 598, 23 N. E. Rep. 1112.

⁴ Swan v. Timmons, 81 Ind. 243; Colcord v. Sylvester, 66 Ill. 540; De Camp v. Burns, 33 App. Div. 517, 523, 53 N. Y. Supp. 1035.

⁵ Pierson v. Ells, 46 Hun, 336.

⁶ Howell v. Miller, 12 Daly, 277;

Troxell v. Haynes, 5 id. 390, 16 Abb. Pr. (N. S.) 1.

⁷ Roberts v. Fahs, 36 Ill. 268; Methodist Church v. Barker, 18 N. Y. 463; Blakeney v. Ferguson, 18 Ark. 347.

⁸ Lothrop v. Southworth, 5 Mich. 436; Anderson v. Falconer, 30 Miss. 145; Lockwood v. Saffold, 1 Ga. 72.

⁹ Alexander v. Gish, 88 Ky. 13, 9 S. W. Rep. 801. See Hays v. Fidelity & Deposit Co., 112 Fed. Rep. 872, 50 C.

C. A. 569.

defendant employs an attorney, the obligors on the bond will not be heard to allege that the attorney did not represent all such parties.¹ In England the undertaking extends to all the defendants, although one or more of them only may be restrained; but not to those who did not ask the court to require it.²

A substantial modification of a restraining order will release the sureties from subsequent liability.³ But in Illinois an injunction may be dissolved piecemeal, and if the liability of the sureties is not increased they are not discharged.⁴ The same rule has been applied where the principal obligor and the execution creditor stipulated that the sheriff might retain the proceeds of the sale of property until the determination of a motion in the case for the appointment of a receiver.⁵ The dismissal of a suit by agreement does not affect the surety.⁶

§ 530. What may be shown in defense. If an injunction rightfully awarded is properly dissolved, no damages can be recovered upon matters done or arising afterwards.⁷ An injunction by order is a provisional remedy, temporary in character. It assumes a pending litigation in which all questions are to be settled by a judgment, and operates only until the final judgment is rendered. If by that a permanent injunction is granted, the temporary writ is ended; and this is equally so if a permanent one is denied.⁸ As a general rule, an undertaking cannot be required where a final decree is made, upon which event the functions of a preliminary injunction cease. Consequently the sureties are not liable for damages subsequently accruing, although the final decree is reversed on appeal.⁹ And if the injunction be dissolved before

¹ *Nimocks v. Welles*, 42 Kan. 39, 21 Pac. Rep. 787. See *Fourth Nat. Bank v. Scott*, 31 Hun, 301.

² *Tucker v. New Brunswick Trading Co.*, 44 Ch. Div. 249.

³ *Tyler Mining Co. v. Last Chance Mining Co.*, 32 C. C. A. 498, 90 Fed. Rep. 15.

⁴ *Brackebush v. Dorsett*, 133 Ill. 167, 27 N. E. Rep. 934.

⁵ *Keith v. Henkleman*, 173 Ill. 137, 50 N. E. Rep. 692.

⁶ *Patterson v. Rinard*, 81 Ill. App. 80; *Boynton v. Phelps*, 52 Ill. 210.

⁷ *Taylor v. Bush*, 5 B. Mon. 84; *Massie v. Sabastian*, 4 Bibb, 433; *Anderson v. Wallace*, 6 T. B. Mon. 381; *Lampton v. Usher's Heirs*, 7 B. Mon. 57, 66. Compare *Jones v. Allen*, 49 C. C. A. 318, 85 Fed. Rep. 523, stated in note to § 528.

⁸ *Jackson v. Bunnell*, 113 N. Y. 216, 21 N. E. Rep. 79.

⁹ *Lambert v. Haskell*, 80 Cal. 611.

the merits are adjudicated, the obligors may show the facts in mitigation that would entitle the plaintiff in the injunction suit to the writ.¹ So where the injunction had been granted to stay a sale under execution, the subsequent reversal of the judgment on which the execution issued may be taken into consideration on the question of damages in an action on the injunction bond.²

The damages and expenses incurred by the real party in interest in procuring a dissolution will be presumed in law to have been incurred by the defendant on the record, and may be recovered in his name for the person beneficially interested.³ The liability of the sureties does not extend to damages sustained by an assignee of the judgment;⁴ nor to counsel fees paid or incurred by one of several defendants;⁵ nor to damages resulting to the defendant from his misapprehension of the scope of the injunction.⁶ A corporation suing on a bond running to it cannot recover damages which have incidentally fallen on its stockholders without showing that they have been compelled to respond for a breach of some valid contract into which they had antecedently entered and

625, 22 Pac. Rep. 327; *Webster v. Wilcox*, 45 Cal. 302.

¹ *Stewart v. Miller*, 1 Mont. 301.

² *Fahs v. Roberts*, 54 Ill. 192.

In *Mahan v. Tydings*, 10 B. Mon. 351, it was held that in an injunction suit brought by executors in their representative character, the bond given by such executors and their sureties, only binds them to the extent of assets. See *Mills v. Forbes*, 12 How. Pr. 466.

³ *Andrews v. Grenville Woolen Co.*, 50 N. Y. 282; *Hovey v. Rubber Tip Pencil Co.*, id. 335.

In *Peerce v. Athey*, 4 W. Va. 22, where an injunction bond was joint as to the obligees, and joint and several as to the obligors, it was held that a joint action might be brought by the obligees and a joint judgment rendered for the whole of their demand, although the claims due them respectively might be of different

amounts and bear interest from different dates.

But in *Fowler v. Frisbee*, 37 Cal. 34, where various persons were severally in possession of and cultivating in separate parcels a tract of land and were sued jointly in ejectment to recover possession of the whole tract, and an injunction was obtained restraining them jointly from taking off the crops, it was held that such parties could not maintain a joint action for damages on the injunction bond, where the damages were not joint. See *Lally v. Wise*, 28 Cal. 539; *Browner v. Davis*, 15 id. 9; *Summers v. Farish*, 10 id. 347.

⁴ *Burgett v. Paxton*, 15 Ill. App. 379.

⁵ *Hildrup v. Brentano*, 16 Ill. App. 443; *Ovington v. Smith*, 78 Ill. 250; *Safford v. Miller*, 59 id. 205; *Burns v. Follansbee*, 20 Ill. App. 41.

⁶ *Lillie v. Lillie*, 55 Vt. 470.

which they were prevented from performing by the injunction, or that they have rightfully liquidated the claims asserted against it.¹ It is a right possessed by the sureties to have the suit in which their bond was given disposed of according to the usual practice of the court; hence they are absolved from liability if, pursuant to a stipulation of the parties, it is determined at chambers after the close of the term.² In Indiana a restraining order made in vacation is not binding unless signed by the judge, and no liability attaches to the sureties upon a bond given pursuant to it.³ If the statutes prescribe the conditions of a bond the sureties are not liable beyond the statutory measure although the language of their obligation is broader and clear;⁴ the same rule applies if the extra-statutory condition was required by the court.⁵ The presence of such a condition does not absolve the obligor from liability for the violation of such conditions as were authorized.⁶

SECTION 8.

APPEAL AND SUPERSEDEAS BONDS.

§ 531. Their conditions; liability of sureties. There [79] is considerable diversity in the conditions of these bonds and undertakings by the legislation of the different states; but in certain particulars there is extensively a substantial agreement. Under the practice which preceded the code, and in the federal courts, bonds on appeals and writs of error, which operate as a *supersedeas*, contain generally the conditions to prosecute the appeal or writ of error to effect, and if the judgment be affirmed in whole or in part, or the plaintiff in error or appellant fail to make his plea good, he shall answer all damages and costs.⁷ A *supersedeas* bond with such a condition is strik

¹ Eaton v. Larimer & Weld Reservoir Co., 3 Colo. App. 366, 33 Pac. Rep. 278.

² Baker v. Frellson, 32 La. Ann. 822.

³ Kiser v. Lovett, 106 Ind. 325, 6 N. E. Rep. 816.

⁴ Horton v. Cope, 6 Lea, 155; Hays v. Fidelity & Deposit Co., 112 Fed. Rep. 872, 50 C. C. A. 569.

⁵ Moore v. Hallum, 1 Lea, 511.

⁶ Slutter v. Kirkendall, 100 Pa. 307; Burrall v. Acker, 23 Wend. 606; Johnson v. Vaughan, 9 B. Mon. 217; Barnes v. Brookman, 107 Ill. 317; State v. Purcell, 31 W. Va. 44, 5 S. E. Rep. 301; Rubelman Hardware Co. v. Grave, 18 Mo. App. 6.

⁷ The agreement to prosecute with effect means to do so with success. Legatee v. Marr, 8 Blackf. 401; Per-

ingly analogous to the bond given by the plaintiff in replevin. In that action the plaintiff obtains possession of the property in question by giving a bond conditioned to prosecute the suit to effect; and when he fails in the performance of the condition he and his sureties are liable for the value of the property and interest thereon unless it is returned. So, by executing a *superseas* bond, a party against whom a money judgment or decree has been rendered, and who appeals or takes a writ of error, retains possession and enjoyment of the money in question subject to the same condition. On the breach of that condition there is a forfeiture of the bond, and the obligee is entitled to compensation, within the penalty, to the amount of the moneys so withheld and interest. In other words, the surety undertakes to pay the judgment if the condition of the bond is not fulfilled.¹ That obligation attaches by virtue of the affirmance of the judgment. The judgment creditor is not bound to proceed against the judgment debtor,² and the sureties have no right to have proceedings against them stayed until attached lands of their principal are sold.³ It is not a defense to the sureties that the plaintiff holds securities belonging to the judgment debtor; they cannot avail themselves thereof as a counter-claim.⁴ The same measure of liability results from the execution of a bond on an appeal from an order directing the issue of an execution under a decree for the payment of money.⁵

reau v. Bevan, 5 B. & C. 291; Kart-haus v. Owings, 6 H. & J. 134; Champomier v. Washington, 2 La. Ann. 1013.

The condition is not satisfied if the appeal is dismissed for want of prosecution, though the judgment is not changed. Coon v. McCormack, 69 Iowa, 539, 29 N. W. Rep. 455; Trent v. Rhomberg, 66 Tex. 249, 18 S. W. Rep. 510. *Contra*, Hobart v. Hilliard, 11 Pick. 143. The performance of one condition is no defense to an action for the breach of another. Trent v. Rhomberg, *supra*.

¹Steinhauer v. Colmar, 11 Colo. App. 494, 55 Pac. Rep. 291; Healy v. Newton, 96 Mich. 228, 55 N. W. Rep. 666; Flannagan v. Cleveland, 44 Neb. 53, 62 N. W. Rep. 297; Woodlie

v. Murry, 2 Tenn. Cas. 625; Tarr v. Rosenstein, 3 C. C. A. 466, 53 Fed. Rep. 112; Graham v. Swigert, 12 B. Mon. 522; Ives v. Merchants' Bank, 12 How. 159; Sessions v. Pintard, 18 id. 106; Talbot v. Morton, 5 Litt. 326; Many v. Sizer, 6 Gray, 141.

²Babbitt v. Finn, 101 U. S. 7; Davis v. Patrick, 6 C. C. A. 632, 57 Fed. Rep. 909; Flannagan v. Cleveland, 44 Neb. 58, 62 N. W. Rep. 297.

³Davis v. Patrick, Flannagan v. Cleveland, *supra*; Ayers v. Duggan, 57 Neb. 750, 78 N. W. Rep. 296; Sterne v. Talbot, 89 Hun, 368, 35 N. Y. Supp. 412.

⁴Sterne v. Talbot, *supra*.

⁵Wood v. Brown, 43 C. C. A. 474, 104 Fed. Rep. 203.

A *supersedeas* bond in the usual form will be valid as a common-law bond for the damages resulting from the stay of proceedings, although no writ of error be sued out.¹ On the receipt of the mandate affirming the judgment, with interest from its date, and costs, on entering a summary judgment against the sureties, it should be for the amount of the original judgment, with interest and costs; the interest should not be computed to date, and judgment entered for the full amount.²

According to some courts the sureties on an appeal bond are not liable beyond the liability of their principal, and if he is an administrator and not liable on the bond because of the insolvency of the estate, they are not liable.³ But this rule does not prevail under the code of New York.⁴ In Tennessee the bond by the administrator was conditioned to perform the judgment; on finding a plea of no assets in his favor, the liability of the surety extended only to the costs and damages.⁵

§ 532. *Supersedeas bonds in federal supreme court.* By the twenty-second section of the judiciary act of 1789 the [80] judge signing the citation is required to take good and sufficient security that the plaintiff in error shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good.⁶ And since 1803, when provision for appeals in equity and admiralty cases was made, *supersedeas* bonds in such cases have been subject to the same conditions. And the twenty-ninth rule of the supreme court of the United States, adopted in 1867, in accordance with the prior adjudications of the court, provided that *supersedeas* bonds in the circuit courts "must be taken with good and sufficient security that the plaintiff in error or appellant shall prosecute his appeal or writ to effect, and answer all damages and costs if he fail to make his plea good." And this rule declared that "such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including 'just damages for delay,' and costs and interest on the appeal." Under this rule the penalty

¹ Healy v. Newton, 96 Mich. 228, 55 N. W. Rep. 666.

² Gordon v. Third Nat. Bank, 6 C. C. A. 125, 56 Fed. Rep. 790.

³ Lunsford v. Baskins, 6 Ala. 512;

Evans v. Adams, 4 Blackf. 54; Fitzpatrick v. Todd, 79 Ky. 521.

⁴ Yates v. Burch, 87 N. Y. 409.

⁵ Banks v. McDowel, 1 Cold. 84.

⁶ R. S., § 1000.

of the bond would be ample for as large a recovery against the surety by action on the bond as the remedy by execution against the principal.¹

It is said in one case that "it is not required that the security shall be in any fixed proportion to the decree. What is necessary is that it be sufficient."² In that case the decree below was for over \$300,000, and a bond had been required for double that amount. On a motion to reduce it, the appellate court, after making the remark which has been quoted, said: "We are satisfied that a bond in a much less amount will be entirely sufficient; and inasmuch as it appears that security in part for the amount they might be decreed to pay had been given by the present appellants, before the bond on appeal was required, by a deposit of bonds of the United States, and other private bonds, amounting in all to a sum not less than \$200,000, we will order that the appellants have leave [§1] to withdraw the appeal bond now on file, on filing a bond in lieu thereof in the sum of \$225,000, with good and sufficient sureties." It will be observed that though the judgment was a money judgment, and rendered against the defendants personally, the court fixed the penalty at a less sum in consideration of there being other security. Hence there could not, for that reason, be a recovery against the sureties for the full sum of the judgment. It was not deemed necessary; but on affirmance of the judgment the bond would be available to the extent of the penalty unless the judgment had been so far otherwise satisfied that a sum less than that would completely discharge it. In an earlier case, not unlike it in the fact of a personal judgment and collateral security, the court say: "The condition of the bond was 'for the prosecution of said appeal to effect, and to answer all damages and costs if' there should be a failure to make the plea good in the supreme court. There was a failure to do this, and the penalty of the bond was incurred. Whatever hardship there may be in this case is common to all sureties who incur responsibility and have money to pay. Beyond that of a faithful application of the proceeds

¹ See *Catlett v. Brodie*, 9 Wheat. 553; *Stafford v. Union Bank*, 16 How. 135, 17 id. 175; *Rubber Co. v. Goodyear*, 6 Wall. 153; *French v. Shoe-* maker, 12 id. 86; *George v. Bischoff*, 68 Ill. 236; *Roberts v. Cooper*, 19 How. 373.
² *Rubber Co. v. Goodyear*, *supra*.

of the land in payment of the decree, the appellants have no equity. They cannot place themselves in the relation of two creditors having claims on a common fund, which may be distributed *pro rata* between them." The appellee "has a claim on both funds; first, on the proceeds of the land, and second, on the judgment entered on the appeal bond for the satisfaction of the original decree."¹

§ 533. Same subject; liability if judgment is in part for money or in rem. It is undoubtedly true that the *supersedeas* bond secures the amount of the judgment or decree rendered against the appellant or plaintiff in error personally to the extent of the penalty, even though there be other security. This is apparent from the authorities cited in the preceding notes. The sureties may be resorted to in the first instance, because an action accrues against them on the forfeiture of the bond, and the value of the other security is no more to be considered in reduction of the amount to be recovered than the responsibility of a solvent principal.² Rule 29 of the supreme court, which has been referred to, formulates the law as generally held in other cases: "In all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin and in suits on mortgages; or where the property is in the custody of the marshal, under admiralty process, as in the case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal."

In a case decided prior to the adoption of this rule, a bond had been given in a penalty of \$25,000 upon appeal from a decree in admiralty rendered for \$22,224; the decree had been

¹ Sessions v. Pintard, 18 How. 106. The judgment was rendered on the bond for the full amount of the penalty before sale of the land which was security. The proceeds were applied to the original decree, and after such application there was less

due than the amount of the judgment on the bond. The latter was reduced accordingly by a receipt, and direction to collect on the execution only the balance.

² Sessions v. Pintard, 18 How. 106.

affirmed with six per cent. damages, as well as costs. On return of the mandate, judgment had been entered for the original amount, and also for \$6,078.20 damages arising by reason of the appeal, and for \$529.98 costs. An amount about equal to eighty per cent. of the total sum for which execution was issued had been realized by the sale of property attached when the proceeding was commenced, and on which a lien continued until sold. The deficiency exceeded the penalty of the *supersedeas* bond; and it was contended in behalf of the surety that the proceeds of the sale should be applied ratably to every part of the demand, and thus reduce the damages and costs to about \$1,200. This view, however, was rejected. It was held that the surety was bound to pay such damages as might be awarded by the supreme court, and costs, and he could have been sued and judgment had against him had no execution issued. He was positively bound to the amount of his bond, and could not be heard to allege an extinguishment of it in part because of a payment made by his principals, leaving an amount due equal to the bond. Mr. Justice Catron said: "This is the plain equity of the case. If the appeal had not been taken, and the property attached had been sold in due time after the first decree for \$25,000, no damages would have been sustained by the plaintiffs below; and as the surety was instrumental in delaying satisfaction, it is equitable that he should respond to such damage as his act occasioned and which enlarged the amount."¹

The bond required by the rule on an appeal from a decree for the foreclosure of a mortgage is not intended as security for either the amount of the decree or the interest accruing on the debt pending the appeal, but only for such damages as may arise from the delay incident to obtaining the judgment of the appellate court.² There is an intimation that the damages may be affected by the use and detention of the mortgaged property; but, as is said in a subsequent case, that was not the point in judgment.³ The bond sued upon in a recent case contained the statutory words, "that the appel-

¹ *Ives v. Merchants' Bank*, 12 How. 554. *Supervisors v. Kennicott*, 103 U. S. 159; *Sessions v. Pintard*, 18 id. 106.

² *Jerome v. McCarter*, 21 Wall. 17; ³ *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. Rep. 911.

lant shall prosecute his appeal to effect, and if he fail to make his plea good shall answer all damages." It also contained an extra-statutory condition: And shall "pay for the use and detention of the property covered by the mortgage in controversy during the pendency of the appeal." It was not competent for the parties to add to their rights or liabilities by virtue of this condition, and it was rejected. The rulings in *Jerome v. McCarter* and *Supervisors v. Kennicott* were approved; and it was held that the bond did not cover the balance due after applying the proceeds of the sale of the mortgaged property, nor the rents and profits thereof, nor the value of its use and detention pending the appeal. The liability was limited to the costs of the appeal and the deterioration or waste of property. It might extend to burdens resting upon it as the result of the non-payment of taxes and loss by fire, if it was not properly insured; but as to these last elements there was no occasion for their consideration. It is also suggested that there was doubt concerning liability for depreciation in the value of the property.¹ The supreme court of Massachusetts has ruled that an appeal bond in an equity suit in a federal court does not include damages for the rents and profits, or for the use and detention of land pending the appeal, unless there is a recovery therefor in the suit.² Where a bond was given to supersede an order confirming a sale of real estate, which order directed the immediate execution of a deed and delivery of possession of the property to the purchaser, the latter was entitled, after the reversal of the order, to recover for the breach of the bond the value of the use and possession of the land during the time he was deprived of it. The case in hand was distinguished from one in which the appeal was from a decree ordering a sale.³

The Utah court has held that a *supersedeas* bond in an action of ejectment given under section 1000, Revised Statutes of the United States, covers liability for rents and profits pending the proceedings in error, but that the recovery must be limited to compensation for actual loss, the rule of compensation appli-

¹ *Kountze v. Omaha Hotel Co.*,
supra.

² *Burges v. Doble*, 149 Mass. 256,
21 N. E. Rep. 428.

³ *Woodworth v. Northwestern Mutual L. Ins. Co.*, 185 U. S. 354, 22 Sup. Ct. Rep. 676, distinguishing *Kountze v. Omaha Hotel Co.*, *supra*.

cable being that which governs in actions upon contract.¹ The same conclusion had previously been announced by Mr. Justice Brewer. He said: The statute provides that the security shall answer all damages and costs where the writ is a *supersedeas*. That he shall answer *all* damages! Now, when the judgment is entered in the circuit court, the right of the plaintiff to the possession of the property is established. He is entitled to the immediate possession, and to the rents and profits that thereafter shall arise therefrom. If by proceedings in error and a *supersedeas* bond he is deprived of that possession, and so, pending the proceedings in error, loses those rents and profits, certainly he is damaged to that extent; and if the *supersedeas* bond is to answer all damages, it should answer for those rents and profits. I do not see any logical escape from that reasoning. The intimation to the contrary in *Omaha Hotel Co. v. Kountze*² was not regarded as binding.³ In agreement with these cases is a recent case in Pennsylvania, which also denies the right of abatement, as against the damages recoverable on the bond, for improvements consisting of a frame building erected on piles so that it could be removed, and repairs made on an old house, to render it habitable, after the ejectment was begun.⁴

§ 534. *Liability in state courts if judgment is in part for money or in rem.* The judgment in the appellate court for damages necessarily ascertains the sum that respondent is entitled to when he realizes the entire amount recovered. If by reason of the appeal the original judgment is wholly or partially lost, that is an additional damage covered by the *supersedeas* bond, if the penalty is large enough. The bond is not for the damages awarded by the appellate court simply, but "all damages;" and hence when a judgment or decree is for the recovery of money not otherwise secured, the bond is required to be made an indemnity for the whole amount of the judgment, including just damages for the delay, and costs and interest on the appeal.

¹ *Tarpey v. Sharp*, 12 Utah, 383, 43 Pac. Rep. 104.

² 107 U. S. 378, 2 Sup. Ct. Rep. 911.

³ *St. Louis Smelting & Refining Co. v. Wyman*, 22 Fed. Rep. 184.

⁴ *Gleeson's Estate*, 192 Pa. 279, 43 Atl. Rep. 1032, 73 Am. St. 808, 8 Pa. Dist. Rep. 64.

Where an intruder, ousted by judgment in *quo warranto* from an office having a fixed salary and of personal confidence, as distinguished from one merely ministerial, takes a writ of error, and by a *supersedeas* bond keeps himself in the office and in the enjoyment of the salary pending the writ, which he fails to prosecute successfully, in an action on the bond by the party who has the judgment of ouster, the measure of damages is the salary received by the intruding party during the pendency of the writ of error, and the consequent operation of the *supersedeas*.¹

In a Kentucky case action was brought on a *supersedeas* bond given to stay execution pending a writ of error from the supreme court of the United States, under the twenty- [84] fifth section of the judiciary act, the decree being otherwise secured. The condition of the bond was to prosecute the writ to effect, or, on failure, to pay the amount of the original decree, with the damages and costs, and all damages, interest and costs that might be awarded in the appellate court. The condition, in terms, was broad enough to secure the payment of the amount of the decree, but the legal effect was discussed with reference to the condition which the law prescribed, and that was the same, substantially, as required by the laws of that state in case of appeals from judgments and decrees. Mr. Chief Justice Simpson, in delivering the opinion, said: "If it were substantially a decree against the defendants for money, then there can be no question that the law required them, in case they appealed, or suspended its execution by the *supersedeas*, to secure to the plaintiff the payment of the amount, and the bond imposes a liability to that extent upon the obligors." The court found the decree to be such, and the plaintiff entitled to full recovery against the sureties.² Where

¹ United States v. Addison, 6 Wall. 291. It was also held in this case that the rule which measures damages upon breach of a contract for wages, or for freight, or for the loss of the rent of buildings, where the party aggrieved must seek other employment, or other articles for carriage, or other tenants, and where the damage he is entitled to recover

is the difference between the amount stipulated and the amount actually received, has no application to public offices of personal trust and confidence, the duties of which are not purely ministerial or clerical. See Lawlor v. Alton, 8 Irish L. 160.

² Graham v. Swigert, 12 B. Mon. 522. Some further observations of the chief justice will not be without

the judgment discharged an attachment and ordered the proceeds of the sale of the goods levied on paid to the defendant, no personal judgment, even for costs, being rendered, the sureties were not liable for the money in the hands of the offi-

value. He said: "The condition of the bond required by the act of congress is substantially the same as is required by the laws of this state in the case of appeals from judgments and decrees. It is, therefore, contended that the decisions of the court upon the effect of such bonds must determine the extent of the obligation of the surety in this case; and that, according to the principles of these decisions, he is not liable for the amount of the decree. . . . The cases referred to for the purpose of sustaining this proposition are *Talbot v. Morton*, 5 Litt. 326, and *Sumrall v. Reid*, 2 Dana, 65. In both of these cases an appeal was taken from a decree to foreclose a mortgage on real property, and subject it to sale for the payment of judgments at law. In the first it was held that the bond was sufficient, although it did not secure the payment of the judgment at law, as the decree was rendered against the mortgaged estate, and there was no decree for money. And the court in that case said it cannot be contemplated by law that the bond should secure the real estate or its value, or that accidents of fire and destruction of the estate are to be provided for in the bond. In the case of *Sumrall v. Reid* the appeal bond was conditioned to pay the amount recovered by the decree and costs; and it was decided that there was nothing recovered by the decree, and it only subjected the real estate in the mortgage to the payment of a judgment at law; there was no liability on the surety for the debt. The principle attempted to be [85] deduced from these cases is, that the law prescribes one uniform con-

dition to such bonds, but discriminates between the liability imposed by a breach of the condition in the different classes of cases. In appeals from a judgment or decree *in personam* the liability extends so far as to secure the judgment or decree; but in appeals from a decree *in rem* the demand asserted in the suit, and to obtain the payment of which the proceeding is instituted, is not secured by the bond. These cases have not settled the doctrine in the manner and to the extent contended for. They only decide that in cases where there is a mere decree of foreclosure, made for the purpose of subjecting real estate to the payment of judgments at law, and an appeal is taken, the bond required by law does not secure the amount of the demand for the payment of which the land is decreed to be sold. This, according to the reasoning of the court in the first case, results in some measure from the nature of the property which is looked to for the security of the debt. It is permanent and not subject to loss, removal or destruction, and, consequently, a stipulation in the bond for its security is unnecessary, and not contemplated by law. If, however, it be conceded that the same doctrine ought to apply to all decrees merely for the sale of mortgaged property, whether personal or real, it by no means follows that it ought to be extended to that class of cases where personal property is attached by a proceeding in chancery instituted for the purpose of obtaining payment of the complainant's demand, where the debtor has a right to retain the property by executing a bond, especially when the appeal is

cer.¹ While it was the law of Kentucky that a party could not appeal from a judgment which was an entirety because he was entitled to more relief than was awarded him and at the same time enforce so much of the judgment as was in his

taken by the debtor himself, having the property in his possession at the time. The effect of the appeal may be to diminish very materially, if not to destroy, the security of the complainant's demand by postponing the execution of the decree until the sureties in the bond executed by the debtor become insolvent, and the property itself be consumed or disposed of, and placed beyond the reach of the creditor.

"In the case of *Worth v. Smith*, 5 B. Mon. 504, it appeared that a number of creditors were proceeding at the same time to subject by attachments the steamer *John Mills* to the payment of their several debts; that the steamer had been sold, and the proceeds of the sale were under the control of the court. In that state of case a contest arose among the creditors about the disposition of the fund; and part of the creditors being dissatisfied with the decree of the chancellor upon the subject appealed to this court, and the decree was affirmed. A suit was then brought by the preferred creditors against the surety in the appeal bond, and it was held that he was only liable for the costs and damages awarded by this court, and not for the sums decreed to the creditors out of the fund for distribution. The ground of the decision was, that the appeal did not affect the security of the fund; that, notwithstanding the appeal, it remained under the control of the chancellor, who was not thereby restricted from taking any step which he might deem proper to secure it. This case does not, however, settle the principle that an appeal taken by the debtor from a

decree to sell personal property which had been attached and remained in his possession would not impose [86] any liability upon the obligors in the appeal bond for the amount of the decree. It seems rather to authorize an opposite inference, inasmuch as in the case last mentioned the appeal would have the effect to suspend the action of the chancellor altogether, and deprive him of all control over the property, and of all power to provide for its security. But let this question be disposed of as it may when it arises, the decree in this case, in our opinion, partakes of the nature of a personal decree, and was virtually, and in effect, a decree against the parties for whom the defendant became surety in the bond, and, consequently, is not within the operation of the principle applicable to the cases where the proceedings are exclusively *in rem*. The statutes under which the proceeding was instituted in the chancery court made the defendants liable to the action of the party aggrieved, either at law or in chancery (1 Statute Law, 260), so that the chancellor had the power to render a personal decree against them for the sum adjudged to the complainant. The boat or vessel in which the slaves were removed out of the limits of the commonwealth is also made liable, and may be condemned and sold to pay and satisfy the damage sustained by the complainant and the costs of suit. But the proceeding against the boat is merely ancillary to the main object of the suit, and intended to aid in its accomplishment, by furnishing means to be applied to the satisfac-

¹ *Neilson v. Jarvis*, 17 Ky. L. Rep. 694, 32 S. W. Rep. 400.

favor, a plaintiff took an appeal from a decree ordering the sale of his land, to pay his creditor, subject to a prior lien, the existence of which lien the plaintiff contested; the defendant prosecuted a cross-appeal and gave a *supersedeas* bond, on which appeal the judgment was affirmed. There was no lia-

tion of the decree. The proceeding was not exclusively *in rem*, but was both *in rem* and *in personam*.

"The damages sustained by the complainant had been ascertained, and a decree rendered for the amount. The defendants had been required to produce the attached property, and had failed to comply with the requisition. The chancellor could have ordered an execution to issue against them immediately for the sum decreed and costs of the suit, or could have enforced the payment of the amount by proceeding against the parties in the bond executed for the forthcoming of the property. In this attitude of the case the parties agreed that the decree pronounced should be treated as a final decree, and the defendants obtained an appeal. The effect of the appeal was to suspend the execution of the decree and prevent the chancellor from ordering an execution to issue against the defendants, or to enforce the bond. The decree, as it was rendered, would not have authorized an execution to issue against the defendants without an additional order; but still the decree was personal, and imposed upon the defendants the duty to pay the money to which the complainant was entitled, and the enforcement of this duty was prevented by the appeal. There is a clear distinction between this case and the cases that have been referred to. In those cases the defendants were not personally liable and the chancellor had no power to order an execution to issue upon the decree. In the

case of *Worth v. Smith* the appeal was not taken by the debtor, but by part of the creditors whose claims had been postponed, and who, of course, were in no manner responsible for the fund in contest, and against whom no decree had been rendered for the payment of money. And in that case the court said that as the surety might have executed the bond alone without his principal, if he were to be made liable for the fund in contest, which had been decreed to the preferred creditors, his liability would exceed that of his principal, against whom no decree for the payment of the fund or any part of it had been rendered. That reasoning, however, does not apply to this case. Here a decree had been pronounced against the principals of the surety. They were personally liable for the sums decreed. The appeal was evidently taken to prevent the enforcement of that liability. The nature of the proceeding had undergone a radical change. It had become, by the failure to deliver the property attached, exclusively personal. It was no longer *in rem*, for there was no property for the chancellor to act upon. He could have proceeded against the surety in the bond, but his liability was personal. The remedy, however, was not confined to the liability of the surety, but extended to the defendants, who were personally liable for the amount of the decree by the express provisions of the statute, which authorizes the party aggrieved in such a case to sue in chancery."

bility on the bond because the act of the defendant in appealing, not the bond, stopped the plaintiff from enforcing his judgment.¹ If the entire judgment in an action to enforce a lien for the recovery of the debt, as well as for the sale of the property, is superseded the plaintiff may recover on the bond so much of the judgment as is *in personam*, although the judgment for the sale of the property be reversed.² If, in an action by a subcontractor, a personal judgment is rendered against the original contractor and the claim is also adjudged to be a mechanic's lien, and one of the landowners appeals and gives a *supersedeas* bond in the usual form, on affirmance of the judgment, the sureties are not liable for the payment of the personal judgment. It seems that while the appeal brought up such judgment for review as against the original contractor, it did not vacate that judgment nor suspend the issue of execution thereon.³ Where a personal judgment was obtained against M., and, under an attachment, a judgment setting aside a deed from M. to B. on the ground that it was fraudulent, and ordering a sale of the land to pay, first, a debt due to another party, and then the appellant's debt, on an appeal by B., superseding only the sale of the land, and after an affirmance of the judgment, there could not be a recovery on the bond for the depreciation in the value of the land, from whatever cause it proceeded, nor for attorneys' fees, the bond not being conditioned to pay all damages, but being a copy of the form appended to the code.⁴ Where there was a sale of land to satisfy two judgments in favor of the same party, the liens on the land being on an equality, and an appeal was taken from one of the judgments and affirmed, it was erroneous, in order to protect the surety in the bond, to apply the proceeds realized from the sale to the satisfaction of the appealed judgment; there should have been a *pro rata* division between the judgments, leaving the surety liable for the balance of that which was superseded.⁵

¹ Lyon v. Lancaster, 16 Ky. L. Rep. 92 (Ky. Super. Ct.).

² Leopold v. Furber, 8 Ky. L. Rep. 198, 84 Ky. 214, 1 S. W. Rep. 404.

³ Sosman v. Conklin, 65 Mo. App. 319.

⁴ Buckner v. Terrell, 8 Ky. L. Rep. 701 (Ky. Super. Ct.).

⁵ Laughlin v. Conkley's Ex'x, 40 S. W. Rep. 248, 19 Ky. L. Rep. 407, distinguishing Ives v. Merchants' Bank, 12 How. 459, and Sessions v. Pintard, 18 id. 406.

[87] In Maryland, where the appeal has not been prosecuted to effect the rule of damages and the extent of recovery will depend on the loss and injury sustained by reason of the stay of execution on the judgment appealed from.¹ In an action on the appeal bond the measure of damages is the actual injury suffered by the appellee from the delay in whatever manner it arises.² If the fund pledged was unequal to the payment of the debt at the time of the decree, the intermediate accruing interest is a clear loss to the plaintiff, occasioned by the delay, and should be made the standard in the absence of other injury.³ By such a bond in a foreclosure case, which is *in rem*, the obligors are not bound on affirmance of the decree to pay the mortgage debt, nor to make good to that extent any deficiency in the proceeds of the sale of the land,⁴ nor did they stipulate that the land should sell for enough to pay even the principal of this debt; but if the deficiency was increased by the intermediate depreciation of the mortgaged property, such increased deficiency would be an item of damage covered by the bond.⁵

§ 535. **Same subject.** Where the operation of an injunction was suspended by an appeal — and it was held that such was the effect of an appeal from an order allowing it — on the affirmance of the order, if the thing on which it was intended [88] to operate should exist in specie in the defendant's possession, then the injunction is restored to its original vigor; but if the thing is consumed or disposed of the complainant must proceed on the bond which was given to indemnify him from all loss and injury which he may sustain by reason of the appeal. And the measure of damages is the value of the property or thing so disposed of and lost to him.⁶

Where a judgment in replevin for the return of the goods is affirmed, their value (if they have not been restored) and

¹ Keen v. Whittington, 40 Md. 489.

² Wood v. Fulton, 2 Har. & Gill, 71.

³ Id.; Jenkins v. Hay, 28 Md. 547.

⁴ Kennedy v. Nims, 52 Mich. 153, 17 N. W. Rep. 735.

⁵ Hinkle v. Holmes, 85 Ind. 405; Jenkins v. Hay, 28 Md. 547; Cook v. Marsh, 44 Ill. 178; Utica Bank v. Finch, 3 Barb. Ch. 293, 49 Am. Dec. 175.

There is an intimation that depreciation in the market value of property is not an element of damage. See Kountze v. Omaha Hotel Co., 107 U. S. 378, 2 Sup. Ct. Rep. 911, and § 533.

⁶ Blondheim v. Moore, 11 Md. 365; Everett v. State, 28 Md. 190.

the costs of suit would seem to be the true standard by which the damages of the appellee should be measured on a suit brought on the appeal bond.¹ But if no damages are awarded and the claim is withdrawn, the recovery can only be for the costs.² In Vermont, where the conditions of the bond are that the appellant will prosecute his appeal to effect or pay all intervening damages occasioned thereby, in estimating such damages the property which the appellant had at the time of the appeal, and all that he acquired during its pendency, is to be taken into account. The plaintiff is entitled to recover the value of his chance of collecting his debt during the time of the suspension of his execution.³ A lessee in possession of premises subject to a right of dower is not liable to heirs not in possession for rents and profits pending an appeal from an order appointing commissioners to make partition.⁴ Nor is one who appeals from the allowance of a will liable on such a bond, in case of affirmance, for extra expenses of the executors in prosecuting the suit subsequent to the appeal, beyond the taxable costs; but where such appeal necessitates the appointment of a special administrator the extra expenses of special administration, beyond the amount that would have been necessary if the estate had been settled by the executors without the intervention of the appeal, constitutes intervening damages recoverable on the bond.⁵ The legislature intended only to provide for the security and recovery of intervening damages whenever the appellee should have judgment [89]

¹ *Karthauss v. Owings*, 6 H. & J. 134.

² *Bryan v. Simpson*, 92 Ga. 307, 18 S. E. Rep. 547.

³ *McGregor v. Balch*, 17 Vt. 562.

⁴ *Stockwell v. Sargent*, 37 Vt. 16.

⁵ *Sargeant v. Sargeant*, 20 Vt. 297.

By statute passed in Illinois in 1865, it was provided that appeals shall be allowed to the supreme court from all decrees, judgments and orders of inferior courts from which writs of error might be lawfully prosecuted; and in granting appeals inferior courts shall direct the condition of appeal bonds, with refer-

ence to the character of the decree, judgment or order appealed from. A bond was given on appeal from a decree dissolving an injunction which restrained the use of land, conditioned to prosecute the appeal and pay the amount of the judgment, costs, interest and damages rendered and to be rendered in case the decree should be affirmed. No judgment was rendered in either court that the appellee recover the rental value of the real estate; it was therefore held that the obligors were not bound for it. *McWilliams v. Morgan*, 70 Ill. 62.

therefor, and not to create any new liability. The appellant is to give security for such damages, provided the other party should be found entitled to recover any.¹ And where interest is recoverable as intervening damages it should be moved for and allowed on the hearing of the appeal.² If the appellee is entitled only to costs, a bond to pay all intervening costs and damages will secure no more than costs.³ So in a bond given on appeal, the condition of which was to pay all such costs as the obligee might recover, the costs which accrued before the bond was made, as well as afterwards, are properly included.⁴ One who becomes surety on a *superseatas* bond substituted for a prior similar bond is liable for all the damages accruing during the pendency of the appeal, and not for those only which accrued after it was filed.⁵

Under a bond given in a *habeas corpus* proceeding to procure the discharge of a minor, claimed by the petitioner as his apprentice, and conditioned to pay all the costs and damages that may accrue on and by reason of the appeal, there may be a recovery of a reasonable attorney's fee for services rendered in procuring the affirmance of the order, but not for the loss of the services of the apprentice pending the appeal, nor for the fee paid the sheriff to procure the surrender and delivery of the apprentice after the termination of the appeal.⁶

A statute of Massachusetts regulating appeals in actions by landlords against tenants provided that if the complainant appeal he shall recognize to pay all intervening damages and costs, and to prosecute his appeal with effect; that if the defendant appeal he shall recognize to pay all rent due and in arrears, and all intervening rent, damages and costs; and that the court of common pleas shall, whenever any appellant thereto fails to prosecute his appeal, affirm the former judgment upon the appellee's complaint, and award such additional damages and costs as have arisen in consequence of the

¹ *Stearns v. Brown*, 1 Pick. 530.

² *Stearns v. Brown*, 1 Pick. 530.

³ *Swan v. Picquet*, 4 Pick. 465.

⁴ *Manufacturing Co. v. Barney*, 45 N. H. 40.

A second undertaking given in lieu of an insufficient one will not operate retroactively unless it is so

expressed. *Henrie v. Buck*, 39 Kan. 381, 18 Pac. Rep. 228.

⁵ *Wilson v. King*, 59 Ark. 32, 23 L. R. A. 802, 26 S. W. Rep. 18; *Hargis v. Mayes*, 20 Ky. L. Rep. 1965, 50 S. W. Rep. 844.

⁶ *Shows v. Pendry*, 93 Ala. 248, 9 So. Rep. 462.

appeal. Under these provisions it was contended that it was competent for that court to render judgment in favor of the landlord, when appellee, after defaulting the appellant, for the intervening rent and damages; that "additional damages" include such rent, because he is damaged by being kept out of possession, and include likewise damages for the timber and wood removed, and any injury to the buildings. The court suggest that the case might be likened to that of interest [90] accruing subsequently to the commencement of the action; but reply, that interest is merely incidental, and therefore is brought up to the time of the judgment; that, with the exception of interest, no damages could be recovered except what had accrued before the action was commenced; that the phrase "intervening damages" seems to have been used without any definite meaning; it is the usual language in regard to appeals, and is employed in respect to appeals by the plaintiff where there can be no intervening damages. The court say: "If the tenant keeps out the owner wrongfully, and there were no other remedy, the statute might perhaps be so construed as to give this remedy, though it would be an awkward construction. There can, however, be no doubt that an action of debt will lie on the recognizance, and a previous judgment of the common pleas for intervening damages is not necessary to sustain the action. This view is confirmed by the clause in the recognizance to pay rent in arrears. That is not intervening rent, and a remedy for it would necessarily be upon the recognizance."¹ Under a bond conditioned to pay all "rent due or to become due," there may be a recovery of rent under a new as well as under the original lease.²

¹ *Braman v. Perry*, 12 Pick. 118.

In *Davis v. Alden*, 2 Gray, 309, it is held that a lessee, who, on appealing from the judgment of a justice of the peace or police court in an action on R. S., ch. 104, recognizes, pursuant to statutes of 1848, ch. 142, to pay all intervening rent, and all damages and loss which the lessor may sustain by reason of the withholding of the possession of the demanded premises, and by reason of any injury done to the premises during such withholding, is liable,

prima facie, and in ordinary cases, to payment at the rate reserved in the lease until the recovery of possession by the lessor, although the buildings on the premises be meanwhile destroyed by fire; and is responsible for all waste, actual and permissive, and for all losses, including the destruction of the building, if not proved to have been caused by inevitable accident.

² *Pray v. Wadell*, 146 Mass. 324, 16 N. E. Rep. 266.

§ 536. **Instances of liability on more specific conditions.** The obligations required by later legislation to stay execution pending appeal are generally more precise, specifying the liability with greater particularity. They are usually required, in terms, to secure the payment of money judgments and decrees with the damages and costs which may be awarded on the appeal; and in other cases, likewise, such peculiar damages as result from the appeal according to the nature of the case. [91] What damages and costs may be awarded on appeal will be considered in subsequent sections. The obligation as to the judgment or decree appealed from, as well as to the damages and costs on the appeal, is simply to pay them, or that appellant shall do so, or such part of the judgment or decree below as shall be affirmed. If the bond is general in terms as to the affirmance of the judgment, it will hold the sureties liable for the costs, expenses and losses resulting from an affirmance by the court of last resort,¹ with interest as an incident thereto from the date of demand upon the surety.² The rate of interest will be the same as that borne by the judgment, notwithstanding a subsequently-enacted statute reduced the rate on judgments; the contract rate was not affected thereby.³ The liability for interest on a judgment rendered by a federal court is not affected by a default judgment rendered against the sureties as trustees in a suit against the plaintiff, such judgment being subsequent to the service of notice on them that the plaintiff looked to them for the payment of his judgment. The sureties' liability did not extend to interest on a sum deposited in court by a receiver and retained there, no provision concerning it being made in the decree.⁴ If the execution of a personal judgment is stayed by a bond and the judgment debtor becomes insolvent between the time of its execution and the final termination of the action, the surety cannot

¹ *Mackellar v. Farrell*, 57 N. Y. App. 281, 41 N. E. Rep. 554; *Waycross Super. Ct.* 398, 8 N. Y. Supp. 307; *Air Line R. Co. v. Offerman & W. R. Robinson v. Plimpton*, 25 N. Y. 484; *Co.*, 114 Ga. 727, 40 S. E. Rep. 738.
² *Murray v. Aiken, etc. Mining Co.*, 39 S. C. 457, 18 S. E. Rep. 5.
³ *Missouri, etc. R. Co. v. Lacy*, 13 Tex. Civ. App. 391, 35 S. W. Rep. 505.
⁴ *Tarr v. Rosenstein*, 3 C. C. A. 466, 53 Fed. Rep. 112.

avoid liability for the amount of the judgment by showing that a rule might have been obtained against the debtor to bring the money into court.¹ The rule might be different if there was a fund in court resulting from the sale of the property attached, the money awaiting distribution.²

Liability for costs, expenses and losses has been enforced where a new court of final appeal was provided for after the bond was executed.³ But it has been held that when the condition is to pay on the affirmance of the judgment by a designated court, there is no liability for the costs of an appeal from its judgment of affirmance.⁴ If, when the appeal bond was given, the supreme court of a state had appellate jurisdiction only on appeal from an intermediate court and the bond conformed to the law as it then was, and the law was subsequently changed so that the appeal went directly to the supreme court, there being no judgment of the intermediate court, the sureties are not liable on the bond.⁵ An appeal bond to perform the judgment of a designated circuit court does not include liability, so far as the surety is concerned, to perform the judgment of any other circuit court.⁶ And such a bond given to perform the judgment of the supreme court is not binding to secure the performance of the judgment of an intermediate court, although the case in which such bond was given was, by an amendment of the constitution and laws enacted in pursuance thereof, transferred from the former to the latter.⁷ These cases are based on the rule that the contracts of sureties are not to be extended beyond their terms. The supreme court of Texas recognizes this principle, but says that such contracts are to be construed in connection with the laws in force when they are entered into, and in view of the fact that every person must know that the power to change the jurisdiction of the courts may be exercised at any time, and cannot be controlled by contracts made or obligations as-

¹ *Mahlman v. Williams*, 89 Ky. 549; *Hinckley v. Kreitz*, 58 N. Y. 282, 12 S. W. Rep. 335. 583.

² See *Worth v. Smith*, 5 B. Mon. 505. ³ *Schuster v. Weiss*, 114 Mo. 158, 21

³ *Horner v. Lyman*, 2 Abb. App. S. W. Rep. 438, 19 L. R. A. 182.
Dec. 399, 4 Keyes, 237. ⁶ *J. A. Rotham Distilling Co. v.*

⁴ *Winston v. Rives*, 4 Stew. & Port. Kernis, 79 Mo. App. 111.

269; *Morgan Co. v. Selman*, 6 Ga. 440; *Nofsinger v. Hartnett*, 84 Mo. 396. ⁷ *Cranor v. Reardon*, 39 Mo. App.

sumed by individuals, it ought not to be held that the parties to an appeal bond contemplated, in the event of such change pending appeal, that their obligation should become inoperative, for the substance and spirit of such an undertaking is that the obligors will discharge the obligation fixed by their bond whenever the duty to do so is declared by a court having jurisdiction over the cause on appeal, whether that jurisdiction existed when the bond was given or was afterwards conferred. Referring to the Missouri cases cited, it was observed that some of them seem to hold that such obligations assureties on appeal bonds assume are contracts within the constitutional safeguards which deny to legislatures power to pass laws whereby the obligation of contracts will be impaired, but it seems to us such is not the character of these obligations, for they are not based on consent of adverse litigants, but are assumed by the makers of such bonds, which are permitted, and thereby the right to appeal secured under the provisions of positive law. The conclusion arrived at was that bonds given to secure the payment of any judgment that might be rendered by the supreme court were binding on all the parties to them although that court was deprived of jurisdiction to hear the causes on which such bonds were given, such jurisdiction being transferred to the courts of civil appeals.¹ Under a bond conditioned to pay upon the affirmance of the judgment by a designated court there is no liability, after the reversal of the judgment, if another and different judgment is entered by consent of the parties, the sureties not consenting thereto.² Where the appeal in the first instance was to an intermediate court which reversed the judgment, and on appeal to the court of last resort the judgment of reversal was reversed and the original judgment affirmed, the sureties were liable for the costs of the final appeal, the mandate to the intermediate court directing the entry of judgment in accordance with its terms. But it would have been otherwise if such mandate had been sent directly to the court of original jurisdiction.³ If a second appeal removing the case to a

¹ Mexican National R. Co. v. Mussette, 86 Tex. 708, 26 S. W. Rep. 1075, 24 L. R. A. 642.

² Nofsinger v. Hartnett, 84 Mo.

³ Miller v. Ryan, 13 Ohio Ct. Ct. 459; Robinson v. Plimpton, 25 N. Y.

higher court, with another set of sureties, results in a second affirmance the liability of the first sureties is not thereby increased; they are not liable for the costs and damages on the second appeal, nor are the two sets of sureties co-sureties.¹

Bail upon discharge from an order of arrest are sureties within the rule that as between different sets of sureties who undertake to secure the same debt, in different stages of legal proceedings, the primary liability rests upon the last set.² The original sureties are not released by the execution of another bond, with other sureties, for a further appeal; the bonds are cumulative securities.³ In a New York case the undertaking was for the payment of any deficiency which should remain after a sale of the mortgaged premises. On appeal to the general term of the supreme court the judgment was affirmed. An appeal was then taken to the court of appeals, and proceedings were stayed upon an undertaking. It was held that the sureties on the first undertaking had no such right to have the real estate sold under the judgment of foreclosure and their precise liability determined immediately after the affirmance of the judgment as to be released from their obligation by the second undertaking. The order providing for the lat-

484; *Richardson v. Kropf*, 47 How. Pr. 286, 60 N. Y. 634; *Gardner v. Barney*, 24 How. Pr. 467.

¹ *Moore v. Lassiter*, 16 Lea, 630; *Hinckley v. Kreitz*, 58 N. Y. 583. See *Post v. Doremus*, 60 id. 371; *Burdett v. Lowe*, 85 id. 241; *Shankland v. Hamilton*, 1 Thompson & C. 239; *Smith v. Crouse*, 24 Barb. 433; *Helbner v. Townsend*, 8 Abb. Pr. 234.

A defendant in a federal circuit court gave bond with a surety conditioned to keep and perform the final decree in the cause and pay all sums which might therein and thereby be decreed to be paid by him. The circuit court rendered a final decree against him for damages and costs, from which he appealed to the supreme court of the United States, and gave bond, with a different surety, to pay all such costs as the court should decree to

be paid to the plaintiff upon affirmance of the decree of the circuit court. The supreme court affirmed that decree, with costs and interest; and, pursuant to its mandate, the circuit court decreed that its own former decree be affirmed, with costs and interest, and that execution issue for the sum found due by that decree, with interest from its date, and for the further amount of costs decreed by the supreme court, and the costs taxed in the circuit court upon the return of the mandate. Held, that this was the final decree in the cause within the meaning of the first bond. *Jordan v. Agawam Woolen Co.*, 106 Mass. 571.

² *Culliford v. Walser*, 158 N. Y. 65, 52 N. E. Rep. 648.

³ *Becker v. People*, 164 Ill. 267, 45 N. E. Rep. 500; *Chester v. Broderick*, 131 N. Y. 549, 30 N. E. Rep. 507.

ter and for the stay of proceedings was not such a novation and substitution of the new undertaking in the place of the original as to release the sureties on the latter from liability for a larger deficiency than would have existed but for the second appeal.¹ In another case, the facts being similar, after affirmance of the foreclosure decree by the court of appeals, the premises were sold, the deficiency being over \$11,000, of which amount \$9,000 was collected on the second appeal bond, being the penalty thereof. It was determined in an action on the second bond that the sureties therein were liable for the deficiency, that the doctrine of subrogation did not apply, and that the sureties on the first bond were not discharged by the proceedings against the sureties on it.² The recovery for which the sureties are liable must be in the identical case in which the bond was given. The opposite party cannot make a judgment in his favor, obtained in another court, or in another suit, though on the same debt or demand, the measure of their liability.³

There are numerous cases in which the doctrine is asserted that the sureties on an appeal bond are only liable, like other sureties, by virtue of the express terms of their undertakings.⁴ There are, however, some cogent reasons for not adhering too closely to the rule that requires a strict construction of contracts in favor of sureties so far as obligations of the character under consideration are concerned. As has been observed: The very wide range and varying character of actions, suits, judgments and decrees necessitated broad generalizations in the stipulated conditions of a form of bond intended to operate in all. The very nature and uses of such bonds and their

¹ Mackellar v. Farrell, 57 N. Y. 772; Markoe v. American Surety Co., Super. Ct. 398, 8 N. Y. Supp. 307. 44 App. Div. 285, 60 N. Y. Supp. 674.

² Chester v. Broderick, 131 N. Y. 549, 30 N. E. Rep. 507. affirmed without opinion, 167 N. Y. 602; Smith v. Huesman, 30 Ohio St. 662; Lang v. Pike, 27 id. 498; Hall v. Williamson, 9 id. 23; Myres v. Parker, 6 id. 501; Hamilton v. Jefferson, 13 Ohio, 421; Fullerton v. Miller, 22 Md. 1; Rice v. Rice, 13 Ind. 562; Foster v. Epps, 27 Ill. App. 235; Henrie v. Buck, 39 Kan. 381, 18 Pac. Rep. 228; Nofsinger v. Hartnett, 84 Mo. 549.

³ Planters' & Miners' Bank v. Hudgins, 84 Ga. 108, 10 S. E. Rep. 501; Evers v. Sager, 28 Mich. 47; Lauer v. Griffith, 92 Ill. App. 388.

⁴ Schuster v. Weiss, 114 Mo. 158, 21 S. W. Rep. 438, 19 L. R. A. 182; Sears v. Seattle Consolidated Street R. Co., 7 Wash. 286, 34 Pac. Rep. 918; Ogden v. Davis, 116 Cal. 32, 47 Pac. Rep. 549.

general recitals, in necessary conformity to the terms of statutes or rules of court, render it unreasonable and unjust to give the liability of sureties therein the strictness of interpretation that sometimes applies in the case of guarantors or special sureties in voluntary contracts between two parties. The interpretation, on the contrary, should rather be liberal, for the necessary protection of those who have nothing to do with the form or approval of the obligation, and are compelled, against their wills, to forego their legal claims and incur risk of loss by reason thereof. This view, we think, is sound in principle and supported by authority in analogous cases.¹ The rule of strict construction in favor of sureties is not to be carried so far as to vitiate a bond which would, but for a misdescription of the amount for which judgment had been rendered, be a contract to pay the whole judgment; in such a case the sureties' liability is not limited to the sum mentioned in the bond. The rule in such a case is that whenever, in the bond, there is enough to identify the judgment a misrecital will not affect, limit or vary the liability of the sureties if from the instrument itself the intention to be bound to answer for the judgment may be gathered.² In some cases it is said that the surety cannot escape liability unless there is a substantial reason for it. The judgment creditor has been prejudiced by the surety's act, and the latter has obtained for his principal the benefit of an appeal, and he is therefore estopped to deny his liability when the bond has subserved the purpose for which it was given and the appellant has had the benefit of it.³

¹ Per Justice Shepard in *Fulton v. Fletcher*, 12 D. C. App. Cas. 1, 17, citing *McElroy v. Mumford*, 128 N. Y. 307, 28 N. E. Rep. 502; *Barton v. Fisk*, 30 N. Y. 166, 172; *Ives v. Merchants' Bank*, 12 How. 159; *Sessions v. Pintard*, 18 id. 106.

² *Dye v. Dye*, 12 Colo. App. 206, 55 Pac. Rep. 205, citing *McElroy v. Mumford*, 128 N. Y. 303, 28 N. E. Rep. 502; *Landa v. Heermann*, 85 Tex. 1, 19 S. W. Rep. 885; *Warren v. Marberry*, 85 Tex. 193, 19 S. W. Rep. 904; *Ryan v. Webb*, 39 Hun. 435; *Phelps v. Daniel*, 86 Ga. 363, 12 S. E.

Rep. 584; *Mathews v. Morrison*, 13 R. I. 309; *Adler v. Potter*, 57 Ala. 571; *Hartlep v. Cole*, 120 Ind. 217, 22 N. E. Rep. 130; *Miller v. Vaughan*, 78 Ala. 323; *Miner v. Rodgers*, 65 Mich. 225, 31 N. W. Rep. 845.

³ *Irwin v. Crook*, 17 Colo. 16, 28 Pac. Rep. 519; *Abbott v. Williams*, 15 Colo. 512, 25 Pac. Rep. 450; *Shannon v. Dodge*, 18 Colo. 164, 32 Pac. Rep. 61; *Creswell v. Herr*, 9 Colo. App. 185, 48 Pac. Rep. 155. This subject is considered in another aspect in § 537.

If the bond is for the benefit of those entitled to costs, as well as for the benefit of the defendant in error, the surety does not discharge his obligation by paying the amount of the penalty of the bond to the defendant in error without the assent of those entitled to the costs; having paid in his own wrong, he is liable, also, for their *pro rata* share.¹ If a *superseas* may be issued to stay proceedings on part of a judgment a bond reciting that the appellant desired to supersede the judgment in so far as the same adjudges the lien of the appellee superior to that of the appellant, and which binds the makers to satisfy and perform the judgment above stated, will not cover the amount of a personal judgment of one of the creditors of the common debtor, that part of the judgment not [92] being superseded.² Where the undertaking is to pay the amount of the judgment and all damages which shall be awarded on the appeal if the judgment be affirmed, and the order of affirmance is interlocutory and conditional, providing for a new trial in a certain event, the undertaking does not extend to the judgment on such new trial. The final judgment thus obtained is not an affirmance of the first judgment. The sureties were only bound for the first judgment when affirmed.³ If the bond is defective or insufficient, although it performs the office for which it was given, the rule that the recovery cannot extend beyond what is expressed in it applies.⁴ The sureties upon an appeal bond given by the defendant in an ejectment action are liable only for a specific judgment, and are released when the defendant pays the costs, has the order for judgment vacated and the cause sent back for a new trial under the statute.⁵ A statute imposing liability for any judgment which may be entered upon the appeal for costs means only such costs as are incurred after the appeal is taken.⁶ A bond conditioned to prosecute the appeal with effect or to pay, satisfy and abide by the judgment that may be rendered does

¹ Curry v. Homer, 62 Ohio St. 233, 56 N. E. Rep. 870. Ann. 468; Smith v. Huesman, 30 Ohio St. 662.

² Gilbert v. Bamberger, 19 Ky. L. Rep. 1833, 44 S. W. Rep. 421. ⁴ Weigley v. Moses, 78 Ill. App. 471.

³ Poppenhusen v. Seeley, 3 Keyes, 170; Wilson v. Churchman, 6 La. ⁵ Clason v. Kehoe, 87 Hun, 368, 34 N. Y. Supp. 431.

⁶ Robinson v. Masterson, 136 Mass. 560.

not impose liability for costs of the trial court.¹ The bond given on an appeal from an order denying a new trial does not cover the judgment subsequently rendered on the verdict unless the benefit of it was lost in consequence of the appeal.² An obligation to pay all such costs as the defendant shall recover of the plaintiff in the action does not include costs that the latter agreed to pay in consideration of a compromise of the action.³ Under a bond covenanting to pay all rents accruing or to accrue, not exceeding a fixed sum, liability is limited to the period during which the appeal has kept the lessors out of possession; it does not cover rent due before it was executed.⁴ In Ohio a surety in an undertaking for costs before a justice of the peace is liable for the costs made there, although the judgment is recovered in the court of common pleas; but the liability does not extend to the costs made in the latter court.⁵

The code has adapted the security on appeal for consequential damages, where a stay of execution is desired, to the special exigence of particular cases. An appeal of itself does not operate to stay proceedings. In an action for specific performance brought by a vendor against the vendee, a judgment was recovered establishing the amount due on the contract, adjudging that the defendant should be barred and foreclosed of all right, claim, etc., to the land, and directing a sale thereof by the sheriff and payment out of the proceeds of the amount adjudged to be due, and in which there was no provision for the payment of any deficiency. The defendant appealed and gave an undertaking according to section 335 of the New York code instead of section 338; it recited that a judgment had been recovered against the defendants. The judgment was affirmed, but no damages were awarded upon the appeal, and the costs were paid. An action was brought on the undertaking, and it was held that though it was not in the proper form, yet as it secured the end for which it was

¹ *Denton v. Wood's Adm'r*, 11 Lea, 505; *Dawson v. Holt*, 12 id. 27.

² *Reitan v. Goebel*, 35 Minn. 384, 29 N. W. Rep. 6.

³ *Smith v. Arthur*, 116 N. C. 871, 21 S. E. Rep. 696.

⁴ *Rosenquest v. Noble*, 21 App. Div. 583, 48 N. Y. Supp. 398.

⁵ *Hull v. Burson*, 61 Ohio St. 283, 56 N. E. Rep. 18.

given and stayed all proceedings on the judgment, it was valid as against the defendants who subscribed it; that as no amount was directed to be paid by the judgment, the defendants were only liable for the difference between the amount bid for the land at the time of the sale and the amount which would have been bid at the time at which the judgment directed it to be sold, with interest on such amount to the time of the actual sale; but as no difference was proved none could be presumed, and the plaintiff was only entitled to nominal damages.¹

It may be doubted that the damages held to be recoverable, [94] if they had been proven, were within the contract.² But there being a recital of a judgment against the appellant, were not the sureties estopped from denying it? The case is briefly reported, and does not disclose whether the recital stated the amount. In a case in Illinois the action was brought on an appeal bond conditioned to prosecute the appeal to effect, and pay the amount of the judgment, costs, interest and damages rendered and to be rendered against the appellant in case the decree should be affirmed. Scott, C. J., remarking upon a similar point, observed: "It is urged by the defendants that the decree was *in rem*, and was not to be performed by Bischoff; and as the master in chancery has executed the decree by selling the property as directed, he and his surety are discharged from all liability created by the condition of the appeal bond. This is not, in our opinion, the true construction. The bond as set out in the declaration distinctly states a decree had been rendered against Bischoff, from which he had prayed an appeal. The object he had in view was to have the execution of the decree suspended until the cause could be reviewed in the supreme court, and the bond is expressly conditioned for the payment of the judgment in the event the decree should be affirmed. The defendants are estopped by the recitals in the bond to deny what they solemnly admitted to be true, viz.: the existence of a decree against Bischoff; and the legal effect of the engagement is to pay it in case it shall be affirmed on appeal, or be liable for the penalty of the bond."³

¹ Chamberlain v. Applegate, 2 Hun, 510.

² See McWilliams v. Morgan, 70 Ill. 62.

³ George v. Bischoff, 68 Ill. 236; Meserve v. Clark, 115 id. 580, 4 N. E. Rep. 770; Gudtner v. Kilpatrick, 14 Neb. 347, 15 N. W. Rep. 708; Love v.

§ 537. Same subject. A statute of Indiana provides that "when any appeal is taken to the supreme court from a judgment in waste, or for the recovery of land, or the possession thereof, the condition of the appeal bond, in addition to the matters hereinbefore prescribed, shall further provide that the appellant shall also pay and satisfy all damages which may be sustained by the appellee for the *mesne* profits of the premises recovered, or for any waste committed thereon as well before as during the pendency of such appeal."¹ It was first held that a bond which did not contain a provision in substance [95] like the statute, although it was conditioned for the prosecution of the appeal, and there had been a breach of that condition, did not render the sureties liable for the rents and profits.² But the late cases hold that such liability exists by virtue of the statute, although the bond is silent.³ A bond executed in behalf of an ejectment defendant conditioned for the payment of the value of the use and occupation of the real estate, pending an appeal, covers his liability for the use and occupation of the land, without the improvements, there not having been an assessment or payment of the value of the improvements, and the defendant not being responsible for their not being made.⁴ In an action for unlawful detainer a judgment was rendered for the plaintiff below, and the bond on appeal was conditioned "to pay all costs of such appeal, and abide by the order the court may make therein, and pay all rent and other damages justly accruing to the plaintiff during the pendency of the appeal." The plaintiffs ought to recover on the bond treble damages for which the defendant was liable, but it was held that the responsibility was limited by the terms of the bond, and the treble damages claimed were not covered

Rockwell, 1 Wis. 382; Adams v. Thompson, 18 Neb. 541, 26 N. W. Rep. 216; Ogden v. Davis, 116 Cal. 32, 47 Pac. Rep. 772.

If no judgment was rendered in the trial court the bond is a nullity. Brounly v. Daniels, 23 Neb. 162, 36 N. W. Rep. 463. See First Nat. Bank v. Rogers, 13 Minn. 407, 97 Am. Dec. 239.

If the order granting an appeal is void there is no liability on the bond

because it was void as a statutory bond. American Accident Co. v. Reigart, 92 Ky. 142, 17 S. W. Rep. 280; Schmidt v. Mitchell, 95 Ky. 342, 25 S. W. Rep. 278.

¹ R. S. 1843, p. 633.

² Malone v. McClain, 3 Ind. 512.

³ Opp v. Ten Eyek, 99 Ind. 345; Hays v. Wilsbach, 101 id. 100.

⁴ Hentig v. Collins, 1 Kan. App. 173, 41 Pac. Rep. 1057.

by the phrase "other damages justly accruing," but only actual damages;¹ which are the value of the use and occupation or the reasonable rental value of the premises.² The rental value of the premises during the pendency of a writ of error in an action of ejectment, the money judgment being merely nominal, cannot be recovered upon a bond conditioned for the prosecution of the writ to effect and the payment of the debt, damages and costs adjudged or accrued upon such judgment, and all other damages or costs that may be awarded.³ The sureties upon an appeal and *supersedeas* bond from a decree enforcing judgment liens on land are not responsible, after the affirmance of the decree, for any portion of the rents and profits of the land while the cause was pending on appeal or for any loss sustained by the appellees on account of the debtor's receipt thereof.⁴

In Alabama and New York an appeal bond which stays the execution of a judgment for the recovery of land or its possession, if conditioned for the payment of "all costs and such damages as the plaintiff may sustain by reason of this appeal," covers the loss of the possession and the value of the use.⁵ In Texas if the plaintiff in an action of trespass to try title recovers judgment for the land and the defendant recovers for the value of his improvements, and appeals, giving a bond conditioned to pay the plaintiff the rental value of the land pending the appeal if the judgment be affirmed, liability for such value exists notwithstanding the land would have had no rental value but for the improvements, and that the possession of the land was surrendered when the judgment for the value of the improvements was paid to the defendant. The latter was not entitled to set off against the rents that accrued pending the appeal im-

¹ Chase v. Dearborn, 23 Wis. 143.

Post v. Doremus, 1 Hun. 521, has some curious features, and is an example of liberal construction of the contract of the sureties to effectuate their obvious intention. It was substantially modified on appeal. Post v. Doremus, 60 N. Y. 371. See Reed v. Lander, 5 Bush, 598; Whitehead v. Boorum, 7 id. 399; Wade v. First Nat. Bank, 11 id. 697.

² Shunick v. Thompson, 25 Ill. App. 619; Rehm v. Halverson, 94 id. 627, 197 Ill. 378, 64 N. E. Rep. 358.

³ Johnson v. Hessel, 134 Pa. 315, 19 Atl. Rep. 700.

⁴ Hutton v. Lockridge, 27 W. Va. 428.

⁵ Cahall v. Citizens' Mut. Building Ass'n, 74 Ala. 539; Clason v. Kehoe, 87 Hun, 368, 34 N. Y. Supp. 431.

provements made on the land after his appeal was taken. Liability for rental value continued from the time the appeal was taken until the filing of the mandate of the appellate court in the trial court, and the sale of the land did not affect such liability, the purchaser having an assignment of the rents.¹ Upon the affirmance of a judgment for the sale of land to pay a debt, interest on the value of the land may be recovered on the bond from the date first fixed for its sale.² In Alabama if an appeal is taken from a decree distributing a fund in court, proceedings being stayed, interest may be recovered on so much of it as was detained therein, and also a reasonable attorney's fee for services in the appellate court.³ Liability for attorney's fees is denied in Kentucky.⁴

Under a bond conditioned, *inter alia*, to pay all damages which, during the pendency of the appeal, may accrue by reason of the appeal, there may be a recovery for the depreciation in the value of stocks the sale of which the bond superseded. It was observed by the court: True, it is alleged that the direct cause of the deterioration of the value of the stock was caused by the directors of the company, but it is evident that this damage or loss in the value of the stock would not have affected the appellants but for the delay caused by the *supersedeas* and appeal. If the stock had been sold under the judgment superseded, the mismanagement of the company would not have affected the appellants. The fund would have been in court subject to distribution or subject to the judgment of this court on the appeal. If appellee could control the stock and prevent its loss in value she should have done so. If its value depended on the action of others over whom she had no control, it seems that by the execution of the bond and the consequent suspension of proceedings under the judgment she elected to make the action of those who could control the value her action, and she should abide the result.⁵ If an appeal works delay in the appointment of a receiver of the property in controversy, and during the delay the property depreciates

¹ Norton v. Davis, 13 Tex. Civ. App. 90, 25 S. W. Rep. 181.

² Hargis v. Mayes, 20 Ky. L. Rep. 1965, 50 S. W. Rep. 844.

³ Drake v. Webb, 63 Ala. 596.

⁴ Welch v. Welch, 20 Ky. L. Rep. 1990, 50 S. W. Rep. 687.

⁵ Welch v. Welch, 20 Ky. L. Rep. 1990, 50 S. W. Rep. 687, 22 Ky. L. Rep. 1259, 60 S. W. Rep. 409.

in value, such depreciation, if the natural and proximate result of the appeal, is an element in the liability of the sureties, which liability continues for such time after the return of the mandate of the appellate court as may be reasonably occupied in a diligent attempt to secure the appointment of a receiver and seizure of the property.¹ If it is shown that the very damages which are sought to be recovered were in the actual contemplation of the parties when the contract was entered into, they may be recovered though they were to some extent contingent and remote — as the loss of the earnings of a railroad where the company has been enjoined from building across the line of another railroad.² The obligors on a bond given in a proceeding brought to reverse a judgment vacating a will are liable for the loss sustained by the successful parties by reason of being kept out of possession and prevented from exercising acts of ownership over the real property they were found to be entitled to, including waste of the property by reason of neglect and decay while the stay was in force. But shrinkage in the value of such property from other than physical causes was not an element of damages, neither were the fees of counsel for services rendered in securing an affirmance of the judgment in the supreme court, nor interest on the damages for waste, the amount being unliquidated.³

[96] The condition of a bond was to prosecute the appeal with effect and satisfy and pay, in case of affirmance, the damages, charges and costs decreed below, and also all costs and damages that should be awarded by the appellate court. The appeal was from an order dissolving an injunction, thereby continuing it in force, restraining the collection or negotiation

[97] of certain drafts. In an action on this bond, after affirmance of the order, the plaintiff sought to recover the value of those drafts which were lost by reason of the delay caused by the appeal, notwithstanding such damages were not decreed in the case in which the appeal was taken. But the court held that the liability of a surety could not be extended by implication beyond the terms of his contract, and that the dam-

¹ *Fulton v. Fletcher*, 12 D. C. App. 1. *ferman & W. R. Co.*, 114 Ga. 727, 40 S. E. Rep. 738.

² *Waycross Air-Line R. Co. v. Of-* ³ *Haughan v. Grimes*, 62 Kan. 258, 63 Pac. Rep. 326.

ages proposed to be recovered were not within the bond.¹ The bond does not impose liability upon the sureties for the act or neglect of any person who is not restrained by it.² A bond to secure costs is limited to the plaintiff's costs.³ These rules are not everywhere accepted because of a different view of the rule of construction applicable to such bonds. Occasion has existed to call attention to this difference of opinion on two phases of the general subject.⁴ It remains to notice some cases which apply a different view to bonds given to secure the payment of costs. A bond given to secure all costs for which the plaintiff may be liable on this suit covers costs accrued before it was executed,⁵ costs on appeal,⁶ and costs incurred after the death of the surety, the bond expressing that "I hereby acknowledge myself security for costs."⁷ The estate of such surety was not released by the giving of an additional bond after his death.⁸ The surety is liable to judgment without resort to the property of the principal.⁹ Cases of this class are to be distinguished from those against sureties generally. As was said by Chief Justice Dixon: To one consulting the decisions in this class of cases, it may possibly, at first sight, seem somewhat surprising that no reference is made in them to the familiar doctrine that the obligation of a surety is *strictissimi juris*, and that nothing is to be taken against him by inference or intendment. A consideration of this doctrine might be supposed to have led to a strict construction of the statute in favor of the surety, and to a different conclusion respecting his liability. This point is explained, no doubt, by reason of the presence and operation of another rule or principle, which counter-veils that just alluded to, and which is that statutes of the

¹ Fullerton v. Miller, 22 Md. 1; McFarlane v. Howell, 91 Tex. 218, 24 S. W. Rep. 853; Lewis v. Maulden, 93 Ga. 758, 21 S. E. Rep. 147; Drake v. Smythe, 44 Iowa, 410; Donovan v. Clark, 76 Hun, 339, 27 N. Y. Supp. 686; Lutt v. Sterrett, 26 Kan. 561.

² Roberts v. Jenkins, 80 Ky. 666; Bridgford v. Fogg, 12 Ky. L. Rep. 570, 14 S. W. Rep. 600.

³ Hiett v. Davis, 88 Ind. 372.

⁴ § 536.

⁵ Sawyer v. Williams, 72 Fed. Rep. 296; McClaskey v. Barr, 79 id. 408; Wilson v. Hudspeth, 3 Dev. 57.

⁶ McClaskey v. Barr, *supra*; Dunn v. Sutliff, 1 Mich. 24; Robinson v. Plimpton, 25 N. Y. 484; Smith v. Lockwood, 34 Wis. 72; Martin v. Kelly, 59 Miss. 664; Hendricks v. Carson, 97 Ind. 245.

⁷ McClaskey v. Barr, *supra*.

⁸ Id.

⁹ Id.

kind, requiring security to be given for costs, being remedial in their nature, are to be liberally construed to effectuate that object.¹ The same principle of just and liberal construction extends to all agreements and undertakings authorized or required in the course of legal controversies before the courts.²

Where the appeal bond is for costs and damages only, the sureties are not liable for the debt.³ Damages, within the

¹ Smith v. Lockwood, 31 Wis. 72; Cox v. Hunt, 1 Blackf. 146. See Sutherland on Statutory Construction, ch. 15.

² Smith v. Lockwood, *supra*.

³ Smith v. Erwin, 5 Yerg. 296; Banks v. Brown, 4 id. 198; Gholson v. Brown, id. 496; Onderdonk v. Emmons, 9 Abb. Pr. 187.

Stille v. Beauchamp, 13 La. Ann. 474: Where the appeal bond recites the judgment and sets forth the fact that the appellant has taken a suspensive appeal from such judgment, and a blank is left for the amount to be filled up, it will be presumed that it was left in order to ascertain by calculation the amount fixed by law for the suspensive appeal, and the party signing the bond will be bound for that amount.

Ward v. Bell, 18 Ind. 104, 81 Am. Dec. 349: If the instrument given specifies no amount or contains no penalty the law will hold the obligors in it liable to the extent required by the statute, upon an appeal and *supersedeas* in such cases, on the ground of the intention of the parties executing the instrument to become liable to that extent. But sureties may expressly limit the amount of their liability by the terms of the obligation; and if they do, and the officer is satisfied with it and accepts it, they will not be bound beyond the amount named, but if the bond proves insufficient the officer may be liable for the deficiency.

Reeves v. Andrews, 7 Ind. 207: A. sued B. before a justice; B. pleaded

a set-off and recovered a judgment. A. appealed and executed a bond after the statute, but in the court above dismissed the action. B. thereupon sued him and his surety upon the appeal bond. Held, that he had a right to dismiss; that the dismissal operated to avoid the proceedings before the justice; that the obligors were estopped at this stage to deny that the appeal had been taken, and that the dismissal was a breach of the condition of the bond, but that the obligor was entitled to only nominal damages, unless special damages were alleged and proved.

Raney v. Baron, 1 Fla. 327: An appeal bond was conditioned that A. should pay said damages so recovered by said B. against him, and costs, in case the judgment of the said court should be confirmed. Held, that the surety in the bond was not liable for the ten per cent. damages awarded by the appellate court against the appellant, but only for the judgment and costs in the court below.

A bond which operates as a *supersedeas*, and is conditioned "to pay all costs in case the decree or order of the circuit court in chancery shall be affirmed," covers as well the costs decreed and taxed to the appellee in the court below as to those in the appellate court. Daly v. Litchfield, 11 Mich. 497; Prosser v. Whitney, 46 id. 407. 9 N. W. Rep. 449.

By the Tennessee code, section 3162, in actions founded on liquidated accounts signed by the party to be charged therewith, bonds, bills

prescribed terms of an appeal bond or undertaking, may [98] be disallowed when they exceed the rights of the party claiming, and the legal liability imposed on the other; as where a general form of undertaking is required for a class of cases usually similar, but distinguishable by individual differences, and the liability contended for does not exist in the particular case. Thus, in an action upon an undertaking executed by the defendant in a foreclosure case upon appeal, pursuant to the California practice act,¹ it was considered by the court that the legislature could not have intended by that section to increase the liability of the principal debtor. It was therefore held that the provision in regard to use and occupation should be understood as referring to those cases in which the creditor is entitled to the value of the use; and that an undertaking to pay what the creditor has no legal right to is not binding on

single, etc., upon an appeal in the nature of a writ of error, the bond shall be taken and the securities bound for the payment of the whole debt, damages and costs, and for the satisfaction of the judgment of the superior court where the cause may be finally tried. *Patrick v. Nelson*, 2 Head, 507.

Under a statute which provides that if any appeal shall be dismissed the surety shall be liable for the whole amount of the debt, costs and damages recovered against the appellant, the debt and damages meant are such as were recovered in the trial court, no judgment therefor being rendered in the appellate court. *Fitzgerald v. Wellington*, 37 Kan, 460, 15 Pac. Rep. 582.

If the bond is for the payment of the judgment and interest it is a mere security for the payment of the former, and whatever discharges the judgment releases the obligors. Hence if the appeal is dismissed without an assessment of damages and the costs thereof paid and the judgment reversed in another proceeding, there is no liability for anything beyond nominal damages, al-

though an action on the bond was begun before such reversal. *Cook v. King*, 7 Ill. App. 549.

¹The section referred to corresponds with section 338 of the New York code: "If the judgment appealed from directs the sale or delivery of possession of real property the execution of the same shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit, nor suffer to be committed, any waste thereon; and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof pursuant to the judgment, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency."

the sureties; that, as this section includes orders as well as judgments, the provision in question applies more particularly to judgments and orders directing a delivery of possession.¹ If all of several plaintiffs or defendants appeal and execute a joint bond, as they ought, each is answerable for the entire amount. If one alone executes, he is bound for the whole.² If a bond is given on an appeal, from a joint judgment against all the appellants and on behalf of all of them, the sureties are liable on its reversal as to all but one of their principals, it being affirmed as to him.³ A judgment is affirmed within the meaning of an appeal bond though a finding be eliminated from the record.⁴ But in a California case, the decision being influenced somewhat by the provisions of the code, it was held that the affirmance must be *in toto* to make the sureties liable.⁵ The affirmance on appeal of a part of the judgment appealed from and the entry of a *remittitur* for the balance does not release the parties to the bond, their obligation being conditional on the affirmance of the judgment.⁶ The

¹ Whitney v. Allen, 21 Cal. 233.

² Young v. Young, 2 J. J. Marsh. 72; Brown v. Hancock, 13 Tex. 21.

³ Gilpin v. Hord, 85 Ky. 213, 3 S. W. Rep. 143; Ives v. Hulce, 17 Ill. App. 35; Alber v. Froelich, 39 Ohio St. 245, overruling Lang v. Pike, 27 id. 498; Lutt v. Sterrett, 26 Kan. 561.

⁴ Foster v. Epps, 27 Ill. App. 235.

"Affirmed" means in effect an affirmance, as where, on appeal from a justice's court, there is a trial *de novo*, and the appellee may elect whether to have judgment for the amount of the recovery appealed from or have the appeal dismissed; whichever is done, the judgment is in effect affirmed. Best Brewing Co. v. Klassen, 85 Ill. App. 464.

If the assessment made by the assessor of a taxpayer's property is largely increased by the supervisors, and, on his appeal to the circuit court, is considerably reduced, though left materially larger than it was fixed by the assessor, the mat-

ter has been decided against him, and he is liable for the statutory damages. Atkinson & Bacot Co. v. Pike County, 73 Miss. 348, 18 So. Rep. 924.

In a creditor's suit to annul fraudulent deeds after an appeal from an interlocutory order, a receiver was appointed, and sold so much of the property in controversy as could be found; a reference was had to the auditor, whose report, distributing the proceeds of the sale, was ratified by a decree. This decree had the effect of vacating and annulling such deeds and was final to such an extent as authorized a suit upon the appeal bond although no formal decree was entered vacating and annulling the deeds. Fulton v. Fletcher, 12 D. C. App. Cas. 1, 15.

⁵ Heinlen v. Beans, 71 Cal. 295, 12 Pac. Rep. 167. See Chase v. Ries, 10 Cal. 517.

⁶ Harding v. Kuessner, 172 Ill. 125, 49 N. E. Rep. 1001.

condition to prosecute the appeal with effect is to be read in connection with the statute governing the particular case. Thus, if it is provided that if, in proceedings for forcible detainer, it shall appear that the plaintiff is entitled to the possession of only a part of the premises claimed, the judgment shall be for that part only, a judgment for the entire building is affirmed if it awards the first floor of it and one-half the basement to the plaintiff; the bond was conditioned against such a judgment.¹ If the principal issue on appeal is between co-defendants and it is decided against the respondent, although his liability is fixed at less than the sum claimed, he is the losing party.² The failure to perfect an appeal operates as an affirmation of the judgment rendered.³

The designated amount is the limit of the liability of the sureties,⁴ except where interest is allowed as damages for delay in paying,⁵ and where costs may be imposed regardless of the sum named in the bond.⁶ Although it be true that an appellant debtor was insolvent when an appeal bond was executed it cannot be assumed that if execution had then issued and been levied that an assignment for the benefit of creditors would have been made and the levy thereby defeated. Such a defense is too speculative to mitigate the liability of the sureties.⁷ In an action upon a *supersedeas* bond against the principal and sureties a legal claim due from the plaintiff to the principal may be set off.⁸

§ 538. **Interest and damages awarded on appeal.** By section 23 of the judiciary act it is provided that where the supreme court shall affirm the judgment or decree they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs, at their discretion. There are similar statutes in the states, but there is generally [99] a limitation to a certain per cent. In the federal courts the

¹ *Rehn v. Halverson*, 94 Ill. App. 627, 197 Ill. 378, 61 N. E. Rep. 388.

² *Flannagan v. Cleveland*, 44 Neb. 58, 62 N. W. Rep. 297; *Healy v. Newton*, 96 Mich. 228, 55 N. W. Rep. 666.

³ *Murray v. Aiken Mining, etc. Co.*, 29 S. C. 457, 18 S. E. Rep. 5.

⁴ *Graeter v. De Wolf*, 112 Ind. 1, 13

N. E. Rep. 111; *Zeigler v. Henry*, 77 Mich. 480, 43 N. W. Rep. 1018.

⁵ *Crane v. Andrews*, 10 Colo. 265, 15 Pac. Rep. 331; §§ 477, 478.

⁶ See § 525, p. 1133.

⁷ *Vent v. Duluth Trust Co.*, 77 Minn. 523, 80 N. W. Rep. 640.

⁸ *Van Elten v. Koster*, 48 Neb. 152, 66 N. W. Rep. 1106.

rate and limit were fixed by rule in 1803 and 1807 at ten per cent. per annum on the amount of the judgment to the date of affirmance where the suit was for mere delay, and six per cent. where there was a real controversy. In both cases the interest was computed as part of the damages, and had to be specially allowed. If, upon the affirmance, no allowance of interest or damages was made, it was equivalent to a denial thereof, and the circuit court in carrying into effect the decree of affirmance could not enlarge the amount thereby decreed, but was limited to the mere execution of the decree in the terms in which it was expressed.¹ There was no liability for interest or damages after the date of affirmance, unless so allowed, until 1842, when it was provided by act of congress "that on all judgments in civil cases hereafter recovered in the circuit or district courts of the United States interest shall be allowed and may be levied by the marshal, under process of execution issued thereon, in all cases where by the law of the state in which such circuit or district court shall be held, interest may be levied under process of execution on judgments recovered in the courts of such state, to be calculated from the date of the judgment, and at such rate per annum as is allowed by law on judgments recovered in the courts of such state."²

In 1852 the supreme court, by rule 62, still further extended the provision for interest, and both interest and damages are now regulated by rule 23, which declares: 1. The interest is to be calculated and levied from the date of the judgment below until the same is paid, at the same rate as interest on judgments in the state courts. 2. That where a writ of error delays the proceedings on a judgment, and appears to be sued out for delay, ten per cent. in addition to the interest is to be allowed upon the amount of the judgment. 3. The same rule is to be applied to the decrees for the payment of money in cases in chancery, unless otherwise ordered by the court. This third clause is intended doubtless to adopt for chancery cases [100] the "same rule" as to interest only. The second clause can only be applied by an affirmative finding that the proceeding has been taken for delay, and hence is not a rule which

¹ *Boyce v. Grundy*, 9 Pet. 275; *Perkins v. Fourniquet*, 14 How. 313.

² 5 Stats. at Large, 503; sec. 966, R. S. of U. S.

could take effect unless otherwise ordered. The court, however, under section 23 of the judiciary act, has authority to award just damages and single or double costs, at its discretion, as well in equity as in law cases. In admiralty a different rule as to interest or damages prevails. In such cases there is a discretionary power to add to the damages allowed in the court below further damages by way of interest. But this allowance of interest is not an incident of affirmance affixed to it by law or by rule of court. If given by the court, it must be in the exercise of its discretionary power, and, *pro tanto*, is a new judgment.¹

If the money of a party is tied up by an appeal interest may be allowed on it as damages covered by the appeal bond.² If a superseded money judgment does not bear interest, it cannot be recovered on the bond as damages.³ No damages will be allowed on appeals and writs of error except on money judgments or decrees.⁴ Damages are allowed for delaying the plaintiff, where delay is the object and there is no ground or expectation of reversal in whole or in part.⁵ Statutes authorizing the imposition of damages when appeals from judgments, orders or decrees for the recovery of money are dismissed for want of prosecution or other enumerated causes are penal in their character and cannot be extended by construction beyond

¹ *Hemmenway v. Fisher*, 20 How. 255; *Phillips' Practice*, 191. See § 518, vol. 2, *Foster's Fed. Practice* (3d ed.).

² *National Bank of Illinois v. Baker*, 58 Ill. App. 343.

³ *Louisville & N. R. Co. v. Sharp*, 91 Ky. 411, 16 S. W. Rep. 86.

⁴ *Arrowsmith v. Rappelge*, 19 La. Ann. 327; *Long v. Robinson*, 13 id. 465; *Hodges v. Holeman*, 5 Dana, 136.

⁵ *Cotton v. Wallace*, 3 Dall. 302; *Barrow v. Hill*, 13 How. 54; *Lathrop v. Judson*, 19 id. 66; *Kilbourne v. State Institution*, 22 id. 503; *Sutton v. Bancroft*, id. 330; *Jenkins v. Banning*, id. 455; *Prentice v. Pickersgill*, 6 Wall. 511; *Campbell v. Wilcox*, 10 id. 421; *Warner v. Lessler*, 33 N. Y. 296; *Maher v. Carman*, 38 id. 25; *Winfield v. Potter*, id. 67; *Murray v.*

Mumford, 2 Cow. 400; *Lehane v. Keyes*, 2 Nev. 361; *Ramsay v. Davis*, 20 Wis. 31; *Russell v. Williams*, 2 Cal. 158; *Magruder v. Melvin*, 12 Cal. 559; *Cady v. Seaniker*, 1 Idaho, 198; *Whittlesey v. Sullivan*, 33 Mo. 405; *Owings v. McBride*, 32 id. 221; *Robinson v. Starley*, 29 Ind. 298; *Hutchinson v. Ryan*, 11 Cal. 142; *Wright v. Sanders*, 3 Keyes, 323; *Amory v. Amory*, 91 U. S. 356; *Dzialgnski v. Bank*, 23 Fla. 346; *Perkins v. Jacobs*, 99 Wis. 409, 75 N. W. Rep. 76.

A judgment dissolving an injunction restraining the collection of an execution is not for the recovery of money, although it states in an advisory way the sum that may be collected. *Mutholland v. Trontman's Adm'r*, 10 Ky. L. Rep. 263 (Ky. Super. Ct.).

the clear legal meaning of their terms. A decree of foreclosure and the dismissal of a cross-bill is not a decree for the recovery of money; such a statute contemplates only cases in which the judgment, etc., appealed from is for the recovery of money from the appellant.¹ Under a statute authorizing the imposition of ten per cent. damages on the affirmance or dismissal of an appeal from a judgment for the payment of money, the computation is to be made on the amount of the judgment at the time it was superseded, although the *superse-deas* prevented the collection of interest.²

§ 539. **Same subject.** The court will not award damages unless the proceeding is in this sense taken in bad faith,³ or, as it is sometimes expressed, unless the appeal or writ of error was clearly frivolous and taken in bad faith.⁴ They have been allowed for the reason that all the questions raised have been previously settled by the court of last resort, or are decided by reference to plain elementary principles;⁵ and also where [101] there is no bill of exceptions or statement of facts, and no error is suggested or apparent in the record;⁶ and in some states for default in filing a transcript;⁷ in not taking other necessary steps;⁸ and where the only error was a trivial one in the computation of interest, and would have been corrected if the attention of the trial court had been called to it;⁹ or on abandonment of the appeal.¹⁰ But in Georgia the mere fact that the appellant did not submit evidence to support his defense, or failed to prosecute his appeal, does not show that it was frivolous so as to subject him to damages.¹¹ This appears

¹ *Hamburger Co. v. Glover*, 157 Ill. 521, 42 N. E. Rep. 46.

² *Popp v. L. & N. R. Co.*, 101 Ky. 157, 40 S. W. Rep. 254.

³ *Story v. Bird*, 8 Mich. 316; *Hart-ridge v. McDaniel*, 20 Ga. 398; *North-western L. Ins. Co. v. Starkweather*, 38 Wis. 361; *Morse v. Buffalo Ins. Co.*, 30 Wis. 534, 11 Am. Rep. 587; *Tobin v. Missouri Pacific R. Co.*, 18 S. W. Rep. 996.

⁴ *Ossouski v. Wiesner*, 101 Wis. 238, 77 N. W. Rep. 184.

⁵ *Pinkham v. Wemple*, 12 Cal. 449; *Kraft v. Auw*, 192 Ill. 574, 61 N. E.

Rep. 847; *Potter v. Leviton*, 199 Ill. 93, 64 N. E. Rep. 1029.

⁶ *Chambers v. Hodges*, 3 Tex. 517; *Whittlesey v. Sullivan*, 33 Mo. 405; *Owings v. McBride*, 32 Mo. 221.

⁷ *Anonymous*, 11 Ill. 87.

⁸ *Stafford v. Anders*, 10 Fla. 211; *Hall v. Kennedy. Sneed*, 124.

⁹ *Rountree v. J. X. L. Lime Co.*, 106 Cal. 62, 39 Pac. Rep. 16.

¹⁰ *Hohl v. Meyer*, 7 La. Ann. 18.

¹¹ *Gilmore v. Wright*, 20 Ga. 198; *Hull v. Tommy*, 30 Ga. 762. See *Madison. etc. R. Co. v. Briscoe*, 18 B. Mon. 570.

to be the rule in Vermont.¹ For the mere failure to file a transcript, no actual damages being shown and it not appearing that the appeal was taken for delay, the allowance cannot exceed interest on the judgment and costs.² In the absence of the record it cannot be determined that an appeal was taken merely for delay.³ Although an appeal was taken for that purpose, if the judgment bears interest and the respondent will be reimbursed for costs and attorney's fees incurred respecting the motion to dismiss, no further liability will be imposed on the appellant unless special damages are shown to have been sustained.⁴ If there is error in the judgment the court will not award damages, even though the error is so small that they refuse to disturb the judgment,⁵ nor where, although reversible error appears, the proceedings below were irregular.⁶ Nor will they allow damages where the appeal proves unsuccessful by a change in the law, as by the emancipation of slaves.⁷ Where the court below erroneously excluded evidence necessary for the recovery of double damages and the verdict and judgment were given for single damages;⁸ where the appellants are not themselves indebted to the appellees, and no decree for money has been rendered against them;⁹ where the decision involves questions of fact and the evidence is conflicting,¹⁰ or where there is palpable error in the proceedings, although it cannot be relieved against because of delay in objecting,¹¹ damages for a frivolous appeal will not be allowed. Nor will they be awarded to a respondent upon affirmance of a judgment fully paid and satisfied before the taking of the appeal. This rule was applied to a case where the plaintiff in a foreclosure decree purchased the property at

The advice of counsel will not relieve the appellant from damages if there is no semblance of merit in the appeal. *Cauthen v. Barnesville Bank*, 68 Ga. 287.

¹ *Pearse v. Goddard*, 1 Tyler, 373.

² *Seattle & M. R. Co. v. Joergenson*, 3 Wash. 622, 29 Pac. Rep. 88.

³ *Water v. Maresch*, 3 Wash. 624, 29 Pac. Rep. 205.

⁴ *Wheeler v. Commercial Investment Co.*, 22 Wash. 546, 61 Pac. Rep. 715.

⁵ *Simons v. Burrows*, 6 La. Ann. 358.

⁶ *McGuire v. Gilbert*, 180 Ill. 96, 54 N. E. Rep. 167.

⁷ *Henderson v. Montgomery*, 18 La. Ann. 211.

⁸ *Waddell v. Chicago, etc. R. Co.*, 20 Iowa, 9.

⁹ *Rowan v. Pope*, 14 B. Mon. 102. See *Northwestern L. Ins. Co. v. Irish*, 38 Wis. 361.

¹⁰ *Austin v. Moore*, 16 La. Ann. 218.

¹¹ *Kinsella v. Cahn*, 185 Ill. 208, 56 N. E. Rep. 1119.

the sale for the full amount of the debt, including costs and interest, and the sale had been confirmed before the appeal. It was considered that the statute providing for damages on affirmance did not reach such a case, or, at least, was quite inoperative, for there could be no delay of payment to complain of arising from the appeal.¹ Part payment of the judgment below will relieve from damages *pro tanto*.² So, where a *supersedeas* bond is executed, but a *supersedeas*, though necessary to stay proceedings, is not actually issued, no damages will be allowed.³ In Oregon damages are not allowed except where there has been an abandonment of the appeal.⁴ They will not be allowed in case of an abandoned appeal, where the appellant, before expiration of the time for appealing, offered to pay the judgment, and the transcript was filed by the respondent.⁵

¹ Northwestern L. Ins. Co. v. Irish, 38 Wis. 361. Wade v. First Nat. Bank, 11 id. 697.

² Brady v. Holderman, 19 Ohio. 26. ⁴ Nelson v. Oregon R. & N. Co., 13 Ore. 141, 9 Pac. Rep. 321.

³ Reed v. Lander, 5 Bush, 598; ⁵ Lester v. Elwert, 25 Ore. 102, 35 Whitehead v. Boorum, 7 id. 399; Pac. Rep. 29.

CHAPTER XII.

NOTES AND BILLS.

§ 540. Promissory notes and bills of exchange.

541. Principal sum.

542. Want or failure of consideration.

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544-548. Partial failure of consideration.

549, 550. Consideration fraudulent or illegal in part.

551-554. Defect of consideration shown by parol evidence.

555. Liability of drawer and indorser for principal sum.

556. Interest on notes and bills.

557. Interest as damages to be paid by maker or acceptor.

558. Liability of drawer or indorser for interest as damages.

559. Notes and bills are by definition payable only in money.

560, 561. Re-exchange and damages on bills dishonored.

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§ 540. Promissory notes and bills of exchange. The [103] liability of parties to these instruments varies according to their relations to them. There is an essential difference in their contracts, and these are subject to different laws. Each party must pay such damages as result naturally and proximately from a breach of his particular contract as interpreted by law. The *maker of a note* enters into an express agreement absolutely to pay a sum certain, either presently or at a specified time in the future, to a person named, or to his order, or the bearer. When notes are drawn according to the usual forms their requirements are plain to the common understanding. These forms are, however, sometimes departed from, and not being precise in language, the short and indeterminate expressions used require interpretation. The liability of an *acceptor of a bill of exchange* is similar to that of the maker of a note. His agreement is to comply with the request contained in the bill. An absolute acceptance is an engagement to pay according to the tenor of the bill, and a conditional or partial one obliges him to pay according to the tenor of the

acceptance.¹ He is primarily and originally liable to pay the bill, but this liability originates in the acceptance, and he is under such obligation only as attaches thereby.²

[104] The measure of damages for non-performance of an agreement to accept for the drawer's accommodation a draft which is still in his hands is the loss and inconvenience thereby occasioned to him, and not the amount of the draft.³ One who draws without authority cannot recover as damages the sum he is compelled to pay in consequence of the draft being returned protested.⁴ A contract results from an acceptance as absolute and certain as from making a note. The amount payable at maturity by the acceptor or maker is ascertained from the face of the paper by similar rules.⁵ After default the sum recoverable by the holder is also determinable against both by like rules; but the acceptor stands in a peculiar relation to the drawer, and the drawer to indorsers, as do also the indorsers of a bill to each other, in respect to re-exchange, or damages in lieu thereof. These peculiarities will receive attention in the proper connection. The sum recoverable from the several parties includes principal and interest, together with the notarial fees where a protest is necessary or authorized to fix the liability of secondary parties,⁶ and sometimes exchange and re-exchange.

§ 541. **Principal sum.** A note or bill is by definition made for a *sum certain* payable in money.⁷ Hence, if it is valid, and subject to be enforced according to its terms, that precise sum as principal is to be recovered. Where the party sued is liable for the full amount the person having the legal title may

¹ Thomas v. Thomas, 7 Wis. 476; Chitty on Bills, 303; Story on Bills, § 238; 1 Par. on Cont. 281.

² Chitty on Bills, 304; Anderson v. Anderson, 4 Dana, 352.

³ Ilsley v. Jones, 12 Gray, 260.

⁴ Rouvert v. Patton, 12 S. & R. 253.

⁵ Story on Prom. Notes, § 114.

⁶ Doughty v. Hildt, 1 McLean, 334; City Bank v. Cutter, 3 Pick. 414; Noyes v. White, 9 Kan. 640; Knowles v. Armstrong, 15 Kan. 371; Ticknor v. Branch Bank, 3 Ala. 135; Curtis v. Buckley, 14 Kan. 449; Woolley v.

Van Volkenburgh, 16 Kan. 20; Loud v. Merrill, 47 Me. 351; Weldon v. Buck, 4 Johns. 144; Bowen v. Stoddard, 10 Met. 375; Cook v. Clark, 4 E. D. Smith, 213; Merritt v. Benton, 10 Wend. 116.

If it is necessary or more convenient for the indorsee to send notice to the indorser by special messenger, he may do so and recover the expense. Pearson v. Crallan, 2 Smith, 404 (1805).

⁷ Cogwill v. Robberson, 75 Mo. App. 412. See § 559.

recover it, though some other person is entitled to the proceeds, if the suit be brought with his consent and for his benefit, as where the plaintiff is an agent for collection, although the beneficial interest of such plaintiff extends only to a part of the amount due. The surplus would, in such case, be [105] held by him as trustee for any other party entitled to receive it. Thus, if a bill be drawn in the regular course of business, as for money really due from the drawee to the drawer, in order to avoid several actions, an indorsee, though he has not given the full value of it, may recover the whole sum payable, and will hold the overplus as trustee for the indorser.¹ [106]

¹ *Dickinson v. Bull*, 72 Ill. App. 75; *Abell Note Brokerage & Bond Co. v. Hurd*, 85 Iowa, 559, 52 N. W. Rep. 488; *Lehman v. Press*, 106 Iowa, 389, 76 N. W. Rep. 813; *Meadowcroft v. Walsh*, 15 Mont. 544, 39 Pac. Rep. 914; *Roberts v. Parrish*, 17 Ore. 583, 22 Pac. Rep. 136; *Roberts v. Snow*, 27 Neb. 425, 43 N. W. Rep. 241; *Wintermute v. Torrent*, 85 Mich. 555, 47 N. W. Rep. 359; *Wilson v. Tolson*, 79 Ga. 137; *Seybold v. Grand Forks Nat. Bank*, 5 N. D. 460, 67 N. W. Rep. 682; *Anderson v. Reardon*, 46 Minn. 185, 48 N. W. Rep. 777; *Giselman v. Starr*, 106 Cal. 651, 40 Pac. Rep. 8; *Wetmore v. Hegeman*, 88 N. Y. 72. This doctrine is so thoroughly established that it has been embodied in the "negotiable instruments law" of several states. Crawford's Annotated Neg. Inst. Law (2d ed.), § 90.

The interest of the acceptor is not liable to be affected by the state of accounts or equities, between the other parties connected with the bill; and the only question in which he has any interest is, whether the party seeking to enforce payment by him is the legal owner of the bill, and whether recovery and payment to such party will be a satisfaction and absolute discharge of his liability upon the bill. *Jones v. Broadhurst*, 9 M., G. & S. 173, 67 Eng. C. L. 173, per *Cresswell*. But *Wilde, C. J.*,

said: "Suppose the drawer of an accommodation bill pays the amount to the holder: what is the reasonable intendment of the payment? If he does not make the payment in satisfaction and discharge of the holder's claim against every party on the bill, what good does he get by changing the plaintiff against him? The drawer of an accommodation bill is, in truth, the only party ultimately liable upon the bill. A person standing in that position, when he pays the bill, must be understood to make the payment in satisfaction of all claims against any one upon the bill."

This case was very thoroughly argued and carefully considered upon principle and authority. And it was held that a bill accepted for value may be collected by the holder in an action against the acceptor, notwithstanding it has been paid to such holder by the drawer, it not appearing that such payment was made in behalf of the acceptor. It affirms the right of the holder to recover for the use of the party paying him, citing *Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 1 M. & P. 11, 14 Eng. C. L. 241, 4 Bing. 390, 3 C. & P. 134; *Reid v. Funnival*, 1 Cr. & M. 533; *Ex parte De Tastet*, 1 Ross. 10. But if the acceptor has a defense which would be good against the

And if the holder receive part payment of the first indorser he may, nevertheless, recover the whole against the drawer and acceptor; though if the latter pay a part then only the residue can be recovered against the former.¹

The rule permitting the holder of a bill or note to recover more than is due to himself is limited to cases where there is some other person entitled to receive from the defendant the overplus of what is due the plaintiff; and, if there be no such person, the plaintiff will be permitted only to recover what is due himself.³ "As between the pledgor and pledgee, when the securities pledged are the obligations of the pledgor, the pledgee can only recover his principal debt. For it would be worse than idle that a plaintiff should recover an amount which he would be obliged instantly to restore to the defendant. So where the collateral is in the hands of a *bona fide*

bill in the hands of the party who has paid it to the plaintiff, he may use that as an equitable defense to the extent that the action is prosecuted for the use of that party. *Thornton v. Maynard*, L. R. 10 C. P. 695. To a declaration by the holder against the acceptor of several bills of exchange, the defendant pleaded by way of equitable defense that the drawers became bankrupt, and that the plaintiff received 425*l.* as a dividend from their estate on account of the bills, and as to that sum was suing only as trustee for the drawers; and the plea claimed to set off a debt due to the defendant from the drawers. Held, a good equitable defense *pro tanto*. *Agra v. Leighton*, L. R. 2 Ex. 56; *Cochrane v. Greene*, 9 C. B. (N. S.) 448; *Elkin v. Baker*, 11 id. 526; *Clark v. Cort*, Cr. & Ph. 154. Lord Coleridge, C. J., said: "These cases . . . appear to establish the soundness of these two propositions: 1. That the holder, having been paid a part of the bill by the drawer's trustees, sues as regards that sum as trustee for the benefit of the drawer's trustee; and 2. That where the plaintiff

is suing merely as trustee, and the defendant has a claim against the *cestui que trust*, which but for the intervention of the trust could have been a set-off at law, such claim can be set off in equity. If, then, these two propositions are sound — and we think they are,—it follows that the plea is good, unless the bankruptcy makes a difference. We think it does not." *Belohradsky v. Kuhn*, 69 Ill. 547; *Wiffen v. Roberts*, 1 Esp. 261; *Jones v. Hibbert*, 2 Stark. 304.

¹ *Chitty on Bills*, *677; *Walwyn v. St. Quintin*, 1 B. & P. 658; *Johnson v. Kennion*, 2 Wils. 262; *Ex parte De Tastet*, 1 Rose, 10.

² *Chitty on Bills*, *677; *Pierson v. Dunlop*, 2 Cowp. 571; *Steel v. Bradfield*, 4 Taunt. 227; *Jones v. Hibbert*, 2 Stark. 304.

A note for a definite sum, given as security for advances, can only be enforced as between the original parties, to the extent of the advances made. *Vogan v. Caminetti*, 65 Cal. 438, 4 Pac. Rep. 435; *Rogers v. Smith*, 47 N. Y. 324.

holder, without notice of a good defense against his assignor, the general and better rule appears to be that the pledgee can recover the amount of his principal debt only."¹ But in case of bankruptcy, though the holder may prove the whole amount under a commission against a remote party, and receive a dividend until his debt is satisfied, he cannot prove for more than the sum actually due on the balance of account against his immediate indorser.²

In cases where there is a defense to a note or bill, in whole or in part, it is unavailable, and the sum payable according to its face is recoverable if the paper has passed into or through the hands of a *bona fide* holder by successive transfers. The title of an indorsee is the title of all the prior parties.³ As soon as it comes into the hands of a holder as to whom it is not subject to defenses and equities good between antecedent parties, its character as a negotiable security is established, and he can transfer it with that immunity.⁴ But if the holder has paid less than full value for the paper, his privilege [107] as *bona fide* holder to exclude defenses attaches, according to some authorities, only in respect to the amount he has paid. As to the remainder there is no privilege; it is open to defenses.⁵ Mr. Daniel says that "where some legal consider-

¹ Union Nat. Bank v. Roberts, 45 Wis. 373, 379, citing Chicopee Bank v. Chapin, 8 Met. 40; Stoddard v. Kimball, 6 Cush. 469; Bond v. Fitzpatrick, 4 Gray, 89; Fisher v. Fisher, 98 Mass. 303; Williams v. Smith, 2 Hill, 301; Duncan v. Gilbert, 29 N. J. L. 521. To the same effect is St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 48 N. W. Rep. 526.

² Ex parte Bloxham, 6 Ves. 448, 609; Ex parte Leers, id. 644; Chitty on Bills, *678.

³ Edwards v. Jones, 2 M. & W. 414; Hunter v. Wilson, 4 Ex. 489; Thiedemann v. Goldschmidt, 1 De Gex, F. & J. 10; Robinson v. Reynolds, 2 Q. B. 202, 210; Hoffman v. Bank of Milwaukee, 12 Wall. 181; United States v. Bank of Metropolis, 15 Pet. 393.

⁴ Hascall v. Whitmore, 19 Me. 102, 36 Am. Dec. 738; Thomas v. Newton,

2 C. & P. 606; Smith v. Hiscock, 14 Me. 449; Solomon v. Bank of England, 13 East, 135, note b; Haley v. Lane, 2 Atk. 182; Woodman v. Churchill, 52 Me. 58; Woodworth v. Huntoon, 40 Ill. 131, 89 Am. Dec. 340; Bassett v. Avery, 15 Ohio St. 299; Watson v. Flanagan, 14 Tex. 354; Masters v. Ibberson, 8 C. B. 100; Prentice v. Zane, 2 Gratt. 262; Hereth v. Merchants' Nat. Bank, 34 Ind. 380; Simonds v. Merritt, 33 Iowa, 537; Peabody v. Rees, 18 id. 571; Morryer v. Cooper, 35 id. 257; Boyd v. McCann, 10 Md. 118; Cook v. Larkin, 19 La. Ann. 507. See Kost v. Bender, 25 Mich. 515.

⁵ Perry v. Council Bluffs City Water Works Co., 67 Hun. 456, 467, 22 N. Y. Supp. 151, affirmed without opinion, 113 N. Y. 637; Campbell v. Brown, 100 Tenn. 245, 48 S. W. Rep.

ation exists in the inception of the paper, it seems that in New York the *bona fide* holder may recover the full amount, no matter what amount he may give for it.¹ This seems to us the true distinction in such cases. If the paper is issued in fraud

970; *Oppenheimer v. Bank*, 97 Tenn. 19, 33, 36 S. W. Rep. 705, 56 Am. St. 778, 33 L. R. A. 767; *Huff v. Wagner*, 63 Barb. 215; *Hargee v. Wilson*, id. 27, and cases cited at end of this note.

In *Huff v. Wagner*, Talcott, J., discusses this point: "The special term granted a new trial upon the exception to the ruling as to the admission of the evidence, and upon the principle that a *bona fide* holder of commercial paper, to which, as between maker and payee, there is a good defense, is entitled to be protected only to the extent of the value he has paid. This, I think, is correct. The protection of the holder in such cases, as in other cases where the law protects *bona fide* purchasers against latent claims, is founded upon the idea of protecting such *bona fide* purchaser for value against any possible loss. And this is the precise reason why a *bona fide* holder of such paper, which has been transferred to him to secure an antecedent debt, cannot recover against the party who has been defrauded: namely, that he has lost nothing by his reliance upon the face of the paper. These principles are discussed and laid down in a very elaborate opinion of the late chancellor, delivered in the court of errors in the leading case of *Stalker v. McDonald*, 6 Hill, 93, in which he expressly holds that if the holder of such paper has paid but a part of the consideration or value of the property, he is only entitled to be con-

sidered as a *bona fide* purchaser *pro tanto*; and refers with approbation to the case of *Edwards v. Jones*, 7 C. & P. 633, in which, in an action on a note for £100, the consideration of which was impeached by a plea, the plaintiff replied that it was indorsed to him for the consideration of £49. And he was only permitted to recover the £49 advance. The proposition sought to be maintained by the counsel for the appellant in this case, namely, that whatever may have been the consideration of the transfer of a negotiable note, if it was a valuable one, the holder, without notice of the invalidity of the note, may recover the entire face thereof, without reference to the amount paid by him for it, would produce most unjust and startling results. It would enable the holder of a stolen note for \$1,000 to recover the entire amount thereof from the maker, from whom it had been stolen, although the holder had purchased the same without notice for only \$100 — a result revolting to common sense, and going far beyond affording that protection which public policy requires should be extended to the parties who purchase negotiable paper for value. I see no reason for any distinction between the case of a purchaser for money, and one where the note is ex- [108] changed for property. If such a distinction could be made the maker of the note would have no protection. Such notes would then be used in the purchase of property, as

¹ 1 Neg. Inst. (5th ed.), § 758, referring to *Howe v. Potter*, 61 Barb. 357. "In this case nothing is said as to

the amount reserved by the holder, but it appears to have been a full recovery upon the draft."

without consideration, the *bona fide* purchaser should be limited in recovery to the amount paid with interest.¹ But if there is an original valid consideration, or the paper was issued fairly and intentionally without consideration, then he

in this case, instead of sold for money. The purchaser is fully protected against loss by being enabled to recover the full value of the property parted with on the purchase.

"The doctrine laid down in *Stalker v. McDonald* was also expressly held in *Williams v. Smith*, 2 Hill, 301, and in *Youngs v. Lee*, 18 Barb. 187, in which Mr. Justice Welles, delivering the opinion of the court, said: 'It follows that the plaintiffs are *bona fide* purchasers and holders of the note upon which the action is brought, and entitled to recover from the indorsers the amount they paid for it *and no more*.' The case of *Youngs v. Lee* was affirmed on appeal, 12 N. Y. 551. The same principle was asserted in *Cardwell v. Hicks*, 37 Barb. 458. The truth is, that in such cases the holder, except so far as he has parted with value, has no equity superior to that of the party defrauded. There is a remarkable silence on this precise point in most of the elementary works I have examined. It is, however, explicitly laid down in *Story on Bills*, § 188, that where a bill has been obtained by fraud a *bona fide* holder can only recover the amount he has advanced. The English cases, where a question of this character appears to have been presented, appear, generally, to have been between the *bona fide* holder and the accommodation maker or indorser; and in such cases it has always been ruled that the holder only recovers the amount of his advances. See *Chitty on Bills*, 81; *Nash v. Brown*, *id.* 81, note 1; *Wiften v. Roberts*, 1 Esp. 261; *Jones v.*

Hibbert, 2 Stark. 304; *Simpson v. Clarke*, 2 Cr., M. & R. 343. I do not perceive any reason why a *bona fide* holder for value may not recover the full face of the note without regard to the amount he has advanced, as well where he sues a mere accommodation maker as where he sues one from whom the note was obtained by fraud. In either case the amount of the recovery is limited to the amount advanced by the holder, because there was no sufficient valid and valuable consideration for the making of the note; and the right to recover at all grows out of the advance which has been made by the holder, which gives it validity in his hands to that extent. I think the discussions and opinions in the English cases show that this point has not been considered debatable where the note was obtained by false and fraudulent representations. Indeed, I think that until quite recently it has been assumed at *nisi prius* in this state that a holder of such paper for value and without notice was entitled to be protected to the extent of his advances, and no more. The point has been expressly decided in *Holman v. Hobson*, 8 Humph. 127, and in *Bethune v. McCreary*, 8 Ga. 114.

"It is claimed by the counsel for the respondent that the case of *The Essex County Bank v. Russell*, 29 N. Y. 673, countenances the doctrine maintained by him. There a bank had discounted or purchased a note which was diverted, and gave as the proceeds of the discount a part in cash and the balance in a note held

¹ *Holcomb v. Wyckoff*, 35 N. J. L. 38, 10 Am. Rep. 219.

is entitled to recover the whole amount regardless of the amount he pays."¹ The doctrine of the text is not sustained by some courts. Thus it is said in Iowa: "The defense that a note has been obtained fraudulently, or without consider-

by it, made by one Brewster, and indorsed by other parties, which was past due and under protest. The bank was allowed to recover the whole amount of the diverted note, on the ground that it was a *bona fide* holder for value, and upon the express ground that the Brewster note which constituted a part of the consideration on the purchase, although under protest, was worth its nominal amount, and was good and collectible. And the principle laid down in *Stalker v. McDonald*, on this point, seems to have been expressly recognized as law. Mr. Justice Hogeboom says, speaking of the plaintiffs (the bank): 'They were, therefore, on discounting this note, *bona fide* holders of it for value, at least to the extent of the sum advanced in cash, on the discount; and to that extent, at all events, they would be entitled to recover in this action. . . . It becomes necessary to determine whether the plaintiffs are *bona fide* holders of the note in suit, in such a sense as to exclude the defense of its misapplication, so far as respects the part of the discount which was appropriated to the purchase of the Brewster paper. *There was no want of consideration on the part of the plaintiff to the full amount of the note in suit in the transaction in question. The Brewster note was, though overdue, good and collectible paper. It was worth its nominal amount, and was collectible for two years afterwards. It was a chose in action which the plaintiff had a right to sell and transfer to Comstock. To*

the full extent of its value it was a valuable consideration.' The case of *Park Bank v. Watson*, 42 N. Y. 490, 1 Am. Rep. 573, is claimed by the counsel for the appellant to have overruled the former cases on the subject and to have established the doctrine for which he contends. In that case the Park Bank had surrendered notes held as collateral security for a debt due it, on receiving the notes in suit, which proved [109] to have been diverted. One of the notes surrendered was the note of Thomas Parks, shown on the trial to be irresponsible. The defendant's counsel had requested the court to charge 'that the plaintiff cannot recover for any amount beyond that which remained after deducting the Parks note.' The request being refused, an exception was taken. The only opinion in the case is that of Judge Lott, who says: 'The surrender of those notes, under the decision in *Brown v. Leavitt*, 31 N. Y. 113, and the cases there cited, made the bank a holder for value, and entitled it to recover the full amount claimed in those actions, without deducting the amount of the note of Parks.'

"The question in *Brown v. Leavitt* was simply whether the surrender and delivery up to the debtor of an existing note, and receiving another in payment of it, constituted a valuable consideration within the meaning of the rule which protects a *bona fide* purchaser for value against defenses existing between prior parties; and neither in that case, nor in any one of the cases there cited, was any question presented like that in the

¹ See *Daniels v. Wilson*, 21 Minn. 530.

ation, does not avail against a *bona fide* holder. If, however, the recovery of such holder may be limited to the amount paid, it is apparent that the defense does avail, for without such defense he would recover the amount evidenced by the note."¹ And in Michigan that "the maker of a note has no concern with the amount paid for it by a *bona fide* purchaser."² This is the doctrine of the federal supreme court where the purchaser of a negotiable security is not individually chargeable with fraud,³ and of the courts of Connecticut, Texas, Massachusetts, Pennsylvania, Wisconsin, Ohio and Indiana.⁴ It does not conflict with the rule which limits the re-

case at bar; unless it be in the cases of *Stalker v. McDonald* and *Youngs v. Lee*, in which cases the doctrine laid down was, as we have seen, directly contrary to the position of the appellant here. I have looked into the original points and case on the argument in the court of appeals of *The Park Bank v. Watson*, and find that it was claimed there by the plaintiff that, notwithstanding the evidence touching the irresponsibility of Parks, the maker of one of the notes surrendered, his note was nevertheless of value, and would probably have been paid. It cannot be affirmed that a particular note of a party, shown to be of the character and in the position such as that of Parks, is wholly valueless. Now the request of the counsel for the defendant in that case was that the judge charge that the entire amount of the Parks note must be deducted from any recovery. Upon well settled practice this request was too broad, as the note of Parks had some value, and an exception to the refusal to charge as requested was therefore unavailable; and the remark of Justice Lott, which has been quoted so far as it is supposed to countenance the idea that the holder of negotiable paper, in good faith, for value, to which there is a defense as against the party from whom the holder re-

ceived it, may recover the full face of the paper without regard to the amount he has paid for it, if not inadvertent, was at least unnecessary to the decision, and wholly unsupported by the authorities on which it was supposed to have been placed." *Gilbert v. Duncan*, 29 N. J. L. 133; *Holcomb v. Wyckoff*, 35 id. 35, 10 Am. Rep. 219; *Moore v. Ryder*, 65 N. Y. 438; *Todd v. Shelbourne*, 8 Hun, 510; *Ingalls v. Lee*, 9 Barb. 647; *Allaire v. Hartshorne*, 21 N. J. L. 665, 47 Am. Dec. 175; *Robbins v. Maidstone*, 4 Q. B. 811; *Williams v. Smith*, 2 Hill, 301; *Valette v. Mason*, Smith (Ind.), 89; *Cook v. Cockrill*, 1 Stew. 475, 18 Am. Dec. 67. See *Grand Rapids, etc. R. Co. v. Sanders*, 17 Hun, 552.

¹ *Lay v. Wissman*, 36 Iowa, 305; *Bank of Michigan v. Green*, 33 Iowa, 110.

² *Vinton v. Peck*, 14 Mich. 287, 296.

³ *Cromwell v. County of Sac*, 96 U. S. 60; *Railroad Cos. v. Schutte*, 103 id. 118; *Wade v. Chicago, etc. R. Co.*, 149 id. 327, 13 Sup. Ct. Rep. 892.

⁴ *Bissell v. Dickerson*, 41 Conn. 61, 73, 29 Atl. Rep. 226; *Petri v. First Nat. Bank*, 83 Tex. 424, 18 S. W. Rep. 752, 29 Am. St. 657; *Petri v. Fond du Lac Nat. Bank*, 84 Tex. 212, 20 S. W. Rep. 777; *Fowler v. Strickland*, 107 Mass. 552; *Moore v. Baird*, 30 Pa. 138; *Bango v. Flint*, 25 Wis. 544; *Baily v.*

covery on a note taken and held as a protection against a specified liability to the amount of the liability,¹ nor the rule which holds that where the purchaser pays a largely disproportionate sum for a note as compared with its value as known to him, he will not be regarded as a *bona fide* holder.² If the maker of a non-negotiable note is not responsible for the value of it as it is expressed on its face an assignee cannot collect such value from his assignor if the latter shows that the price paid him for it was less than its face. *Prima facie* that is its value; but it is not conclusively so. The assignor's liability is the amount received, with interest.³

[110] § 542. **Want or failure of consideration.** It is essential to the validity of every contract that it be based on a sufficient consideration. Notes and bills are not exceptions; some consideration there must be;⁴ but they import a consideration; that is, in the absence of any express admission a consideration is presumed by law to exist, not only between the original parties, as maker and payee of the note, or drawer and acceptor of a bill, but also between other and subsequent parties. In suing upon these contracts no special averment or proof of consideration is necessary;⁵ the aver-

Smith, 14 Ohio St. 396; Farber v. National Forge & Iron Co., 140 Ind. 54, 39 N. E. Rep. 249.

¹ Grant v. Kidwell, 30 Mo. 458.

² De Witt v. Perkins, 23 Wis. 445.

³ Thomas v. Linn, 40 Wa. Va. 122, 20 S. E. Rep. 878; Goff v. Miller, 41 W. Va. 683, 24 S. E. Rep. 643, 56 Am. St. 886; Mackie v. Davis, 2 Wash. (Va.) 219, 1 Am. Dec. 482; Drane v. Scholfield, 6 Leigh, 397; Foust v. Gregg, 68 Ind. 399; Schmied v. Frank, 86 Ind. 250.

⁴ Fowler v. Shearer, 7 Mass. 14, 22; Jennison v. Stone, 33 Mich. 99.

⁵ Sprague v. Sprague, 80 Hun, 285, 30 N. Y. Supp. 162; Carnwright v. Gray, 127 N. Y. 92, 27 N. E. Rep. 835, 24 Am. St. 424, 12 L. R. A. 845.

In Bourne v. Ward, 51 Me. 191, it was held that negotiable notes, when they have passed into the hands of indorsees in the usual course of

trade, enjoy the privilege of having a consideration presumed. But notes not negotiable, and negotiable notes while in the hands of the payee, enjoy no such privilege. Bristol v. Warner, 19 Conn. 7; Delano v. Bartlett, 6 Cush. 364; Burnham v. Allen, 1 Gray, 496. If they contain the words "value received," they are *prima facie* evidence of consideration. See Holliday v. Atkinson, 5 B. & C. 501; Bristol v. Warner, 19 Conn. 7.

In Richardson v. Comstock, 21 Ark. 69, it is held that a note in the hands of the payee is *prima facie* evidence of consideration, the words "value received" being in it. The opinion says, "the note upon its face furnishing *prima facie* evidence of consideration, as held by a series of adjudications of this court." Gage v. Melton, 1 Ark. 228; Rankin v. Bad-

ment and proof of a contract of such nature includes [111] this essential element. But the presumption of consideration is not conclusive between the immediate parties, nor, indeed, between remote parties, except in favor of a *bona fide* holder for value.¹ Under a statute providing that on the failure of the consideration of a note the holder cannot recover more than he paid for it, a *bona fide* holder for value can recover only a nominal sum unless he shows that he paid more.² If there is evidence of a defense, in whole or in part, to a note by way of recoupment of the damages suffered because of the partial want or partial failure of consideration the burden is upon the indorsee-plaintiff to show that he is a *bona fide* holder of the note,

gett, 5 Ark. 346; Greer v. George, 8 Ark. 133; Cheny v. Higginbotham, 10 id. 273; Dickson v. Burks, 11 id. 307. The cases in 8 and 10 Ark. were upon promissory notes—but the notes were not set out—and whether the words “value received” are in them or not does not appear. The decisions seem to proceed on the ground that, as promissory notes, they import a consideration. Story on Prom. Notes, § 181; Chitty on Bills, pp. 78, 85.

Where one consideration of a note has been negatived by a breach of warranty, there can be no presumption, in the absence of evidence, that there was any other. In such a case the maker is not obliged to prove that there was no other consideration. Aldrich v. Stockwell, 9 Allen, 45.

The introduction of testimony to show an actual consideration does not prevent the party offering it from availing himself of the legal presumption. Durland v. Durland, 153 N. Y. 67, 47 N. E. Rep. 42.

¹ Hoffman v. Bank of Milwaukee, 12 Wall. 181; Lenheim v. Fay, 27 Mich. 70; Crossly v. Ham, 13 East, 498; Goodman v. Harvey, 4 A. & E. 870; Hannover v. Doane, 12 Wall. 312; Andrews v. Pond, 13 Pet. 65;

Skilding v. Warren, 15 Johns. 270; Fisher v. Leland, 4 Cush. 456, 50 Am. Dec. 805; Ryland v. Brown, 2 Head, 270; Norvell v. Hudgins, 4 Munf. 496; Harrisburg Bank v. Meyer, 6 S. & R. 537; Thrall v. Horton, 44 Vt. 386; Lawrence v. Stonington Bank, 6 Conn. 521; Taylor v. Mather, 3 T. R. 83, note; Brown v. Davies, id. 80; Ayers v. Hutchins, 4 Mass. 370; Thompson v. Hale, 6 Pick. 259; Boggs v. Lancaster Bank, 7 W. & S. 331; Tucker v. Smith, 4 Me. 415; Brown v. Turner, 7 T. R. 630; Conger v. Armstrong, 3 Johns. Cas. 5, 2 Am. Dec. 126; Conroy v. Warner, 3 Johns. Cas. 259; Amory v. Merryweather, 2 B. & C. 573; Evans v. Kymer, 1 B. & Ad. 528; Kasson v. Smith, 9 Wend. 437; Steers v. Lashley, 6 T. R. 61; Walker v. Hagerty, 30 Neb. 120, 46 N. W. Rep. 221; Bank of Stewart County v. Adams, 96 Ga. 529, 23 S. E. Rep. 496; Benson v. Dublin Warehouse Co., 99 Ga. 303, 25 S. E. Rep. 615; Montgomery v. Hunt, 99 Ga. 499, 27 S. E. Rep. 701; Mahon v. Gaither, 70 Ill. App. 434; Kent v. Barnes, 72 id. 617; First Nat. Bank v. Oliver, 16 Tex. Civ. App. 438, 41 S. W. Rep. 414.

² Wray v. Warner, 111 Iowa, 64, 82 N. W. Rep. 455.

and that it was taken by him before maturity for value. But a distinction has been made between cases where a note was originally obtained by fraud, or was fraudulently put into circulation by the payee, or was given upon an illegal consideration, and cases where there has been only a want or failure of consideration as between the maker and payee. In the former class of cases the production of the note by the indorsee and the proof or admission of the genuineness of the signatures are not enough to make out a case for the plaintiff if the fraud or illegal consideration is proved, but the burden still remains on him to produce some additional evidence that he took the note in good faith for value before maturity; while in the latter class of cases the production of the note by the indorsee and the proof or admission of the genuineness of the signatures make out a *prima facie* case in his favor, which is not met merely by proof of a want or failure of consideration, but the burden of also introducing evidence that the indorsee did not take the note in good faith for value before maturity is on the defendant.¹

It is not within the object of the writer to discuss in detail the law which defines a *bona fide* holder for value; but rather what deductions are authorized where the paper is open to defenses. If there is a total *want* or a total *failure* of consideration, there can be no recovery; the essential basis of a binding contract is then shown to be wanting.² Fraud vitiates a contract; and, at the election of the defrauded party, it may be avoided; but, if not avoided by him, it is only available [112] as ground for a cross-action or recoupment, which is of the same nature; or as a defense where the fraud has directly

¹ Holden v. Phoenix Rattan Co., 168 Mass. 570, 47 N. E. Rep. 241.

² Warner v. Crouch, 14 Allen, 163; Starr v. Torrey, 22 N. J. L. 190; Buckles v. Cunningham, 6 Sm. & M. 358; Clough v. Patrick, 37 Vt. 421; Grant v. Townsend, 2 Hill, 554; Sawyer v. Chambers, 44 Barb. 42; Cragin v. Fowler, 34 Vt. 326, 80 Am. Dec. 680; Payne v. Cutler, 13 Wend. 605; French v. Gordon, 10 Kan. 370; O'Neal v. Bacon, 1 Houst. 215; Morrill v. Aden, 19 Vt. 505; Case v. Gerrish, 15 Pick. 49; Rice v. Goddard, 14 id. 293; Dickinson v. Hall, id. 217; Joliffe v. Collins, 21 Mo. 338; Smith v. Brooks, 18 Ga. 440; Washburn v. Picot, 3 Dev. 390; Aldrich v. Stockwell, 9 Allen, 45; Tillotson v. Grapes, 4 N. H. 444; Dunbar v. Marden, 13 id. 311; Aurora Nat. Bank v. Dils, 18 Ind. App. 319, 48 N. E. Rep. 19; Jackson v. Warwick, 7 T. R. 121. See Diefendorff v. Gage, 7 Barb. 18; Fitch v. Redding, 4 Sandf. 130.

caused a want or failure of consideration.¹ The fraud or covin necessary to defeat recovery on a note by a *bona fide* indorser before maturity must relate to the execution of the note, and not to the consideration on which it is based, and must consist of some trick or device that induces the giving of one kind of instrument under the belief of the maker that he is giving one of a different kind.² Where the defendant was induced to put his name on the back of a bill of exchange by the fraudulent representation of the acceptor that he was signing a guarantee, he was not liable if he signed without knowing that it was a bill and under the belief that it was a guarantee, and was not negligent in so doing.³ If the signer of a note is negligent in signing it without knowledge of its terms, he is liable to a *bona fide* holder.⁴ A total failure of consideration nullifies a contract equally as a total want of consideration prevents its inception. Accommodation paper is without consideration in the hands of the accommodated parties.⁵ Nor can a note be supported as a gift; for a gift is not consummate and perfect until a delivery of the thing promised; and, until then, the party may revoke his promise.⁶ If a note or bill be given for property as purchased which has no existence, there is no consideration;⁷ and it is the same if property bought is wholly without value.⁸ A note or bill given for the price of a void or

¹ *Andrews v. Wheaton*, 23 Conn. 112; *Wright v. Irwin*, 33 Mich. 32; *Thornton v. Wynn*, 12 Wheat. 183; *Withers v. Greene*, 9 How. 213; *Drew v. Towle*, 27 N. H. 412, 59 Am. Dec. 380; *Stone v. Peake*, 16 Vt. 213; *Clopton v. Elkin*, 49 Miss. 95; *Nichols v. Hunton*, 45 N. H. 470; *Southall v. Rigg*, 4 Eng. L. & Eq. 366, 20 L. J. (C. P.) 145; *French v. Gordon*, 10 Kan. 370; *Morrill v. Aden*, 19 Vt. 505; *Lewis v. Cosgrave*, 2 Taunt. 2. See *Carpenter v. Phillips*, 2 Houst. 524.

² *Woods v. Hynes*, 2 Ill. 103; *Easter v. Minard*, 26 Ill. 494; *Gray v. Goode*, 72 Ill. App. 594.

³ *Foster v. Mackinnon*, L. R. 4 C. P. 704.

⁴ *Ward v. Johnson*, 51 Minn. 480, 53 N. W. Rep. 766, 38 Am. St. 515.

⁵ *Jackson v. Warwick*, 7 T. R. 121;

Knight v. Hunt, 5 Bing. 432; *Sparrow v. Chisman*, 9 B. & C. 241; *Thompson v. Clubley*, 1 M. & W. 212.

⁶ *Nash v. Brown*, Clutton on Bills, *74, note x; *Edw. on Bills & N.* 307; *Fink v. Cox*, 18 Johns. 145, 9 Am. Dec. 191; *Easton v. Pratchett*, 1 Cr., M. & R. 798; *Shaw v. Camp*, 160 Ill. 425, 43 N. E. Rep. 608.

⁷ 2 Kent's Com. *468; *Hastie v. Couturier*, 9 Ex. 102; *Barr v. Gibson*, 3 M. & W. 390; *Strickland v. Turner*, 7 Ex. 208; *Allen v. Hammond*, 11 Pet. 63.

⁸ *Tuft v. Myerscough*, 197 Ill. 600, 64 N. E. Rep. 711; *Arnold v. Wills*, 86 Ind. 368; *Brown v. Weldon*, 27 Mo. App. 251; *Shepherd v. Temple*, 3 N. H. 455; *Ramsey v. Sargent*, 21 id. 397; *Perley v. Batch*, 23 Pick. 283, 34 Am. Dec. 56; *O'Neal v. Bacon*, 1 Houst. 245.

worthless patent right is without consideration.¹ So a contract by note, bill or otherwise to pay purchase-money of land conveyed by a void deed, as when made by a married woman;² or by a valid deed with covenants of warranty, by which no right or title passes.³ And where property, either personal or real, is purchased with warranty of title or quality, and it turns out that there is no title in the vendor, or that the property is destitute of the warranted quality and is worthless, and no actual benefit is transferred to the purchaser, the warranties will not constitute a consideration.⁴ If a statute declares that the illegality of a contract shall make a note given because of it void, the note will be void in the hands of an innocent purchaser for value before maturity; but unless the statute expressly so declares mere illegality of consideration is not a defense to the note as against a *bona fide* holder thereof to whom it was indorsed for value before maturity.⁵ The general rule that the validity of a contract is to be governed by the law of the place where it is made⁶ does not apply where the contract because of which the note sued upon was given contravenes the criminal laws of the state in which action is brought on the note.⁷

[113] Where the maker and payee of a note were owners of land, and the former took a conveyance of it to sell it on joint account, and gave the note as security for prompt payment of the purchase-money when the land should be sold, a defense to the note of a want of consideration was held good until the

¹ Wray v. Warner, 111 Iowa, 64, 82 N. W. Rep. 455; Smith v. Hightower, 76 Ga. 630; Clough v. Patrick, 37 Vt. 421; Joliffe v. Collins, 21 Mo. 338; Dickinson v. Hall, 14 Pick. 217. But see Miller v. Finley, 26 Mich. 249, 12 Am. Rep. 306.

² Warner v. Crouch, 14 Allen, 163; Grout v. Townsend, 2 Hill, 554.

³ Rice v. Goddard, 14 Pick. 293; Fisher v. Salmon, 1 Cal. 413, 54 Am. Dec. 297.

⁴ Rice v. Goddard, 14 Pick. 293; Dickinson v. Hall, id. 217; Aldrich v. Stockwell, 9 Allen, 45; Shepherd v. Temple, 3 N. H. 455; Mason v. Wait, 5 Ill. 127. See Owings v. Thompson,

4 id. 502; Vincent v. Morrison, 1 id. 227; Lamerson v. Marvin, 8 Barb. 9; Hoy v. Taliaferro, 8 Sm. & M. 727; Furniss v. Williams, 11 Ill. 229; Clark v. Snelling, 1 Ired. 382; Wilson v. Jordan, 3 Stew. & P. 92.

⁵ Hopmeyer v. Frederick, 74 Ill. App. 301; Estate of Long v. Jones, 69 Ill. App. 615; Pope v. Hanke, 155 Ill. 617, 40 N. E. Rep. 839.

⁶ See § 358.

⁷ Pope v. Hanke, 155 Ill. 617, 627, 40 N. E. Rep. 839, 28 L. R. A. 568; Faulkner v. Hyman, 142 Mass. 53, 6 N. E. Rep. 846; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Fisher v. Lord, 63 N. H. 514.

sale was made.¹ A want of consideration destroys the validity of a contract without regard to the *bona fides* of the transaction; as where the defendant promised as administrator to pay a given sum for value received by one of the heirs of the intestate; or where a debtor pays part of his debt before it is due, and a note is given him instead of a receipt to show that he is allowed interest on the sum paid; or where a note is given in renewal of another which was not founded on any consideration; or is given to a widow for a debt due to her deceased husband's representatives; or where it is given to the mother of a child that has been beaten to stay a prosecution for the injury; or where it is given on a mere moral or honorary obligation, not on anything which the law esteems a valuable consideration.² A total failure of consideration occurs where there was a consideration at the inception of the contract and it subsequently becomes wholly nugatory. This may be illustrated by a note or bill given for the purchase-money of goods to be subsequently delivered at a stated time, and a failure to deliver the same.³ Where a note was given in consideration of the relation of apprenticeship which the parties supposed was to be created between the maker's son and the payee, but which relation at the time of the trial it appeared never did exist between them, it was held the consideration wholly failed. By the statute of Anne the duty was laid on the master [114] in consideration of the premium received by him to have the same inserted in the indenture, and that instrument properly stamped. He having failed to perform that duty, and the time for it having expired, the relation was not instituted.⁴

§ 543. **Partial want of consideration.** Partial want of consideration avoids a note or bill *pro tanto* where the holder is subject to defenses relating to the consideration; as where a note is given on a settlement of account by mistake for more than is due;⁵ and where a bill is drawn as to part for value,

¹ Marsh v. Bennett, 22 Ill. 313.

² Edwards on Bills, 327; Ten Eyck v. Vanderpool, 8 Johns. 120; Schoonmaker v. Roosa, 17 id. 300; Crofts v. Beale, 5 Eng. L. & Eq. 408, 20 L. J. (C. P.) 186, 15 Jur. 709; Slade v. Halstead, 7 Cow. 322; Geiger v. Cook, 3

W. & S. 266; Bryan v. Philpot, 3 Ired. 467; Heast v. Sybert, Cheever, 177.

³ Wells v. Hopkins, 5 M. & W. 7.

⁴ Jackson v. Warwick, 7 T. R. 121.

⁵ Mercer v. Clark, 3 Bibb, 224; Phetteplace v. Steere, 2 Johns. 442; Forman v. Wright, 11 C. B. 481. See Briscoe v. Kenealy, 8 Mo. App. 76.

and as to the remainder for the accommodation of the plaintiff, the recovery will be limited to the consideration of value;¹ and it may be stated generally that where a note or bill is given for several distinct considerations and one is not a consideration which the law deems valuable, so much of the promise as is founded upon that consideration is void, and there will be a deduction from the amount of the paper of so much as was included for that element of the consideration which is invalid;² and this partial defense is available although the amounts of the several considerations are not liquidated and fixed by the parties. In such case if one of two independent considerations on which a note is founded is one which the law deems valid and sufficient to support a contract, and the other not, the note will be apportioned as between the original parties or such as have the same relative rights, and the holder will recover to the extent of the valid consideration and no further; and the question what amount was [115] founded on one consideration and what on the other will be settled by the jury upon the evidence.³

¹ Darnell v. Williams, 2 Stark. 166.

² Bates v. Butler, 46 Me. 387; Parish v. Stone, 14 Pick. 198; Collins Iron Co. v. Burkam, 10 Mich. 283; Great Western Ins. Co. v. Rees, 29 Ill. 272; Clopton v. Elkin, 49 Miss. 95; Goss v. Whitehead, 33 id. 213; Wilson v. Forder, 20 Ohio St. 89, 5 Am. Rep. 627; Barber v. Backhouse, Peake, 61; Sparrow v. Chrisman, 9 B. & C. 241; Lewis v. Cosgrave, 2 Taunt. 2; Wintle v. Crowther, 1 Tyrw. 213; Gascoyne v. Smith, McClel. & Y. 338; Stephens v. Wilkinson, 2 B. & Ad. 320; Barker v. Morton, 7 Up. Can. App. 114; Allaire v. Harts-horne, 21 N. J. L. 665, 47 Am. Dec. 175; Payne v. Ladue, 1 Hill, 116. But see Lash v. McCormick, 17 Minn. 403; Walters v. Armstrong, 5 id. 448; Leighton v. Grant, 20 id. 345; Whitacre v. Culver, 9 id. 295.

³ Parish v. Stone, 14 Pick. 198; Loring v. Sumner, 23 Pick. 98.

In Parish v. Stone, Shaw, C. J., said: "It seems very clear that

want of consideration, either total or partial, may always be shown by way of defense; and that it will bar the action, or reduce the damages from the amount expressed in the bill, as it is found to be total or partial respectively. It cannot, therefore, in such a case depend upon the state of the evidence whether the different parts of the bill were settled and liquidated by the parties or not. Where the note is intended in a great degree to be gratuitous, the parties would not be likely to enter into very particular stipulations as to what should be deemed payment of a debt and what a gratuity. The rule to be deduced from the cases seems to be this: that where the note is not given upon any one consideration, which, whether good or not, whether it fail or not, goes to the whole note at the time it is made, but for two distinct and independent considerations, each going to a distinct portion of the note, and

§ 544. **Partial failure of consideration.** A partial failure of consideration is a subject on which there has been much conflict of authority. On principle there should be no difference between partial failure and partial want of consideration in respect to the mode of arriving at certainty of [116] amount to be deducted on that account. Wherever the amount is provable for the purpose of a defense *pro tanto* on the ground of a partial want of consideration it ought to be provable for a like defense if the consideration has partially failed. Much has been done to settle the law on this subject by the declaration of the negotiable instruments act that "absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.¹ In an English case, decided in 1824, it was declared that a partial failure of the consideration of a promissory note constitutes no ground of defense, if the *quantum* to be deducted on that account is

one is a consideration which the law deems valid and sufficient to support a contract, and the other not, there the contract shall be apportioned, and the holder shall recover to the extent of the valid consideration, and no further. In the application of this principle there seems to be no reason why it shall depend upon the state of the evidence showing that these different parts can be ascertained by computation; in other words, whether the evidence shows them to be respectively liquidated or otherwise. If not, it would seem that the fact, what amount was upon one consideration and what upon the other, like every other questionable fact, should be settled by the jury upon the evidence. This can never operate harshly upon the holder of the note, as the presumption of law is in his favor as to the whole note; and the burden is upon the defendant to show to what extent the note is without consideration. Suppose a father

proposes, upon his son going into business, to aid him by an advance of several thousand dollars, and for that purpose gratuitously offers him his note for that sum; but as his son had performed services to the value of a few dollars, for which no price was agreed, upon giving his note the father, intending to cancel and discharge that and all other claims, takes a general receipt for all services and other dues, and afterwards, the note not having been negotiated, a suit should be brought on it by the payee against the maker, might not the defendant show the want of consideration by way of defense *pro tanto*? And yet the amount must be settled by a jury; the evidence of the original agreement not distinguishing between what was payment and what was gratuity." *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Fuld v. Austin* 151 Cal. 379, 61 Pac. Rep. 612.

¹ Crawford's Annotated Neg. Inst. Law (2d ed.), § 54.

not of definite computation, but of unliquidated damages.¹ It was a case in which, according to the report, the real ground of complaint was inadequacy, and not part failure, of consideration. A note was given for 20*l.* for the plaintiff's disclosing to the defendant an improvement in certain machinery, which turned out to be *less beneficial* than was anticipated by the parties. The improvement was not entirely useless; and therefore the sum agreed to be paid for the disclosure, although disproportionate to the benefit received, was not without consideration. In the absence of any warranty, or undertaking of the promisee in respect to the extent to which the improvement should be beneficial, the promisor bought the disclosure for such benefit, more or less, as he could derive from it; if small, he was obliged to be content; no element he had contracted for and had a right to exact from the seller was wanting; if large, even beyond expectation, the seller was obliged to be content; he reserved no right to require more to be paid.²

There is an important difference between a want or failure of consideration and its inadequacy. If the consideration is of value, it is sufficient, although it is not adequate in the sense of being equal. A consideration is not deficient merely because the undertaking based upon it is of very much greater value. No defense of want or failure of consideration can be grounded on any such disparity.³ There is no want of consideration where the promisor has received all he bargained for, and it is of some value; nor is there, under such conditions, a failure of consideration. It is enough that he gets all that he is entitled to exact from the other. A party entering into a contract is admonished by the law that it fixes no values except of money; that the amount which may be recovered from him on his express promise is not the absolute value

¹ Day v. Nix, 9 Moore, 159.

² See Agra v. Leighton, L. R. 2 Ex. 56.

³ Upon an exchange of notes each is a valid consideration for the other, and is fully available in the hands of the holder; and the fact that one of the notes is not paid at maturity does not sustain a defense of failure

of consideration in an action upon the other. Rice v. Grange, 131 N. Y. 149, 30 N. E. Rep. 46. This is the rule although the exchange is made for the mutual accommodation of the parties and one of the notes is worthless. Farber v. National Forge & Iron Co., 140 Ind. 54, 39 N. E. Rep. 249.

of what he receives, as evidence might establish it, but the sum which he agrees, on his own judgment, and with a view to his own purposes, to pay for it. A purchaser is subject to the rule of *caveat emptor*; and although he may suppose that the subject of purchase has qualities of which it is in fact destitute, and for that reason engages to pay a sum for it greatly in excess of the true value, he is entitled to no redress on that account, and can ask for no abatement of the requirements of his contract in any such case which is unaffected by fraud or warranty.

In modern times the necessity for bringing cross-actions has been abridged by the practice and legislation increasing the scope of defenses as to matters connected with the consideration, not only of commercial paper, but of all other contracts. By the common law, even in an action on a *quantum meruit* for work done, there was, as late as the beginning of the last century, a hesitation in the English courts to allow the defendant to prove in reduction of damages that the work was done in an improper and insufficient manner; it was doubted whether a cross-action should not be brought.¹ In an action of *assumpsit* for rebuilding the front of a house the defendant showed under a plea of *non assumpsit* that the work was badly done. There was a conference of the English judges in respect to allowing such defense. Its allowance was treated as a departure from the previous practice.² It was resolved that the correct rule was, that if there has been no beneficial service there should be no pay; but if some benefit has been derived, though not to the extent expected, this should go to the amount of the plaintiff's demand.³ Lord Ellenborough said: "Where a specific sum has been agreed to be paid by the defendant the plaintiff may have some ground to complain of surprise if evidence be admitted to show the work and materials provided were not worth so much as was contracted to be paid; because he may only come prepared to prove the agreement for the specified sum and the work done. But where the plaintiff comes into court upon a *quantum* [118] *meruit* he must come prepared to show that the work done

¹ *Basten v. Botter*, 7 East, 479.

³ *Farnsworth v. Garrard*, *supra*.

² *Farnsworth v. Garrard*, 1 Camp 38.

was worth so much, and therefore there can be no injustice in suffering the defense to be entered into even without notice.”¹ And it was added by another member of the court, that “if even a specific sum had been agreed to be paid, and notice given, then the defendant should be let into the defense. For after all, considering the matter fairly, if the work stipulated for at a certain price were not properly executed the plaintiff would not have done that which he engaged to do, the doing of which would be the consideration of the defendant’s promise to pay, and the foundation on which his claims to the price stipulated for would rest; and, therefore, especially if he should have notice that the defendant resists payment on that ground, he ought to come prepared with proof that the work was executed properly.”² Thus the practice came into vogue of making defenses, for defect of consideration, to actions for fixed or agreed sums. But this was not permitted in England where a note or bill had been given. It was held there pretty uniformly that a partial failure of consideration was no defense in such cases.³ The giving of such paper was treated, in respect to such a defense, as the payment of so much cash.⁴ This distinction has not been recognized by the American courts. Where the action is between the original parties or others holding the paper subject to defenses, a partial failure of consideration can be set up as a partial defense; in the latter case it is available to the same extent as though the action were brought by the original party and founded on the original contract or consideration.⁵

§ 545. *Same subject.* Many American cases hold that a partial failure of consideration is not available; that the de-

¹ *Basten v. Butter*, 7 East, 479.

² *Id.*, per Lawrence, J.

³ *Morgan v. Richardson*, 1 Camp. 40; *Tye v. Gwynne*, 2 *id.* 346; *Trickey v. Larne*, 6 M. & W. 278; *Sully v. Frean*, 10 Ex. 535; *Georgian Bay L. Co. v. Thompson*, 35 Up. Can. Q. B. 64; *Gascoyne v. Smith, McC. & Y.* 338. But see *De Sewhanberg v. Buchanan*, 5 C. & P. 343.

⁴ *Warwick v. Nairn*, 10 Ex. 762; *Jones v. Jones*, 6 M. & W. 84.

⁵ *Wyckoff v. Runyan*, 33 N. J. L.

167; *Batterman v. Pierce*, 3 Hill, 171; *Smith v. Smith*, 30 Vt. 139; *Durment v. Tuttle*, 50 Minn. 426, 52 N. W. Rep. 909, citing local cases; *Nichols & Shepard Co. v. Soderquist*, 77 Minn. 509, 80 N. W. Rep. 630; *Bay View Brewing Co. v. Tecklenberg*, 19 Wash. 469, 53 Pac. Rep. 724 (if the partial failure can be definitely ascertained by computation); *Field v. Austin*, 131 Cal. 379, 63 Pac. Rep. 692; *Allen v. Henn*, 197 Ill. 486, 64 N. E. Rep. 250.

fendant must resort to his cross-action.¹ Occasionally a partial failure is allowed if the amount to be deducted on that [119] account is liquidated and may be ascertained by mere computation. In a New Hampshire case a note was given for seventeen articles of machinery, with no separate valuation; five of the articles were at the time under a valid attachment against the vendor, and were afterwards sold under execution in the attachment suit. In an action on the note an abatement was claimed by the defendant for part failure of consideration because of their loss. The court say: "To this extent the consideration has failed; and had there been a specific value fixed to the articles when the defendant purchased them, the amount could now be deducted and allowed in this suit. But the value was not fixed. The whole seventeen articles were sold for \$1,200, and whether these five were worth five-seventeenths of that sum, or one-half, or one-third, or what they were worth, is a matter entirely unliquidated; and upon the authorities cited, the ruling of the court excluding the defense was correct."² This strict rule has been changed in that state and in several others by statute;³ and in many others it has been departed from upon general principles. In Maine an action was brought on a note given for the good will and practice of a physician; the defense was that after a certain period subsequent to the sale the vendor resumed practice in the same town. It was held that by such resumption the vendor deprived the defendant of a part of the consideration of the note, and although the injury was unliquidated it might be proved in mitigation of damages. Wells, J., said: "If there be a sale of two chattels for a gross sum and a note given for the price, and one of the chattels is not the property of the vendor, and a partial want of consideration may be shown, why should not

¹ Washburn v. Picot, 3 Dev. 390; Russell v. Splater, 47 Vt. 273; Berlin v. Schermerhorn, 21 Vt. 189; Jordan v. Jordan, Dudley, 181; Hinton v. Scott, id. 245; Scudder v. Andrews, 2 McLean, 464; Stone v. Penke, 16 Vt. 213; Carpenter v. Phillips, 2 Hoast. 524; Thrall v. Horton, 44 Vt. 386; McClain v. Williams, 8 Yerg. 239; Merrill v. Aden, 19 Vt. 505; Craigin

v. Fowler, 31 Vt. 326, 80 Am. Dec. 680; Hackett v. Schud, 3 Bush, 354.

² Riddle v. Gage, 37 N. H. 519, 75 Am. Dec. 151; Drew v. Towle, 27 N. H. 412, 59 Am. Dec. 380; Kirkpatrick v. Murrhead, 16 Pa. 117. See Dyer v. Homer, 22 Pick. 253.

³ Clough v. Baker, 48 N. H. 254. See § 54, Neg. Inst. Law, quoted in Merrill v. Aden, 19 Vt. 505; Craigin § 544.

the same defense be allowed if both of the chattels were the property of the vendor, and the title passed to the vendee, but the vendor destroyed one of them before delivery? In one [120] case there is a want of consideration at the time when the contract is made to the extent of the value of one of the chattels; in the other a failure of it to the same extent caused by the misconduct of the vendor. There does not appear to be any good reason why the maker of the note might not defend on one ground as well as the other."¹ In Minnesota and Oregon it has been held that a partial failure of consideration, though unliquidated, is available as a defense to the extent of the failure.² And this rule prevails in New Jersey.³ In Minnesota one of the makers of a joint and several note may interpose, to defeat recovery *pro tanto*, the defense that there was a partial failure of consideration, arising out of the breach of a contract of warranty entered into with all the makers, as to part of the property for which the note was given.⁴ Where

¹ *Herbert v. Ford*, 29 Me. 546. The judge continued: "Accordingly it was held in *Dyer v. Homer*, 22 Pick. 253, where there was a sale of chattels which was considered valid between the parties, but not so as to attaching creditors, and some of the chattels were taken and held by an attaching creditor, that the maker of the note given for them might prove the failure of the consideration in an action on the note. . . . If Clark, by resuming his practice, has prevented the defendant from enjoying the entire benefit of the contract, he ought not, through the plaintiff (the vendor's agent, to whom the note was payable), to be permitted to recover compensation for that which he has agreed the defendant shall enjoy, when by his own interference the defendant has been deprived of it. Clark is responsible in damages if there has been a breach of his contract; but it does not appear from the current of authorities that the defendant is limited to that remedy alone. The consideration of

the contract was the good will of the practice, and so far as that has been taken away by Clark there is manifestly a failure of it. The tendency of decisions in this country has been to allow a broader latitude of defense than was permitted by the rigid rules of the common law to bills of exchange and promissory notes, where the justice of the case required it, and a circuity of action could be avoided."

A similar decision was made in *Stacey v. Kemp*, 97 Mass. 166, under the name of reducing the damages. See *Hodgkins v. Moulton*, 100 id. 309.

² *Bisbee v. Torinus*, 26 Minn. 165, 2 N. W. Rep. 168; *Davis v. Wait*, 12 Ore. 425.

³ *Wyckoff v. Runyon*, 33 N. J. L. 107; *Woodward v. Emmons*, 61 N. J. L. 281, 39 Atl. Rep. 703, and local cases cited.

⁴ *Nichols & Shepard Co. v. Soderquist*, 77 Minn. 509, 80 N. W. Rep. 630. See *Waterman v. Clark*, 76 Ill. 428; *McHardy v. Wadsworth*, 8 Mich. 349.

the purchaser of thirty-five acres of land, at one hundred dollars per acre, gave his note for one-half the consideration and paid the other half, and title to thirty acres failed, the court assumed, in the absence of evidence to the contrary, that the land was of equal value per acre, and that an apportionment of the amount of the failure between the cash payment and the note was unnecessary. In addition to obtaining five acres of land the maker of the note secured under the covenants of the deed the right to resort to the covenants in the deed of his grantor's grantor, and was chargeable with the amount of the latter's liability upon them. If that grantor chose to give more than he was obliged to to be released from his covenants, that, so far as the excess was concerned, was a matter between him and the maker of the note; it did not affect the rights of one who purchased the note after it became due.¹

A partial failure of consideration of a note given for the price of property sold, caused by breach of warranty, fraudulent misrepresentations or fraudulent overcharge, may be shown in mitigation of damages.² A covinous note given to defraud creditors cannot be avoided by the maker for the fraud; it may be enforced against him; the statute declares the invalidity of the note only as to the party or parties whose right, debt or duty is attempted to be avoided.³ [121] So a partial failure may be given in evidence to reduce damages where part of the articles for which the note was given were unskillfully manufactured, and not in compliance with the contract;⁴ and to the extent of the depreciation, where a note is given for depreciated currency loaned at the nominal amount; and where a note is payable to a bank, and its depreciated bills have been duly tendered in payment.⁵ So a note given for prospective work which fails in part to be done

¹ *Durment v. Tuttle*, 50 Minn. 426, 52 N. W. Rep. 909.

² *Nichols & Shepard Co. v. Soderquist*, *supra*; *Anttman v. Mason*, 83 Ga. 212, 9 S. E. Rep. 536; *Merrill v. Taylor*, 72 Tex. 293, 10 S. W. Rep. 532; *Burton v. Stewart*, 3 Wend. 236, 20 Am. Dec. 692; *Harrington v. Stratton*, 2 Pick. 510; *Coburn v. Ware*, 30 Me. 202; *Hammatt v. Emerson*, 27 id.

308, 46 Am. Dec. 598; *Haycock v. Rand*, 5 Cush. 26; *Welch v. Hoyt*, 24 Ill. 117; *Lewis v. Cosgrave*, 2 Taunt. 2.

³ *Carpenter v. McClure*, 39 Vt. 9, 91 Am. Dec. 370.

⁴ *Spaulding v. Vandercook*, 2 Wend. 431. See *Payne v. Cutler*, 13 id. 605.

⁵ *Commercial & R. Bank v. Atherton*, 1 Sm. & M. 641; *Scott v. Hamblin*, 3 id. 285.

by reason of the death of the payee is subject to a deduction proportioned to the amount of work left unperformed.¹ But it has been held that the consideration of a premium note to an insurance company cannot be impeached by showing that the company became insolvent during the period of the insurance, for the rights of other persons were involved.² And in other cases the amount of the failure of consideration may be of so uncertain a nature as to be incapable of any estimate, even upon testimony; and therefore the court will not make any inquiry concerning it.³ But where a purchaser of personal property transferred and indorsed a note of a third person in payment, amounting to more than the purchase price, and received the vendor's note for the excess, on which he brought suit, it was held that such vendor, to establish entire failure of consideration, might show that the maker of the indorsed note was insolvent so that a suit thereon would be unavailing; and he need not release any part of the plaintiff's responsibility as indorser, for his liability would be limited to the amount received as consideration therefor.⁴

§ 546. Same subject. A want or failure of consideration in a strict sense is a mere negation; as a defense it rests on the idea and principle of there being no valid contract; that [122] it was wholly or partially void from the beginning, or afterwards wholly or partially ceased to be binding, because lacking or losing this indispensable support. The distinction is very obvious between a full or partial defense based on the theory that the plaintiff's demand in whole or in part never had any valid existence, and a defense which concedes the existence of such demand, and succeeds by canceling or reducing that demand by setting up a counter-claim. The latter mode of defense, under the name of *recoupment*, has been considered.⁵

To the extent that there is either a want or failure of consideration, as distinguished from mere inadequacy, the law in

¹ Clendinen v. Black, 2 Bailey, 488, 23 Am. Dec. 149. See Gleason v. Clark, 9 Cow. 57, holding that evidence of negligence in the performance of professional services may be given in evidence under notice to reduce the amount.

² Sterling v. Mercantile Ins. Co., 32 Pa. 75, 72 Am. Dec. 773.

³ Pulsifer v. Hotchkiss, 12 Conn. 234.

⁴ Litchfield v. Allen, 7 Ala. 779.

⁵ See § 168 *et seq.*

some form affords relief. If *wanting* as to a part of the contract, as we have seen, the contract is void *pro tanto* in its inception; there can be no recovery for such part, whether it is apportionable by mere computation from *data* in the contract, or must be ascertained by a jury upon testimony, and whether the action is upon the original contract or upon a note or bill. So far the English and American authorities agree. A partial failure of consideration generally, if not invariably, admits of another remedy by cross-action. Such failure may arise from accident, and afford ground for rescission of the entire contract; as where some element or incident stipulated for in an executory purchase, and which is the leading inducement thereto, has ceased to exist before complete performance. A subsequent completion of the purchase would be a waiver of the objection. But if the value of the subject-matter of a purchase be impaired before delivery by the tortious act or the neglect of duty of the vendor, recovery may be had therefor in a separate action, or it may be the ground of an abatement of the purchase price. A partial failure of consideration may also arise from the default of the plaintiff in the performance of some concurrent or precedent agreement; or may result from some act or default of the plaintiff, equivalent to a breach of some agreement subsequently to be performed, and which was the consideration of the promise sued on. In the case of mutual agreements, performance on one side is the consideration of the performance on the other, where [123] they are concurrent or dependent. If one party fails to perform his part he cannot require performance of the other. A declaration in an action upon such a contract which does not aver performance of precedent conditions, or a readiness to perform concurrent stipulations, fails to state a cause of action; it does not show that the consideration of the defendant's promise has been kept good.¹ If a note be sued on, the consideration of which was a contract of the payee to perform precedent or concurrent stipulations, and they have not been performed, and the plaintiff in respect to them is in default,

¹ Hall v. Perkins, 5 Ill. 548; Buckmaster v. Grundy, 2 id. 310; Washington v. Ogden, 1 Black, 450; Lawrence v. Griswold, 30 Mich. 410; Rogers v. Cody, 8 Cal. 324; Dickson v. Morgan, 54 Iowa, 684, 7 N. W. Rep. 145.

these facts may be alleged as a defense. Such a defense is a failure of consideration, and may be total or partial.¹ It does not rest on rescission of the contract, nor is it recoupment.²

In the case of independent stipulations the contract has a valid inception, and is sustained on the principle that one stipulation is a consideration for another. Where the contract provides for some act to be done on one side in return for some subsequent act to be done on the other, the doing of the first act is a condition precedent, and the agreement to perform it is independent, and the consideration is the promise of the other party to perform the subsequent act. The consideration of the promise to perform such subsequent act is the performance, not the promise to perform the precedent condition. Where a promise is the consideration, if it is in binding form and made by a competent party, there is no want of consideration; and if its obligation is not afterwards impaired, there is no failure thereof. By the strict common law a party bound by independent stipulations, those based on a promise as a consideration as distinguished from its performance, is bound to perform according to the tenor of his undertaking; that undertaking is enforced for all that it im-[124] ports, without regard to the ability of the other party subsequently to perform his promise which was the consideration.³

§ 547. **Same subject.** Where A. sold his business as a dentist in a specified place to B., who gave his note for the agreed price, receiving from A. a bond conditioned that he would not practice as a dentist in that place, and a suit was brought on the note after a part had been paid, it was held that the defense of a part failure of consideration, by reason of A. failing to perform the condition of the bond, was inadmissible. The court say: "A part of this consideration he received at the time; all that could be received or enjoyed, and for what was to be done in the future, he received the contract, . . . as

¹ Tyler v. Young, 3 Ill. 444, 35 Am. see Waterhouse v. Kendall, 11 Cush. Dec. 116; Goodwin v. Nickerson, 51 128.

Cal. 166; Wells v. Hopkins, 5 M. & ²Thompson v. Richards, 14 Mich. W. 7; Lawrence v. Griswold, 30 Mich. 172.

410; Coppock v. Burkhart, 4 Blackf. ³Foster v. Jared, 12 Ill. 451; Read v. 220; Rogers v. Cody, 8 Cal. 324. But Cummings, 2 Me. 82. See n. 3, p. 1512.

contained in and secured by said bond. This was evidently the consideration he received for which he agreed to pay the three thousand dollars, for which the note was given, and all this consideration he received; he got all that he bargained for. But taking it as stated in the plea, that the bond was the consideration for the note, then there was no want of consideration, for the plea alleges that the bond was that consideration, and that it was received according to the agreement of the parties. There was then no want of consideration, either total or partial. Has there been any *failure* of this consideration? Has the bond which was the sole consideration for this note failed in any way? Is it not as valid a security now as at first? Has it proved to be of no binding force or effect? Has it become a void instrument since it was made? If it had been void from the beginning, then there might have been a *want* of consideration. If it has become void since it was made, so as to be no longer of any force or effect as a security, then the consideration has *failed*. But it is not claimed that such is the fact. The bond, which is admitted to have been the consideration for which the defendant . . . agreed to pay three thousand dollars, and which was received just according to agreement, and which was a good and sufficient consideration for such promise at the time, remains in full force and effect; just as valid and binding now as it was the day it was given. If it was a sufficient consideration then, [125] wherein has it failed to be so now?"¹ But it was formerly the

¹ Clough v. Baker, 48 N. H. 254. Sargent, J., further said: "The distinction between a failure of consideration and such a failure to perform on one side as gives the other party an election to rescind the whole contract, or to enforce it, has not always been made or clearly stated, and some confusion may be found in the authorities. Tillotson v. Grapes, 4 N. H. 444, is a case in which such a failure to perform his contract on one side as would authorize the other side to rescind the whole contract is improperly spoken of as a failure of consideration. 2 Smith's L. Cases, *9 and 10, in note to Cutler

v. Powell, and cases cited; Dodge v. McClintock, 47 N. H. 383, and cases cited; Wallace v. Antrim Shovel Co., 44 N. H. 521; Campbell v. Jones, 6 T. R. 570."

By a written agreement between A. and B. the former agreed that B. should have leave to cut timber and wood on his land, and B. agreed that A. should have leave to flow his land by means of a dam to a certain extent. They were treated as independent agreements, and it was considered that either might not only have his action for a breach of the contract in his favor, without regard to his performance of his contract

peculiar function of equity to mitigate the severity of this rule of law where the real consideration, the thing promised, failed.¹ The principles of equity on this subject have, however, been largely incorporated into the common law, although not to the same extent in all jurisdictions. Under various circumstances where parties have bound themselves to conditions precedent, or by independent stipulations, they have been permitted to avoid this contract at law, as they could in equity, by showing that the promise, which was the technical consideration, had ceased to be of any value, because, by some act or default of the promisor, he was unable to perform his promise. This doctrine is pointedly stated by Richardson, C. J., in a case which arose in New Hampshire: "When a promise of the payee is the consideration of a note, and that promise fails altogether, so that the maker of the note loses all the advantage he might have expected to derive from it, and nothing is left to him but a mere right of action for the breach of that promise, we are of opinion that he may waive that right of action, and treat the whole agreement as a nullity, if he so choose, and thus avoid the note. In such a case the substantial inducement which [126] led the maker of the note to enter into the contract having totally failed, justice requires that he should not be held to perform the contract on his part against his will. He may, if he please, perform the contract on his part, and resort to an action for the breach of the contract on the other side; but he is not compelled to do this. These principles we consider as well settled by authority."²

§ 548. Same subject. In a case in Illinois a note was given for the purchase-money of land; it was payable a month earlier than the contract required the vendor to make a conveyance. The action upon the note, however, was delayed until after the time appointed for conveying. The vendor had no title to the land when the contract was made, and had none when the day arrived for performing it. Although payment of the purchase-money was a condition precedent, yet, as the vendor had no power to convey, and had neglected to

to the other party, but that either in such a case might revoke his license at his option, whether the other party did or not, provided the license is on other grounds revocable. Dodge v. McClintock, 47 N. H. 383.

¹ Morgan v. Smith, 11 Ill. 194.

² Tillotson v. Grapes, 4 N. H. 444.

obtain title, the consideration of the note was deemed to have entirely failed. Scates, J., says: "I should by no means regard it as want or failure of consideration that the covenantor had no title at the time of making the covenant, or at the time of the performance of a condition precedent by the other party, for peradventure he may obtain the title by or before the day of conveyance. The difficulty is in the proof, and not in the applicability of the defense. The old doctrine, holding a promise to be a consideration of a promise, should only be applied where no other consideration can be found available to sustain the agreement of the parties. Here we find another, a better, and a surer one. We reach the same goal by a shorter route. If the parties are unable to sustain their contract by the performance of the consideration, we allow them to rescind it at once, and without delay, and thus save the circuitry of action and costs occasioned by allowing the plaintiff to recover the money on the note, and the defendant to recover back upon the breach of covenant. By the delay in bringing this action the defendants are enabled to prove their defense by showing the inability of the obligors to assure the estate; and it seems to me to savor more of technicality, harshness, nay, injustice, than of reason or [127] equity, to say to them, because you agreed to pay a month before you were entitled to a conveyance, that you must now pay the money, and sue upon the covenant, although you are ready and able to show that the covenantors are not able to convey the estate which they agreed to convey."¹ In another

¹ Gregory v. Scott, 5 Ill. 392. See Lull v. Stone, 37 Ill. 224; Davis v. McVickers, 11 Ill. 327; Owings v. Thompson, 4 Ill. 502; Deal v. Dodge, 26 Ill. 458; Tyler v. Young, 3 Ill. 444, 35 Am. Dec. 116.

The statute referred to in the foregoing cases does not define a failure of consideration. It provides that: "In any action commenced, or which may hereafter be commenced, in any court of law in this state, upon any note, bond, bill, or other instrument in writing for the payment of money, or property, or the performance of

covenants or conditions, by the obligee or payee thereof, if such note, bond, bill, or instrument in writing was entered into without a good and valuable consideration; or, if the consideration upon which said note, bond, bill, or instrument in writing was made or entered into, has wholly or in part failed, it shall be lawful for the defendant or defendants, etc., to plead such want of consideration, or that the consideration has wholly or in part failed, etc.; and if it shall appear that the consideration has failed in part, the plaintiff shall re-

case in that state, a plea of failure of consideration of a note averred that the payee was to plant a hedge for the maker which should become a complete protection against stock in from three to five years; that the note in question was given for moneys payable for such hedge at the time of planting; that the plants set out were winter-killed and useless, never having grown; and that it was then out of the power of the payee to make the hedge according to the agreement. Although the money for which the note was given was due at the time of planting the hedge, and the note made payable one day after date, and the hedge was not to be completed until from "three to five years," it was held that the consideration had failed, a demurrer to the plea being taken as an [128] admission of the statement that it was then out of the power of the payee to perform the agreement within the stipulated time.¹

The defense of a failure of consideration in such cases rests on the principle of a rescission of the contract. The defendant who has relieved himself from the performance of a condition precedent or any independent stipulation on the ground that the promise which was its consideration has altogether failed cannot afterwards claim damages for such failure. He has not himself performed, but has been absolved from furnishing the consideration on his part. A sale fills the definition of a valid contract, where there is delivered or sold at a given price a tangible property, or existing subject of any kind, with warranty, and which must possess value if the warranty be true. The contract for the purchase-money is a valid

cover according to the equity of the case." Scates' Comp. Stats., ch. 73, p. 292. Under this statute it was held that in an action upon a promissory note given for the purchase-money of land, deeded with a covenant against incumbrances, money paid to extinguish an incumbrance should be deducted. Breese, J., said: "A part of the consideration of the note sued on was that the land sold was free from incumbrance. . . . To the extent, then, of this incumbrance, there was a failure of consideration.

Morgan v. Smith, 11 Ill. 199; Whisler v. Hicks, 5 Blackf. 100, 33 Am. Dec. 454; Smith v. Ackerman, 5 Blackf. 541; Buell v. Tate, 7 id. 55; Pomeroy v. Burnett, 8 id. 142."

¹ Edwards v. Pyle, 23 Ill. 354; Morgan v. Smith, 11 Ill. 194; Schuchmann v. Knoebel, 27 Ill. 175; Tillotson v. Grapes, 4 N. H. 444; Litchfield v. Allen, 7 Ala. 779; Stone v. Fowle, 22 Pick. 166. But see Read v. Cummings, 2 Me. 82; Thompson v. Warren, 5 Cold. 644.

consideration on one side, and the undertaking which the warranty imports is a consideration on the other. The warranty of title against defect, or of qualities, is a contract for the present existence of facts. The acceptance of the property so warranted is no admission of the truth of the warranty; but where delivery and payment are to be simultaneous acts the warranty is generally relied on as the consideration for the price agreed to be paid. The money is parted with on the faith of the warranties—that is, that they are true, not that the purchaser will have only his remedy for damages. Such title as the vendor has is at once vested in the purchaser, and the property is taken absolutely. If the warranties are not true, they are broken at the time of the sale, but the fact is then undecided; they are to be verified or shown to be false by some future test. The same may be said of a sale where a note is given for the price payable at a future day. Payment of the price is not a legal waiver of a warranty, though it may have some weight as an evidentiary fact to negative the breach thereof. If, however, before the price is paid upon an executed sale the fact can be established that the warranty was untrue, by the later and better authorities it may be [129] shown either as an unliquidated partial failure of consideration, or as a cross-claim, the damages upon which may be set off by recoupment. In England, where the action is brought on the original contract, fraud or breach of warranty in a sale, or failure of the plaintiff to perform his part of the agreement, may also be proved in reduction of damages. The sum to be recovered for the price of the article may be reduced by so much as the article is diminished in value by reason of the fraud or non-compliance with the warranty.¹

§ 549. Consideration fraudulent or illegal in part. Fraud is a private wrong, and any entire contract into which it enters may be avoided *in toto* by the party against whom it was practiced.² If not avoided for the fraud, and the injury there-

¹ Lewis v. Cosgrave, 2 Taunt. 2; v. Heard, 15 Me. 296; Lewis v. Cosgrave, 2 Taunt. 2; Solomon v. Turner, Street v. Blay, 2 B. & Ad. 456, as explained in Mondel v. Steel, 8 M. & W. 858, 870. 1 Stark. 51; Nicewanger v. Bevard, 17 Ind. 624; Rose v. Wallace, 11 id.

² Coburn v. Haley, 57 Me. 346; Wyman v. Heald, 17 Me. 329; Robinson v. Rolman v. Williams, 4 Blackf. 70; 112; Davis v. Jackson, 22 id. 233;

from only goes to part of the consideration, the note may be avoided *pro tanto*, as for partial failure of consideration.¹ If the maker would repudiate the contract entirely for the fraud he must return the consideration, unless it is wholly without value;² but without doing this he may have a deduction to the extent that the subject-matter is diminished in value by reason of the fraud, wherever a part failure of consideration is allowed as a defense.³ But in England, where partial failure of consideration is not allowed as a defense to a note, it was held no defense in an action by the indorser against the acceptor that the latter had been imposed on in respect to the contract by the drawer, on account of which the acceptance was given, and that the plaintiff was privy to such imposition, where the acceptor did not wholly repudiate the transaction on discovering the imposition, but still retained possession of [130] the premises under such contract, as the consideration had not altogether failed, so as to render the bill wholly void.⁴ Where a note is given for several distinct items or considerations, one of which is afterwards discovered by the maker to be fraudulent, or where one item not chargeable to him is stealthily included therein without his knowledge, the note is not wholly void or voidable, but only to the extent of the fraudulent item.⁵

In a case in Ohio⁶ a member of a firm after dissolution,

Cowger v. Gordon, id. 110; James v. Lawrenceburgh Ins. Co., 6 id. 525; Doughty v. Savage, 28 Conn. 146; Dow v. Higgins, 72 Ill. App. 302.

¹ Bischof v. Lucas, 6 Ind. 26; Stevens v. McIntire, 14 Me. 14; Allen v. Henn, 197 Ill. 486, 64 N. E. Rep. 250.

² See Reeves v. Kelly, 30 Mich. 132.

If there is a total failure of consideration the maker of the note need not show in a suit to recover upon it that he returned or offered to return that for which the note was given. Taft v. Myerscough, 197 Ill. 600, 64 N. E. Rep. 711; Wynn v. Hiday, 2 Blackf. 123.

³ Bischof v. Lucas, 6 Ind. 26; Coburn v. Ware, 30 Me. 202; Hammatt v. Emerson, 27 Me. 303, 46 Am. Dec.

598. See Sternburg v. Bowman, 103 Mass. 325.

⁴ Archer v. Bamford, 3 Stark. 175, 1 C. & P. 64. See Solomon v. Turner, 1 Stark. 51.

But if the action were brought on the original contract for the price the rule laid down in De Sewhanberg v. Buchanan, 5 C. & P. 343, would be applied. Lorn v. Tucker, 4 C. & P. 15.

⁵ Griffiths v. Parry, 16 Wis. 218; Haycock v. Rand, 5 Cush. 26; Deering v. Chapman, 22 Me. 48; Brown v. North, 21 Mo. 528; Wade v. Scott, 7 id. 509; Andrews v. Wheaton, 23 Conn. 112.

⁶ Wilson v. Forder, 20 Ohio St. 89, 5 Am. Rep. 627.

without authority from his copartners, renewed firm notes by giving a new note in the firm name. The new note, without any intent to defraud, was made to bear interest at ten per cent., and to include the individual note of one of the partners. The defendant, a member of the firm, supposing the new note was simply a renewal of the firm notes at six per cent., promised to pay it. It was held that such new note was binding on him for the amount of the firm note surrendered on the renewal, with simple interest from that time.¹ So in a Mississippi case it was stated in a plea to an action upon a note against a surety that he and another, before a sale by administrators, informed them that they would become the sureties of one K. for any amount of property he might buy at the sale. He purchased to the amount of \$1,138.45. Afterwards, and before the execution on the note in suit, K. became indebted to the administrators otherwise than for property bought at such sale in the further sum of \$400. The administrators included this sum also in the note and presented it, signed by K., to the defendant, and fraudulently and knowingly held the same out to him as for that sole consideration. The defendant being misled, and supposing that the note embraced only the amount of K.'s purchase at the sale, signed it. It was held that the note was not voidable *in toto*, but [131] only to the amount of the excess.² Where the fraud, however, is committed in procuring the execution of the note, as by misreading it to an illiterate person, or substituting another for the one read, the note is wholly voidable.³

§ 550. Same subject. Where part of the consideration of a note was illegal no apportionment can be made; the whole note is void. The principle that no court shall aid men who found their cause of action upon illegal acts is not only well settled, but is most salutary. It is fit and proper that those who make claims which rest upon violations of the law should have no right to be assisted by a court of justice; that courts should refuse their aid to those who seek to obtain the fruits of an unlawful bargain.⁴ Thus, if a note be given for the

¹ See *Gamble v. Grimes*, 2 Ind. 392. Dec. 604; *Griffiths v. Kellogg*, 39

² *Clopton v. Elkin*, 49 Miss. 95; *Goss* Wis. 290, 20 Am. Rep. 50.

v. Whitehead, 33 id. 213.

⁴ *Gardner v. Girtin*, 69 Ill. App.

³ *Stacy v. Ross*, 27 Tex. 3, 84 Am. 422; *Tenny v. Foote*, 95 Ill. 90, Dou-

price of articles sold, and a sale of a part of them was unlawful, the note is not valid for any part.¹ If part of the consideration of a note be an agreement to discontinue a criminal prosecution, or to refrain from commencing one;² or to do an act which would be a violation of official duty;³ or to indemnify against any unlawful act, as where a premium is to be given for insurance on a cargo, the exportation of a part of which is prohibited by law,⁴ the note is wholly void; being an illegal contract, it is not divisible.⁵

thart v. Congdon, 197 Ill. 349, 64 N. E. Rep. 348; *McTighe v. McKee*, 70 Ark. 293, 67 S. W. Rep. 754; *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423; *Booth v. Hodgson*, 6 T. R. 405; *Card v. Hope*, 2 B. & C. 661; *Holland v. Hall*, 1 B. & Ald. 53; *Shaw v. Spooner*, 9 N. H. 197, 32 Am. Dec. 348; *Clark v. Ricker*, 14 N. H. 44; *Brigham v. Potter*, 14 Gray, 522; *Sternburg v. Bowman*, 103 Mass. 325.

¹ *Carlton v. Bailey*, 27 N. H. 230; *Kidder v. Blake*, 45 N. H. 530; *Carlton v. Whitcher*, 5 N. H. 196; *Coburn v. Odell*, 30 N. H. 540; *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592; *Bliss v. Brainard*, 41 N. H. 261; *Greenough v. Balch*, 7 Me. 461; *Hanauer v. Doane*, 12 Wall. 342; *Gray v. Hook*, 4 N. Y. 449; *Gammon v. Plaisted*, 51 N. H. 444; *Roby v. West*, 4 id. 285, 17 Am. Dec. 423; *Perkins v. Cummings*, 2 Gray, 258; *Braith v. Gnelick*, 37 Iowa, 212; *Gaitskill v. Greathead*, 1 Dow. & Ry. 359; *Scott v. Gilmore*, 3 Taunt. 226; *Snyder v. Wiley*, 33 Mich. 495; *Trist v. Child*, 21 Wall. 441.

² *Shaw v. Spooner*, 9 N. H. 197, 32 Am. Dec. 348; *Hinds v. Chamberlin*, 6 N. H. 225.

³ *Waite v. Jones*, 1 Bing. N. C. 656.

⁴ *Parkin v. Dick*, 11 East, 502.

⁵ *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664.

Where, however, an entire stock of goods is sold at one and the same time, but each article for a separate

and distinct agreed value, the contract is not to be regarded as entire and indivisible; and if the sale of some of the articles be prohibited by law, the illegality will not render the sale of the other articles illegal also. *Carleton v. Woods*, 28 N. H. 290. The action was brought upon notes given for the whole purchase, and also for goods sold and delivered. The promise embraced in the notes was held entire, and part of the consideration being illegal, the notes were void; but it was held otherwise as to counts for goods sold and delivered. *Woods, J.*: "The various articles sold may well be regarded as sold separately, each article constituting the consideration for the promise to pay the price agreed for it. By the contract each article was separately valued. Its value was to be determined by its original cost and freight, and that price was to be paid for it. The bargain was in effect a contract to pay for each article a price to be determined in the manner before stated. The consideration for the promise to pay for the goods is not to be regarded as one and indivisible. The sale and delivery of each article formed the consideration in this case for the promise to pay the price for it. The contract was divisible. The fact that the whole stock was sold at the same time can make no difference. The terms of

In a case in Ohio¹ Scott, C. J., said: "The concurrent [132] doctrine of the text-books on the subject of contracts is, that if one of two considerations of a promise be *void* merely, the other will support the promise; but, that if one of two considerations be *unlawful*, the promise is void. When, [133] however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful and void for the residue. Whenever the unlawful part of the contract can be separated from the rest, it will be rejected and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts part of which are unlawful; because the whole consideration is the basis of the whole promise. The parts are inseparable.² Whilst a partial *want*

the agreement are to be looked at in determining its character. It was not a case of a sale of an entire stock of goods for an entire price for the whole, without reference to the value of the separate articles sold. Instead of that, there was in fact a particular sum agreed to be paid for each article sold. This, we think, was the legal effect of the contract. And while the separate values of the articles sold can be ascertained, as fixed by the parties, the principle is not readily seen which would defeat the right of recovery for the stipulated price of that portion the sale of which was legal. Under a count like the present, less may be recovered than is declared for. A recovery may be had for a part although the claim may be defeated in part. . . . The contract for the goods sold in this case, then, not being entire, but divisible, and the prices of the several articles being agreed by the parties, and readily ascertainable, we are of opinion that the plaintiff is entitled to recover, under the count for goods sold and delivered, the agreed price of the goods sold, excepting the

spirituous liquors. There is a distinction between a case in which one or an entire promise, as a note, is made upon a consideration, a part of which is illegal, and a case where for an entirely good consideration several distinct things are granted or contracted to be done, one of which is unlawful. In the former case, the promise is wholly void; in the latter, the grant or promise, so far as legal, may be upheld. *Doe v. Pitcher*, 6 Taunt. 358; *Kerrison v. Cole*, 8 East, 231; *Monys v. Leake*, 8 T. R. 411; *Leavitt v. Palmer*, 3 N. Y. 19, 37; *Wigg v. Shuttleworth*, 13 East, 87; *Howe v. Syngé*, 15 id. 410; *Gaskell v. King*, 11 id. 165. See *Greenwood v. Bishop of London*, 5 Taunt. 727; *United States v. Bradley*, 10 Pet. 343; *Hyslop v. Clarke*, 14 Johns. 458; *Mackie v. Caines*, 5 Cow. 547, 15 Am. Dec. 477."

¹ *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664.

² *Metcalf on Cont.* 246; *Addison on Cont.* 456; *Chitty on Cont.* 730; 1 *Parsons on Cont.* 456; 1 *Parsons on Notes & Bills*, 217; *Story on Notes*, § 190; *Byles on Bills*, 111; *Chitty on Bills*, 94.

or *failure* of consideration avoids a bill or note only *pro tanto*, *illegality* in respect to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy."¹ It has also been held that where a contract is void for illegality, the subsequent repeal of the law which rendered it illegal will not relieve it of the objection.² Nor will a seal protect from inquiry into the legality of the consideration.³ If partial payments are made upon a note of which an ascertainable portion of the consideration is illegal, and to a greater amount than that part of the consideration, the creditor, in the absence of a special appropriation of such payment by the debtor, is not at liberty to apply the same in satisfaction of the illegal part of the debt.⁴

[134] § 551. Defect of consideration shown by parol evidence. The question how far a different bargain from that stated in the bill or note may be proved by parol evidence to establish a defect of consideration has been much discussed, and

¹ And see comments in the same opinion on the case of Doty v. Knox County Bank, 16 Ohio St. 133.

² Roby v. West, 4 N. H. 285; Jaques v. Withy, 1 H. Bl. 65; Gorsuth v. Butterfield, 2 Wis. 237.

³ Gray v. Hook, 4 N. Y. 449; Collins v. Blantern, 2 Wils. 347; Livingston v. Tremper, 4 Johns. 416; Tuxbury v. Miller, 19 id. 311.

⁴ Gammon v. Plaisted, 51 N. H. 444; Caldwell v. Wentworth, 14 id. 431; Hall v. Clement, 41 id. 166; Hilton v. Burley, 2 id. 193; Warren v. Chapman, 105 Mass. 87; Haynes v. Nice, 100 id. 27, 1 Am. Rep. 78; Rohan v. Hanson, 11 Cush. 44. See Deering v. Chapman, 22 Me. 488, 39 Am. Dec. 592; Maybin v. Coulon, 4 Dall. 298.

In Greenough v. Balch, 7 Me. 461, there was an account between the parties of several transactions, a part of which were legal and a part illegal. After the last illegal transaction a payment was made on the account, which was considerably more in amount than the sum of both legal

and illegal debits at that time; this payment was credited, but the account remained open, and all the succeeding items were lawful. It was held that a note given for a balance subsequently accruing was not affected by the illegal items, for the new balance was deemed to arise from lawful charges; that the accounts being kept in continuation did not alter the case; the illegal items had been voluntarily paid, and such payment could not be recovered.

In Brisbane v. Pratt, 4 Denio, 63, the action being in the name of an indorsee of a note, which note was received after it became due, in the absence of any proof that he paid value for it, held, that there is a presumption that the action is brought for the benefit of the former holder, and his declarations made while he held the note, and after it became payable, that it was given for an illegal consideration, are admissible for the defendant.

has elicited considerable contrariety of opinion. It is an undoubted rule of the common law that parol contemporaneous evidence shall not be received to vary or contradict a written contract.¹ This rule, however, does not preclude proof between proper parties to negative the presumption which the law raises that a note or bill is founded on a valuable consideration. Nor does it stand in the way of parol evidence to contradict an express and even specific admission in the paper of a consideration. It may be shown that there was no consideration, or a different one.² Nor does it exclude proof that the note or bill was given for accommodation when it is sued on by the accommodated party;³ or that it was given for indemnity with a view to limiting recovery to the amount of the loss indemnified against;⁴ or for future advances, and with a [135] view to limiting recovery to the amount advanced.⁵

¹ 1 Greenl. Ev., § 275; 2 Jones, Ev., § 437; Adams v. Wordley, 1 M. & W. 374; Barnstable Savings Bank v. Ballou, 119 Mass. 487; Woodbridge v. Spooner, 3 B. & Ald. 233; Conner v. Clark, 12 Cal. 168, 73 Am. Dec. 529; Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Hoare v. Graham, 3 Camp. 57; Hunt v. Adams, 7 Mass. 518; Wells v. Baldwin, 18 Johns. 45; Fitzhugh v. Runyon, 8 id. 375, id. 189; Warren Academy v. Starrett, 15 Me. 443; Harlow v. Boswell, 15 Ill. 56; Lane v. Sharpe, 4 Ill. 566; McCarthy v. Howell, 2 Ill. 341; Abrams v. Pomeroy, 13 Ill. 133; Mager v. Hutchinson, 7 Ill. 269.

² Bradner on Ev. (2d ed.), p. 200; Pollen v. James, 45 Miss. 129; Folsom v. Mussey, 8 Me. 400, 23 Am. Dec. 522; Abbott v. Hendricks, 1 M. & G. 791; Great Western Ins. Co. v. Rees, 29 Ill. 272; French v. Gordon, 10 Kan. 370; Cragin v. Fowler, 34 Vt. 326, 80 Am. Dec. 680; Aultman v. Mason, 83 Ga. 212, 218, 9 S. E. Rep. 536, quoting the text.

³ King v. Phillips, 12 M. & W. 705; Thompson v. Clubley, 1 id. 212; Violet v. Patton, 5 Cranch, 142;

Moore v. Cross, 17 How. Pr. 385; Fant v. Miller, 17 Gratt. 47; Robertson v. Williams, 5 Munf. 381.

⁴ Haseltine v. Guild, 11 N. H. 390; Gilbert v. Duncan, 29 N. J. L. 133; Colman v. Post, 10 Mich. 422, 82 Am. Dec. 49; Bowker v. Johnson, 17 Mich. 42. See Homan v. Thompson, 6 C. & P. 717.

⁵ Lawrence v. Tucker, 23 How. 15; Collins v. Carlisle, 13 Ill. 254.

In Bowker v. Johnson, 17 Mich. 42, Judge Campbell says: "When a mortgage accompanies a note or bond, it is a mere incident to the principal security, and the note or bond is the substantial evidence of debt. Yet it has always been held that it might be shown that the whole transaction, appearing on its face to be unconditional, was a security for something else, and no enforcement has been allowed for any other purpose than the actual one. The statute of frauds does not prevent trusts in personality from being evidenced by parol, and a trust is therefore admitted to be shown against all but bona fide holders, whether it be to create a special in-

[136] Accommodation paper is made in contemplation of a consideration to be received by the accommodated party; until that consideration accrues the paper has no validity; when it has arisen the paper is good within its nominal amount to the

terest, a defeasance, or any other similar equity. See *Catlin v. Birchard*, 13 Mich. 110. This doctrine has been applied in various ways. It has been allowed to convert an absolute deed into a mortgage. *Wadsworth v. Loranger*, Harr. Ch. 113; *Emerson v. Atwater*, 7 Mich. 12. To turn a contract of sale into a mortgage. *Batty v. Snook*, 5 Mich. 231; *Swetland v. Swetland*, 3 id. 482. To show that the original mortgagee had no interest in the securities. *Bishop v. Felch*, 7 Mich. 371. To show that a negotiable note secured by mortgage was really given for indemnity. *Colman v. Post*, 10 Mich. 422, 82 Am. Dec. 49. To show that a bond and mortgage for a fixed sum was given in consideration of a promised loan and a promised conveyance of property, and that there had not been a complete compliance with the promises. *Robinson v. Cromelien*, 15 Mich. 316. In *Bennett v. Beidler*, 16 Mich. 150, a note was given for a sum of money, which was the price of the crops on certain lands purchased at auction at an estimated number of acres, with an agreement that the maker of the note might have a subsequent measurement made to ascertain the true amount of the purchase-money. The note having been paid by the maker to a *bona fide* holder, and the land falling short, he was held entitled to recover back the surplus payment." The case under consideration was an action upon a promissory note for \$1,000. Upon the trial it appeared in evidence that this note, with another of like amount, was given under the following circumstances: Defendant

bought out B.'s interest as partner in a brewery, and was to pay \$3,000, one-third cash and the balance by these two notes; and was to assume and pay in full all of B.'s share in the debts of the firm, in which defendant succeeded him, and indemnify him against all liability and damages. B. showed a schedule of debts and assets as a basis of this arrangement, and it was agreed that if defendant paid debts beyond what appeared on the schedule, he should be entitled to a corresponding deduction on the notes, which were to be left in bank to stand for that purpose. The defendant gave an unqualified bond to pay and indemnify, and executed the notes. One of the notes was indorsed by B. to a *bona fide* holder. Defendant paid claims in excess of the schedule list, of which B.'s half amounted to \$1,459.20. And referring to the case in hand, the learned judge continued: "We can perceive no difference in principle between these cases. J. undertook absolutely to pay the debts of B., whatever might be their amount, and did pay them. But the price payable by J. was fixed upon the basis that such debts should be taken at a specified sum, and, if exceeding that, should entitle him to a corresponding reduction. So far as they were in excess, they reduced the consideration for his notes; and, being capable of pecuniary calculation, and not in the nature of unliquidated damages, stand on the same footing as if he had given an accommodation note, or a note for money, in excess of a money price fixed at the time. The debts were all in existence at the

extent that upon such consideration the accommodated party could incur a personal obligation. When commercial paper is given to cover a loss which is contingently incurred on the faith of it, or to recover future advances which the receiver of the paper either binds himself or has an option to make, the payee holds it upon a legal consideration from the beginning; but until the loss happens in the one case, or advances are made in the other, the promise of payment between the immediate parties is dormant. A note given for the premium of insurance on taking out an open marine policy is of this character; it becomes operative and valid only as fast as risks are assumed on the policy, and to the extent of the premiums thereby earned.¹ Hence, the real consideration may be contingent, conditional or defeasible, and it may be shown by parol to be so; that it had not arisen, or, if it potentially existed at first, that it afterwards became nugatory so as not to support the promise to pay.

§ 552. *Same subject.* The consideration being open to inquiry so far as the promise to pay depends upon its existence, continuance or amount, such promise may be indirectly [137] varied and controlled by parol evidence; not by showing that a different promise from the written one was made, but that it is different in legal effect as a consequence of a want, cessation or shrinkage of the consideration; — by evidence that the consideration implied had no existence; that it did not continue, or was, or has become, deficient in amount. The promise may thus be altogether undermined, postponed, or reduced. A different agreement cannot be shown from that expressed in the note.² A parol agreement contemporane-

ate of the transaction, and when ascertained and paid reduced to that extent the value received by J. of B. The agreement rendered it the duty of B. to hold the notes as security for no greater sum than was equitably due, and had he retained them both they would have been enforceable for no more." *First Nat. Bank v. Haulebeck*, 65 Hun, 54, 19 N. Y. Supp. 567.

¹ *Furniss v. Gilchrist*, 1 Sandf. 53; *Maine Mut. M. Ins. Co. v. Stockwell*,

67 Me. 382; *Elwell v. Crocker*, 4 Bosw. 22.

² The effect of the Illinois statute (2 Starr & Curtis, p. 2802) allowing the defense of failure of consideration of a note modifies the rule relating to varying a writing by parol; that rule gives way as to the note in suit, and also as to any other instrument executed in connection with and forming a part of the transaction which gave the note its existence. *Baker v. Fawcett*, 69 Ill. App.

ous with the making of a note by two that one of them shall be liable only in the event that it cannot be collected of the other;¹ that a note payable on demand shall not be demanded until after the maker's death;² that the note shall be void if a suit be compromised;³ or if a verdict be obtained in an action between other parties,⁴ is not admissible. So a note given for the right to vend a patented article in a particular county, payable at a certain time, cannot be affected by parol evidence that when it was executed it was verbally agreed that it should not be due and payable until sales to a specific amount had been made.⁵ And an absolute note for purchase-money of land for which a quitclaim is to be executed is not subject to be defeated by proof of a contemporaneous parol agreement that if the land should be redeemed the note should be void.⁶ Nor can a parol condition be proved in an action on such a note that it is to be void if other interests in the same land cannot be purchased in a particular manner.⁷ The terms of a note or other written contract cannot be varied by evidence which goes simply to the fact that a different promise to pay was made by the defendant from that reduced to writing.⁸

[138] An instrument not under seal may be delivered upon conditions the observance of which, as between the parties, is essential to its validity; and the annexing thereof to the delivery is not an oral contradiction of the written obligation, though negotiable as between the parties to it or others having notice.⁹ While parol evidence is not admissible to vary the effect of an undertaking, or merely to show that it was to be renewed, yet where the note does not contain the whole

300; *New York L. Ins. Co. v. Easton*, id. 479.

¹ *Mager v. Hutchinson*, 7 Ill. 266. See *Pike v. Street, M. & M.* 226.

² *Graves v. Clark*, 6 Blackf. 183; *Woodbridge v. Spooner*, 3 B. & Ald. 233.

³ *Dale v. Pope*, 4 Litt. 166.

⁴ *Foster v. Jolly*, 1 Cr., M. & R. 703.

⁵ *Harlow v. Boswell*, 15 Ill. 56.

⁶ *Lane v. Sharpe*, 4 Ill. 566.

⁷ *Ely v. Kilborn*, 5 Denio, 514.

⁸ *Erwin v. Saunders*, 1 Cow. 249, 13 Am. Dec. 520; *Underwood v. Si-*

monds, 12 Met. 275; *Adams v. Wilson*, id. 138; *St. Louis Perpetual Ins. Co. v. Homer*, 9 id. 39; *Holzworth v. Koch*, 26 Ohio St. 33; *Bookstaver v. Jayne*, 60 N. Y. 146; *Moseley v. Hanford*, 10 B. & C. 729; *Woodbridge v. Spooner*, 3 B. & Ald. 233; *Hoare v. Graham*, 3 Camp. 57; *Adams v. Wordley*, 1 M. & W. 374; *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529; *Mahan v. Sherman*, 7 Blackf. 378; *State v. Overturf*, 16 Ind. 261.

⁹ *Benton v. Martin*, 52 N. Y. 570.

contract in pursuance of which it was made, it is competent to show what that contract was and the purpose for which it was made.¹ But this is only competent to show that the note has been diverted from its original purpose, or to prove a defect of consideration.²

A plea to an action on a note payable one day after date stated that a certain specified part of the sum therein mentioned was included in consideration that suit should not be brought on the note for sixty days; and the suit being brought within that time, it was claimed that there was a partial failure of consideration. On demurrer this plea was held good. Proof of such facts would vary the legal effect of the note, but it does so consequentially by explaining the consideration.³ In a late California case a written contract for the

¹ *Bookstaver v. Jayne*, 60 N. Y. 146. The answer of defendant J., to an action upon a promissory note, stated that defendant G., who was a merchant doing business, was indebted to the plaintiff in the sum of about \$5,000; that an action had been commenced to recover the same; that, to induce defendant to become an indorser, plaintiffs promised that if J. would indorse G.'s note for \$4,000, at three months, they would discontinue said action and give at least one renewal of the note; that, relying upon said agreement, defendant indorsed the note in suit; that plaintiffs did not perform their agreement, but, on the contrary, entered up judgment in said action, issued execution and levied upon said G.'s stock of goods, and thereby destroyed his credit and caused him to fail in business, and deprived said G. of the opportunity of eventually paying the note and relieving defendant of liability, and did not give a renewal of said note. The defendant claimed that thereby his indorsement became null and void. It was held that the plaintiffs utterly failed to carry out the agreement upon which the notes were indorsed

by the defendant, and therefore had no right to enforce their collection. See *Holzworth v. Koch*, 26 Ohio St. 33; *Adams v. Wordley*, 1 M. & W. 374; *Bellows v. Folsom*, 2 Robert. 138.

² *Id.*

³ *Hill v. Enders*, 19 Ill. 163; *Morgan v. Fallenstein*, 27 id. 31.

Caton, C. J., said in the case last cited: "It may be that, strictly speaking, the agreement to pay the money mentioned in the note at the time there stated, and the agreement not to enforce the payment of that amount till after the 1st of June, 1861, all being made at the same time, constituted but one agreement, only that part of it which is embodied in the note being reduced to writing, the rest being allowed to rest in parol, and that by the general rule of law this latter part, which was not embraced in the writing, could not be shown by parol. If that rule is to be applied in this case, then it must in all similar cases; and it would be impossible in any case to show a total or partial failure of consideration of a note by parol, for the consideration of a note must necessarily form part of the agreement in pursuance of which

purchase of a business and the stock of a corporation designated an aggregate sum as the purchase price, no valuation being placed upon any of the items composing the consideration. The evidence disclosed that the value of the property, other than the stock, was estimated at ten thousand dollars, the sum paid in cash, and the stock itself at fifty-five dollars a share, making in the aggregate the amount of the notes. The stock was worthless, and if it was the sole consideration for the notes would have entitled their maker to judgment because of a total failure of consideration.¹

It may be shown in defense to an action upon a note which expresses that it is given for a lease that a part of the consideration was the good will of an insurance business and an insurance list, and that this part has been withheld.² So where the maker and payee of a note were owners of certain lands, and the maker took a conveyance to sell them on joint ac-

the note is given; that part of the agreement which constitutes the consideration is never reduced to writing, and it must be shown by parol if it is ever shown. If I agree with you to deliver you my horse to-morrow, and you give me your note for \$100 in consideration thereof, here only part of the agreement is reduced to writing by the execution and delivery of the note, and that portion which requires me to deliver the horse to-morrow is left in parol. Shall it be said that when I refuse to deliver the horse I may turn round and say you shall never prove it because that portion of the agreement was not put into the writing? The truth is that even the common law made an exception to that rule of evidence in cases where notes or other instruments for the absolute payment of money are given. It has always been admissible to show by parol the consideration upon which such instruments were executed. But whatever may have been the rule of the common law, our statute has expressly provided for this de-

fense; and necessarily, to give effect to the statute, parol evidence must be admitted to show what the contract was, as well as to show that the consideration has failed. The statute has made no exception, and we can make none. A note or bond to pay money is necessarily but a part of the agreement between the parties, leaving out as it does all that portion of the agreement which induced the undertaking to pay the money; and if this part could [140] not be shown by parol there must ever be a liability to a failure of justice. Nor is the exception to the general rule . . . confined to showing by parol a failure of consideration. Usury, and, in fine, any other defense arising out of the original agreement upon which the note was given, or of which the note constitutes a part, may be shown by parol in order to establish a defense to the note."

¹ Field v. Austin, 131 Cal. 379, 63 Pac. Rep. 692.

² Great Western Ins. Co. v. Rees, 29 Ill. 272.

count, and as security to make prompt payment of the purchase-money, after the lands should be sold, made the note in question, these facts were deemed admissible; and it appearing that the lands remained unsold, there was held to be a want of consideration.¹ It is to be observed that a note given under such circumstances and for such a purpose is not void for want of consideration. It is valid as a security for the fulfillment of a trust. The transfer of the title to the maker was a consideration. Parol evidence being admissible even at law to show the fiduciary character of the transfer, it was permitted to have effect to restrain accordingly the written promise to pay; for upon the real consideration there was no equitable duty to pay until a sale had been made. In view of the trust there was no consideration for payment until that event—and this defense was a legal one. Caton, C. J., said: “He (the plaintiff) might have held it till a consideration had arisen. This he did not choose to do, but brought his action, when in fact no consideration for the promise existed.” It seems difficult to reconcile with this case one decided by the same court in the following year.² The opinion was delivered by the same judge, and he states the facts set forth in the notice as a pleading, constituting the alleged defense: “It shows that the several creditors of F. met him by appointment, [141] of whom the plaintiff and defendant were two, and in pursuance of an arrangement then agreed to by all, W. gave his notes for the amounts of the several debts of the creditors present, as an evidence of the amounts due them from F.; that this note is one of those then given for the supposed amount due from F. to S. The notice further shows that it was agreed between all parties that W. was only to pay the several notes then given, as he should collect the debts due F. Now, the notice nowhere states that he has not collected enough to pay all the notes, but it states that afterwards, but how long cannot be learned, the arrangement was broken up by F., with the consent of all parties, and the contract set aside, all the parties interested, including S., consenting thereto. The notice does not show, except by implication, that W. was to be em-

¹ *Marsh v. Bennett*, 22 Ill. 213.

Harris v. Harris, 69 Ind. 181; *King*

² *Walters v. Smith*, 23 Ill. 342. See *v. King*, id. 467.

powered to collect F.'s debts." Upon this statement the learned judge proceeded to say: "If this notice is to be understood as stating that it was the agreement that W. should collect F.'s debts, and pay the proceeds over *pro rata* in satisfaction of the notes, as fast as he should collect the money, and that he should be liable to pay the notes only as fast as the collections would enable him to do so, it clearly states a fact which the law cannot allow him to prove. This is not an attempt to prove a want or a failure of consideration of the note, but it is an attempt to vary the terms of the note."¹

[142] § 553. Same subject. In a Mississippi case² an administrator at a sale of his decedent's personal property proclaimed that the slaves about to be sold were subject to judgment liens, and he offered and agreed that in case they should be seized under the judgments, the sale should be considered as void, and the notes of the purchasers be given up. The

¹The notice of defense which is set out in the report states that the note was given solely upon consideration that F. "would assign over and deliver to the defendant a large amount of indebtedness due or to become due to him from third persons, and out of the proceeds of which, when collected, the defendant was to pay." Caton, C. J., said: "The paper says the money should be paid on or before the 25th of December, 1859, absolutely. The offer of parol proof is that he did not agree to pay the money absolutely on that or any other day, but that he only made a conditional promise that he would pay the note if he collected the money, but never without. Our statute allowing the failure or want of consideration of a note to be proved by parol never intended to allow parol proof to change the terms of a note which has been delivered and become operative. The rule that the writing must speak the intention of the parties is as applicable to a note as to any other written instrument. It is, no doubt,

competent to show what the note was given for, but that does not alone constitute a defense; but in order to make out a defense it is necessary to show that W. did not at the time promise as the paper says he did. This it was inadmissible to show by parol. What we said in *Lane v. Sharp* (3 Scam. 566) is directly applicable to this case, and sufficiently expresses our view of the law on this subject."

In *Great Western Ins. Co. v. Rees*, 29 Ill. 272, the court say: "The ruling of this court in *Lane v. Sharp* and in all subsequent cases founded upon that is to be considered as having no application to a case where no consideration or a total or partial failure of consideration is properly pleaded in an action brought upon an instrument of writing for the payment of money or property or the performance of covenants or conditions to an obligee or payee." See *Mann v. Smyser*, 76 Ill. 365; *Nichols v. Hunton*, 45 N. H. 470.

²*Buckels v. Cunningham*, 6 Sm. & M. 358.

slaves, on that assurance, sold for their full value. In an action brought by the administrator on a note given for the purchase-money, it was held that the makers of it might show under the general issue that the slaves for the price of which the note was given were taken out of their possession and sold under judgments against the estate, and that the consideration of the note had thus failed. The court say the rule of law that parol testimony cannot be heard to vary written agreements has never been carried so far as to defeat the right to prove a failure of consideration.¹ A promise cannot be enforced in full unless the consideration exists and continues intact as the promisee is bound to furnish and maintain it. The consideration of commercial paper may, and usually does, exist in parol; it may be intrinsically or conventionally conditional or contingent; it may be subject to suspense, change or rescission by oral stipulation; its value and duration may be assured or determinable in the same manner, and so that the defendant's promise will also be correspondingly absolute or mutable: be enforceable in full when the consideration is intact, and wholly or in part discharged if it be wanting, [143] or if it fail entirely or partially. The cases already referred to of notes given for a special purpose, as for indemnity, future advances, or as security for other acts than that of paying the precise money mentioned in the instrument, are illustrations of the defeasibleness of such written promises, as well as of the flexible nature and efficiency of the law in maintaining the conventional equipoise of right and obligation between the parties by proof relating to the consideration.

These principles were clearly recognized in an early case in Maine.² The defendant was a wharfinger in G., to whom the plaintiff, living in P., had been in the practice of sending various kinds of lumber for sale, which the defendant sometimes sold for cash and sometimes on credit. Whenever he made sales he credited the plaintiff with the amount; it being, however, understood that he was not to be debtor therefor to the plaintiff till he should actually receive the money. On the

¹ *Sumner v. Williams*, 8 Mass. 162, ² *Folsom v. Mussey*, 8 Me. 400, 23
5 Am. Dec. 83; *Shepherd v. Temple*, Am. Dec. 522.

5 N. H. 455; *Tillotson v. Grapes*, 4 id.

10th of June, 1828, he sold to one H. four hundred and seventy-eight dollars' worth of the plaintiff's lumber, taking his negotiable note for that sum, payable to the plaintiff in ninety days; the purchaser then being in good credit and the time comporting with the usage in such cases. For the proceeds of this sale, among others, the plaintiff was credited in the defendant's books at the date of the note in suit. The plaintiff, wishing to make arrangements to preserve his property from being sacrificed by his creditors, made a nominal sale to the defendant of all his lumber then on the latter's wharf, for the amount of which, and for the sum credited as above to the plaintiff in the defendant's books, including the amount sold to H., the note in controversy was made; it being then agreed orally between the parties that the defendant should sell the lumber, and collect what was due for lumber already sold, and account to the plaintiff therefor in the same manner as if no note had been given, and that his liability to the plaintiff should not be changed or affected by giving the note. The plaintiff then indorsed the note of H. to the defendant. Here was a sale in form and legal effect between the parties, though voidable by creditors, of lumber and a [144] note; and the question was whether the note should be enforced for the full amount expressed, or whether the amount collectible thereon should be adjusted according to the eventual value of the consideration under the verbal bargain contemporaneously made. The opinion of the court by Weston, J., places the judgment upon broad principles which are believed to be sound and in accord with the best authorities of later date. He says: "It is an undoubted rule of the common law that parol testimony shall not be received to vary or contradict a written contract. In support of this principle many cases have been cited. That the defendant did make the contract declared on is not controverted. It is a note of hand which, like a specialty, imports a consideration, and, indeed, acknowledges one. Shall this written acknowledgment be contradicted by parol evidence? The rule upon which the defendant relies, strictly understood, would exclude it. And yet, that such evidence is admissible for this purpose is as well settled as the rule. Between the decisions which illustrate and enforce the rule and those which recognize the ex-

ception there may be an apparent discrepancy, but that will generally be found to arise from the different aspects in which they have been viewed. The case of *Barker v. Prentiss*¹ and the opinion of Chief Justice Parsons there given has maintained its ground in practice, although the language used in subsequent opinions . . . appears sometimes to lose sight of the distinctions there made. The position laid down in that case is that in all written simple contracts evidence of the consideration may be received between the original parties. And this is the uniform practice of our courts. If upon this inquiry it results that there was no consideration or that it has failed totally or partially, or that the contract was signed under mistake or misapprehension, the rights of the parties are determined as the justice of the case requires upon a view of all the facts. The plaintiff fails to recover, or he recovers a part only, of what the note or other contract expresses according to equity and good conscience. Of this character was the evidence in the case before us. It went to the consideration. The lumber which formed part of the consideration of the note was assumed to be worth a certain sum, but [145] its final value was to depend on the sales. If overvalued, there would be a failure of consideration by the amount of the excess. If undervalued, the defendant was to pay the difference. As the estimate fell short of the value as ascertained, this part of the evidence operated in favor of the plaintiff. With regard to that part of the note in suit which arose from the H. debt, if that was not at the defendant's risk, if lost without negligence imputable to him, there would be a failure of consideration to that amount. Now the evidence proves that the defendant did not become the guarantor of the H. note, and that it was not taken at his risk. It has been lost. That loss must fall upon the plaintiff unless negligence in relation to it is chargeable to the defendant."

§ 554. Same subject. On like principles, in an action against the maker of a promissory note by an assignee with notice, it was held a good defense that the note was given in consideration of a tract of land, and that at the time of making the note it was verbally agreed between the payee and the

¹ 6 Mass. 430.

defendant that he should not be called on for its payment until the payee should obtain a patent from the United States for the land, which was expected before the note would by its terms mature, and that the payee had not obtained the patent.¹ The court allowed the defense because the consideration for which the note was given had not been received by the defendant. Where a note was given instead of a receipt for money paid before it was due, the transaction was allowed to be proved by parol, and the fact being admitted by demurrer, it was held that there was no good ground for a promise.² And where the only consideration of a note was a promise by the payee to convey to the maker on payment a tract of land, if the payee should own it, and if not, that he would buy it as cheap as he could and let the maker have it at cost, and the payee died insolvent before the note became due, without title to the land, it was ruled that the consideration of the note had wholly failed and the maker had a right to treat it as a nullity.³ [146] So in an action upon a note given for the price of personal property, a parol agreement for a deduction in case the property should not prove to be of certain quality was deemed equivalent to a warranty; and on that defense the action was defeated.⁴

An assurance given to a surety by the obligee, when solicited by the obligor to execute with him a writing obligatory, that the signing was but a matter of form, and that he should not be applied to for payment, has been proven, as tending to show that the execution of the instrument was procured by fraud, in an action against such surety to enforce the obligation.⁵ An acceptor sued by the indorsee of a bill may show by parol that the acceptance was for the plaintiff's accommodation, and without consideration: and for this purpose that it was agreed that the bill, when due, should be taken up by the plaintiff.⁶ A note purported to be for consideration due

¹ Gorham v. Peyton, 3 Ill. 363.

² Slade v. Halsted, 7 Cow. 322.

³ Tillotson v. Grapes, 4 N. H. 455.
See First Nat. Bank v. Breese, 39
Iowa. 640.

⁴ Shepherd v. Temple, 3 N. H.
455.

⁵ Miller v. Henderson, 10 S. & R.
590; Hain v. Kalbach, 14 id. 159, 16
Am. Dec. 484; Zeibert v. Grew, 6
Whart. 404. But see Barnstable Sav-
ings Bank v. Ballou, 119 Mass. 487.

⁶ Thompson v. Clubley, 1 M. & W.
212.

to the plaintiff for business transacted for the defendant; but it was allowed to be shown by parol that the real consideration for which it was made was future services which had not been performed.¹

Where the consideration of a note was the assignment of a half interest in a bond for the conveyance of land, and it was agreed between the parties that the assignee should pay, by his note to the assignors, the same amount they had given therefor, and, through this misrepresentation, the note was taken for four times the sum paid for the same, the recovery was limited to the amount actually paid.² It is often difficult to determine, on a given state of facts, whether the parol evidence offered goes to the contract or the consideration. The difficulty is particularly apparent where a note or bill is based upon some precedent transaction, and by a contemporaneous verbal agreement resort may be had to that transaction for a new and more accurate statement of the amount of the debt, or of some ground of deduction; or it is agreed that in a specified event the note or bill is to be void without actual payment; or that it shall be paid only out of some special [147] fund contemplated to exist. In cases of doubt there is a leaning—of the English more strongly than of the American courts—against the admission of the evidence, and even where there is much reason to believe that the inducement to make or become a party to the bill or note was the promise held out of relief, in whole or in part, from the obligation, in the manner indicated by such extraneous proof. If the evidence tends to show a defect of consideration it is admissible,³ but otherwise not. This test, however, has not in all cases been very rigidly observed.⁴ It may be well to express what is implied

¹ *Abbott v. Hendricks*, 1 M. & G. 791. See *Pecker v. Sawyer*, 24 Vt. 459.

² *Stevens v. McIntire*, 14 Me. 14.

³ *Smith v. Brooks*, 18 Ga. 440.

⁴ See *Goddard v. Hill*, 33 Me. 582; *Mahan v. Sherman*, 7 Blackf. 378; *Miller v. White*, id. 491; *Leighton v. Grant*, 20 Minn. 345; *Lash v. McCormick*, 17 id. 403; *Walters v. Armstrong*, 5 id. 448; *Spring v. Lovett*, 11 Pick. 417; *Campbell v. Hodgson*,

Gow, 74; *Mosely v. Hanford*, 10 B. & C. 729; *Hodgkins v. Moulton*, 100 Mass. 309; *Sawyer v. Chambers*, 44 Barb. 42; *Allen v. Furbish*, 4 Gray, 504, 67 Am. Dec. 67; *Pecker v. Sawyer*, 24 Vt. 459; *Warren Academy v. Starrett*, 15 Me. 443; *Isaacs v. Elkins*, 11 Vt. 679; *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173; *Foster v. Jolly*, 1 Cr. M. & R. 703; *Pike v. Street*, M. & M. 226; *Susquehanna Bridge & B. Co. v. Evans*, 4

in the preceding discussion, that the parties to a negotiable instrument may make the consideration for it a matter of contract, in which case parol proof is not admissible to show that it is other or different from that which is expressed.¹

§ 555. **Liability of drawer and indorser for principal sum.** All persons joining in drawing a bill are liable to the holder as drawers, whether personally interested in the consideration or not; an accommodation drawer is liable to all parties who become the holders, except the accommodated party, in the due course of business, unless there has been a diversion of the paper from the special use intended, when it is good only to a *bona fide* holder for value.² Where several persons join as drawers they are also jointly liable to the acceptor, if they draw without funds and he pays the bill. It is money paid at their request, and the amount paid is recoverable.³ "The presumption that the drawer has funds in the hands of the acceptor may be rebutted. The drawee may show that he accepted and paid the bill for the accommodation of the drawer, and then, in the absence of any express stipulation, the law will imply an undertaking on the part of the drawer to indemnify the acceptor. On this implied obli- [148] gation the acceptor may have an action against the drawer, but not on the bill itself.⁴ As between the drawer and drawee the bill is a mere request or direction to pay money; it never speaks, as it does between other parties, the language of contract, or imports any obligation. When the acceptor sues, whether he declares specially on the implied promise to indemnify, or generally for money paid, the bill itself is not the foundation of the action; it is but an item of evidence."⁵ The drawer's contract, as such, to the holder of

Wash. C. C. 480; Hill v. Ely, 5 S. & R. 363; Abbott v. Hendricks, 1 M. & G. 791; Conner v. Clark, 12 Cal. 163, 73 Am. Dec. 569; Hyde v. Tenwinkel, 26 Mich. 93.

¹ Reisterer v. Carpenter, 124 Ind. 30, 24 N. E. Rep. 371; Hubbard v. Marshall, 50 Wis. 322, 6 N. W. Rep. 497.

² See Linn County Nat. Bank v. Crawford, 69 Fed. Rep. 532.

³ Griffith v. Reed, 21 Wend. 502, 34 Am. Dec. 267.

⁴ Id., per Bronson, J.; Young v. Hockley, 3 Wils. 346; Chilton v. Whiffin, id. 13; Chitty on Bills, 344, 410.

⁵ Griffith v. Reed, *supra*. It was held in this case that there was no implied promise of the surety to repay the acceptor. But in Suydam v. Westfall, 2 Denio, 205, such an ac-

the paper is to pay the sum mentioned in the bill conditionally; that is, if the bill is not accepted and paid by the drawee, and notice of the dishonor be duly given. His liability is that of the first indorser of a promissory note.¹

The drawing as well as the negotiating of a bill implies an undertaking to the payee, and to every other person to whom the bill may afterwards be transferred, that the drawee is a person capable of accepting the bill, and making himself responsible for its payment; that he shall, if applied to for that purpose, express in writing upon the bill an undertaking to pay when it shall become payable; that he shall pay it on presentment for that purpose when it becomes payable; and that if the drawee fail to do either, he, the drawer, will pay the amount stated in the bill, with legal damages thereon, provided he have due notice of the dishonor.² The indorsement of a bill or note is equivalent to the drawing of a bill; the former is like a new bill drawn by the indorser on the [149] drawee or acceptor; and the latter by the indorser on the maker in favor of the indorsee.³ The indorser warrants that the bill or note will be accepted and paid, according to its tenor; that it is in every respect genuine; that it is valid; that the ostensible parties are competent, and that he has lawful title to and the right to indorse it.⁴ Of course, if the

tion was sustained by the court of errors. Bockee, Senator, said: "As relates to all intervening parties, the acceptor of a bill of exchange is considered to stand in the same position as the maker of a promissory note. The drawers are in the character of indorsers. But this analogy ceases when the acceptor has paid the bill from his own funds. The relation between the drawer and the drawee is then reversed, and the former becomes the debtor."

¹ 1 Parsons on N. & B. 54; Ballingalls v. Gloster, 3 East, 481, 4 Esp. 268.

² Bayley on Bills, ch. 5; Story on Bills, § 108; Edwards on Bills, 287; Evans v. Gee, 11 Pet. 80; Mellish v. Simeon, 2 H. Bl. 378; Milford v. May,

1 Doug. 55; Mason v. Franklin, 3 Johns. 202; Walker v. Bank, 13 Barb. 636, 9 N. Y. 582.

³ Grinnell v. Herbert, 5 A. & E. 436.

⁴ McConeghy v. Kirk, 68 Pa. 200; Condon v. Pearce, 43 Md. 83; Prescott Bank v. Caverly, 7 Gray, 216; Shaw v. Outwater, 77 Hun, 87, 28 N. Y. Supp. 312; Remsen v. Graves, 41 N. Y. 475; 1 Daniel on Neg. Inst., § 669; Turnbull v. Bowyer, 40 N. Y. 456, 100 Am. Dec. 523; Blethen v. Lovering, 58 Me. 437; Bank of Commerce v. Union Bank, 3 N. Y. 230; Coolidge v. Brigham, 1 Met. 547; Mills v. Barney, 22 Cal. 240. See Swall v. Clarke, 51 Cal. 227.

A second indorsement admits the signature and capacity of every prior party, including the existence and

drawer's or indorser's contract in any of these particulars is not fulfilled he is liable, either on the principle of the failure of consideration, or on the contract.¹ The assignment by indorsement of a non-negotiable instrument calling for payment of money is an implied warranty, unless it be otherwise agreed, that there is a valid subsisting debt, and that the maker of the instrument is solvent or will be when the claim falls due.² The indorser of a negotiable promise to pay money, though it be *quasi*-commercial paper—negotiable in form but lacking some elements of such paper, as town orders, always subject to equitable defenses,—guarantees the genuineness of it and the validity of the promise.³

One who transfers a bill or note without indorsement impliedly warrants that it is valid, so far, at least, as he has been connected with its origin, as that it is not to his knowledge void for usury.⁴ So, a drawer or indorser without recourse undertakes that the paper is what it purports to be, a valid obligation of those whose names are upon it.⁵ He is liable if

capacity of the corporation which made the note. *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. Rep. 103, 57 Am. St. 479.

¹ *Chitty on Bills*, *95; *Edwards on Bills*, 291; 1 *Daniel on Neg. Inst.*, § 669; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Little v. Derby*, 7 Mich. 325; *Gurney v. Womersley*, 4 E. & B. 133, 23 Eng. L. & Eq. 256; *Appleton Bank v. McGilvray*, 4 Gray, 518, 64 Am. Dec. 92; *Hurst v. Chambers*, 12 Bush, 155.

² *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27, 23 S. E. Rep. 681, 56 Am. St. 828.

³ *Willis v. French*, 84 Me. 593, 24 Atl. Rep. 1010, 30 Am. St. 416.

⁴ *Drennan v. Bunn*, 124 Ill. 75, 16 N. E. Rep. 100; *Cressey v. Kimmel*, 78 Ill. App. 27; *M. Rumley Co. v. Dollarhide*, 86 id. 477; *Whitney v. Nat. Bank*, 45 N. Y. 305; *Bell v. Dagg*, 60 id. 528; *Smith v. Corege*, 53 Ark. 295, 14 S. W. Rep. 93; *Delaware Bank v. Jarvis*, 20 N. Y. 226. See *Brown v. Montgomery*, id. 287.

An oral warranty of the collectibility of a note is not within the statute of frauds. *Smith v. Corege*, *supra*; *Milks v. Rich*, 50 N. Y. 269. On such a warranty the assignor will be estopped by a judgment against his assignee, and if he directs the latter to sue the maker of the note he will be liable for the amount he received for it and the costs of the suit. *Smith v. Corege*, *supra*. If, however, the genuineness of the note has been considered by the parties and the vendor has declined to warrant it the rule is otherwise. *Bell v. Dagg*, 60 N. Y. 528.

As to warranty by misrepresentation and concealment, see *Vance v. McBurnett*, 94 Ga. 251, 21 S. E. Rep. 520.

⁵ *Challis v. McCrum*, 22 Kan. 157, 31 Am. Rep. 181; *Merriam v. Wolcott*, 3 Allen, 258, 80 Am. Dec. 69, overruling *Ellis v. Wild*, 6 Mass. 321; *Meyer v. Richards*, 163 U. S. 385, 411, 16 Sup. Ct. Rep. 1148. The opinion in the last case refers to *Ellis v.*

any of the prior signatures are not genuine;¹ if the instrument was invalid between the original parties by reason of payment or set-off,² for want of consideration,³ or illegality of the consideration, or if any prior party was incompetent, or the indorser without title;⁴ so if there be fraud or misrepresentation.⁵ The words "without recourse" apply only to the solvency of the prior parties.⁶ One who transfers without recourse a note and a mortgage apparently given to secure it warrants the validity of the security.⁷ One who sells municipal bonds does not, unless he so stipulates, guarantee their validity and solvency;⁸ but only that they belong to him and are not forged.⁹ This question has been recently considered by the

Wild, *supra*; Baxter v. Duren, 29 Me. 434, and Fisher v. Rieman, 12 Md. 497, as holding otherwise, and says that it is doubtful, in view of Hussey v. Sibley, 66 Me. 192, 22 Am. Rep. 557, and Milliken v. Chapman, 75 Me. 306, 317, whether Baxter v. Duren, *supra*, would now be followed there. "The three cases referred to, it is needless to say, are practically disregarded by the entire current of American and English authority, and stand alone."

¹ Brown v. Ames, 59 Minn. 476, 61 N. W. Rep. 448; Lennon v. Grauer, 159 N. Y. 433, 54 N. E. Rep. 11; Damon v. Williamson, 18 Ohio St. 515. One who sells as agent will be personally liable unless he discloses the fact of his agency and the name of his principal. Brown v. Ames, *supra*; Bailey v. Galbreath, 100 Tenn. 599, 47 S. W. Rep. 84.

² Ticonic Bank v. Smiley, 27 Me. 225, 46 Am. Dec. 593; Daskam v. Ullman, 74 Wis. 474, 43 N. W. Rep. 321.

In the last case the purchaser paid the full amount of the note with interest due; took an assignment of a chattel mortgage and a mortgage of land which had been given to secure the note; sold the chattels under the mortgage and commenced foreclosure of the land mortgage.

The defense of payment was established, and an action was thereafter brought to recover for the conversion of the chattels, the defense of which was tendered the assignor of the note, who declined it; judgment went against the assignee. In the foreclosure suit the assignor made the defense on the issue of payment. It was ruled that he was bound by both judgments and was liable to the assignee for the amounts thereof paid by him, and for reasonable attorneys' fees paid by him in both suits.

³ Blethen v. Lovering, 58 Me. 437; Gompertz v. Bartlett, 2 E. & B. 849, 24 Eng. L. & Eq. 156.

⁴ 1 Daniel, Neg. Inst., § 670; Giffert v. West, 33 Wis. 617; Hannum v. Richardson, 48 Vt. 508, 21 Am. Rep. 152.

⁵ Prettyman v. Short, 5 Harr. 360. See Curtis v. Brooks, 37 Barb. 476.

⁶ McCormack v. Ware, 13 Ky. L. Rep. 678 (Ky. Super. Ct.).

⁷ Waller v. Staples, 107 Iowa. 758, 77 N. W. Rep. 570.

⁸ Ruohs v. Bank, 94 Tenn. 57, 48 S. W. Rep. 393.

⁹ Otis v. Cullom, 92 U. S. 147; Richardson v. Marshall County, 100 Tenn. 346, 45 S. W. Rep. 440.

federal supreme court in a case in which bonds of Louisiana were bought and sold in good faith as valid and lawful obligations; in fact, they were absolutely void, having never been lawfully put into circulation. The purchaser sued to recover the money paid. The case was determined according to the principles of the civil law, although the discussion covers the common-law rule as well. The conclusions arrived at are that by the civil law warranty, whilst not of the essence, is yet of the nature of the contract of sale, and is implied in every such contract, unless there be a stipulation to the contrary. That by the common law the doctrine is universally recognized that where commercial paper is sold without indorsement or without express assumption of liability on the paper itself, the contract of sale and the obligations which arise from it, as between vendor and vendee, are governed by the common law relating to the sale of goods and chattels; and that the undoubted rule is that in such a sale the obligation of the vendor is not restricted to the question of forgery *vel non*, but depends upon whether he has delivered that which he has contracted to sell, this rule being designated in England as a condition of the principal contract, as to the essence and substance of the thing agreed to be sold, and in this country being generally termed an implied warranty of identity of the thing sold, and that, so far as the practical result of the two systems of law is concerned, they lead to the same conclusion, and entitled the purchaser to recover the money paid with interest from the time of judicial demand.¹

The terms of the negotiable instruments act on this general subject are: Every person negotiating an instrument by delivery or by a qualified indorsement warrants: (1) That the instrument is genuine and in all respects what it purports to be; (2) That he has a good title to it; (3) That all prior parties had capacity to contract; (4) That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. Subdivision 3 does not apply to

¹ Meyer v. Richards, 163 U. S. 385, 16 Sup. Ct. Rep. 1148, disapproving Littauer v. Goldman, 73 N. Y. 506.

persons negotiating public or corporate securities, other than bills and notes. A subsequent section reads thus: Every indorser who indorses without qualification warrants to all subsequent holders in due course: (1) the matter and things mentioned in subdivisions one, two and three of the preceding section, and (2) That the instrument is at the time of his indorsement valid and subsisting. And, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor; and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

Mr. Crawford,¹ the author of the act referred to, says of the last section given above that it makes an important change in the law. In *National Park Bank v. Seaboard Nat. Bank*² it was held that where a bank, which had acted merely as collecting agent, had paid the proceeds of a check over to its principal, the bank making the payment could not recover from the collecting bank upon subsequently discovering that the check had been raised. In this case the check was presented by the S. Bank to the drawee bank through the clearing house, and hence there was no question as to the liability of the S. Bank as an indorser to an indorsee. But in *United States v. American Exchange Nat. Bank*³ the court, proceeding upon principles similar to those relied upon in the New York case, held that the indorsement of a bank to which paper has been indorsed for collection does not import a guaranty of the genuineness of all prior indorsements, but only of the agent's relation to the principal as stated upon the face of the paper, and that in such case the collecting bank was not liable after it had paid the proceeds to its principal, although a prior indorsement was a forgery. But the statute applies to all indorsers who indorse without qualification; and no exception is made of indorsers to whom the instrument has been indorsed restrictively.

Although the drawer or indorser is held to the implied war-

¹ Annotated Neg. Inst. Law (2d ed.), § 126.

² 114 N. Y. 28, 20 N. E. Rep. 632, 11 Am. St. 612.

³ 70 Fed. Rep. 232.

warranties heretofore stated, the damages are not assessed in respect to the principal sum according to the general rule applicable to warranties of quality or title of personal property, which is that the warrantor shall pay so much as the actual value of the property falls short of what it would be worth if the warranty had been kept good. On the contrary, [150] where recourse is had to an indorser, the recovery on account of the principal sum is limited to the amount paid; in other words, there is a compulsory refunding of the consideration and interest thereon.¹ Where, however, a party purchases accommodation paper at less than its face, on representations made by a party to it that it is business paper, and he relies on them, he will be entitled to the whole sum payable by its terms, although it exceeds the amount paid for it, with the legal interest thereon.² And if an indorser who has been made liable to his indorsee on account of his indorsement settles with the latter, and obtains a transfer of the bill, he may recover on it from the acceptor for his own use the same amount which his indorser might have recovered, or rather what he would have recovered if he had not negotiated the bill. And it is immaterial whether, upon such transfer, he paid more or less, or merely gave a new security.³

§ 556. Interest on notes and bills. Interest is only allowed before maturity when expressly stipulated for; but when it is clearly reserved, it is calculated from the date of the instrument unless a different time is specified for it to begin.⁴ The simple words "with interest," or similar phrase, will suffice to give interest from date.⁵ And on such a gen-

¹ *Smeltzer v. White*, 92 U. S. 390; *Munn v. Commission Co.*, 15 Johns. 43; *Cram v. Hendricks*, 7 Wend. 569; *Ingalls v. Lee*, 9 Barb. 647; *Hutchins v. McCann*, 7 Port. 94; *Noble v. Walker*, 32 Ala. 456; *Raplee v. Morgan*, 3 Ill. 561; *Shaeffer v. Hodges*, 54 Ill. 337; *Braman v. Hess*, 13 Johns. 52; *Short v. Coffeen*, 76 Ill. 245; *Wynn v. Poynter*, 3 Bush, 54; *Semmes v. Wilson*, 5 Cr. C. C. 285; *Bank of United States v. Smith*, 4 id. 712; *Cook v. Clark*, 4 E. D. Smith, 213; *Judd v. Seaver*, 8 Paige, 548.

In *Mechanics' Bank v. Minthorne*, 19 Johns. 244, it was held that the plaintiff, as indorsee, was not precluded from recovering against the indorser seven per cent., the legal rate, by having discounted the note at six.

² *Burrall v. De Groot*, 5 Duer, 379.

³ *Bunker v. Langs*, 76 Hun, 543, 28 N. Y. Supp. 210; *Deas v. Harvie*, 2 Barb. Ch. 448.

⁴ *Kennerly v. Nash*, 1 Stark. 453; *Hopper v. Richmond*, id. 507.

⁵ *Id.*; *Dewey v. Bowman*, 8 Cal.

eral reservation of interest, it may be recovered from date until paid, although at maturity no suit could be [151] brought;¹ and it is the same if payable at the end of a specified time from the death of the maker.² But interest on a note payable within one year after the death of the maker is not recoverable before the expiration of that time.³ Commonly speaking, an instrument of this sort, reserving interest in general terms, carries interest from date, whether payable on demand or at a specified time. The reason is that the party making the promise is expected to keep it; and, if he does, no interest can be due from any other period than its date.⁴ On a contract to pay interest annually, the fact that it was to be compounded with the principal, if not paid, does not postpone the right to collect interest until the maturity of the note.⁵ If unliquidated claims do not bear interest a counter-

145; *Winn v. Young*, 1 J. J. Marsh. 51, 19 Am. Dec. 52; *Ely v. Wither-spoon*, 2 Ala. 131; *Dickinson v. Tun-stall*, 4 Ark. 170; *Inglish v. Watkins*, id. 199; *Kilgore v. Powers*, 5 Blackf. 22; *Pate v. Gray*, Hemp. C. C. 155; *Doman v. Didden*, Ry. & M. 381; *Whitton v. Swope*, 1 Litt. 160; *Roffey v. Greenwell*, 10 A. & E. 222; *Conners v. Holland*, 113 Mass. 50; *Pitt-man v. Barrett*, 34 Mo. 84; *Smith v. Goodlett*, 92 Tenn. 230, 21 S. W. Rep. 106. See § 305.

¹ A married woman, being admin-istratrix, received a sum of money in that character, and loaned it to her husband, and took for it the joint and several promissory note of her husband and two other persons, payable to her with interest; held, although she could not have main-tained an action upon the note dur-ing the life-time of her husband, yet that he having died, and it having been given for good consideration, it was a chose in action surviving to her, and that she might maintain an action upon it against either of the other makers at any time within six years after the death of her husband, and recover interest from the date

of the note. *Richards v. Richards*, 2 B. & Ad. 447.

² *Roffey v. Greenwell*, 10 A. & E. 222.

³ *Randall v. Grant*, 59 App. Div. 485, 69 N. Y. Supp. 221. See *Larrabee v. Southard*, 95 Me. 385, 50 Atl. Rep. 20.

⁴ *Roffey v. Greenwell*, *supra*. Lord Denman said in this case: "There is, indeed, another period from which it might be computed, that of the maker's death; but it appears improbable that if that was his in-tention he should not have expressed it with more distinctness. We think that in the absence of all particular proof we must presume the note to have been given for value, so that interest would be due from the date. If that be doubtful the instrument ought to be construed most strongly against the maker." *Washband v. Washband*, 24 Conn. 500; *Adairs v. Wright*, 14 Iowa, 22. See *Carter v. King*, 11 Rich. 125; *Rollman v. Baker*, 5 Humph. 406; *Powell v. Guy*, 3 Dev. & Batt. 70.

⁵ *Rowe v. Schertz*, 74 Mo. App. 602; *Carter v. Carter*, 76 Iowa, 474, 41 N. W. Rep. 168; *Fox v. Gray*, 105 Iowa, 433, 75 N. W. Rep. 330.

claim for unliquidated damages in an action on a note does not stop interest before verdict if the damages are not previously liquidated.¹ Under the negotiable instruments act, "where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof."²

The courts adopt a construction favorable to interest or most strongly against the maker; and where interest is promised to be paid in general terms in case the note shall not be paid [152] at maturity, it is computed from date.³ The rate stipulated to be paid before maturity generally governs to the date of payment or judgment, if not in contravention of any statute;⁴ and upon the assumption that such was the intention of the parties, such agreements are construed to mean that interest at the conventional rate shall continue not only to the time specified for payment, but until actual payment. There is, however, a want of harmony in the decisions upon this point. In Minnesota the legal rate governs arbitrarily after maturity, if the parties have stipulated for a rate generally above it or have even agreed, in express terms, that such rate

¹Smith v. Turner, 33 Ore. 379, 54 Pac. Rep. 166.

²Crawford's Neg. Inst. Law (2ded.), p. 25.

³Several notes were payable at distant days; some at three per cent. per annum, if paid at maturity; "if not, six per cent. interest to be paid;" and one payable without interest, "until the note is out, if not paid then lawful interest until paid." They were not paid at maturity, and it was held that interest was recoverable according to the agreements therein from date. Daggett v. Pratt, 15 Mass. 177; Parvin v. Hoopes. Morris, 294; Horn v. Nash, 1 Iowa, 204; Hackenbury v. Shaw, 11 Ind. 392.

The cases of Billingsly v. Cahoon, 7 Ind. 184, and Wernwag v. Mothershead, 3 Blackf. 401, are perhaps distinguishable, and not to be considered as inconsistent; because in

each the agreement was for a higher rate of interest upon default than the law would give in the absence of any agreement; and hence, as effect could be given to the language employed without allowing interest from the date of the notes, it was allowed to run from their maturity only. 2 Parsons on N. & B. 382, note d. See Flanders v. Chamberlain, 24 Mich. 305.

The opening part of a contract of conditional sale, which was designated as a note, contained an absolute promise to pay interest, while the latter part provided that interest should be paid on condition that a sum named was not paid within one year. Interest was allowed from the date of the contract. Third Nat. Bank v. Spring, 23 N. Y. Misc. 9, 59 N. Y. Supp. 794.

⁴See § 306 *et seq.*

shall be computed until the debt is paid. Any rate in excess of the legal rate stipulated to be paid while the debtor is in default is treated as penalty, and only the legal rate is allowed.¹ In many cases elsewhere it has been held that the agreement fixing the rate without specifying the period for which it shall be computed is intended to have effect only during the period of credit; that if the parties desire to regulate the rate to be allowed afterwards, they should do so expressly by agreeing that it shall continue after maturity or "until paid."² In Connecticut the conventional rate before maturity is applied during the period of default, not so much on the ground that the contract as such covers that period, as on the principle that it should be deemed a just rate because the parties had agreed to it before maturity.³

A stipulation for interest without stating the rate is a contract for the legal rate; and this rate, and the validity of any stipulation specifying the rate, are to be determined by the law of the place of contract, which is the place where the contract is entered into, unless it was made with reference to the laws of some other state or country. A contract is governed by the laws of the place where it is to be performed.⁴ If

¹ See § 310.

² See § 309; *Brewster v. Wakefield*, 22 How. 127; *Burnhisel v. Firman*, 22 Wall. 170; *Haywood v. Miller*, 14 Wash. 660, 45 Pac. Rep. 307.

³ See § 309, n. In ch. 8, the subject of interest, in its general features, is fully treated.

⁴ *Gaylord v. Johnson*, 5 McLean, 448; *Arrington v. Gee*, 5 Ired. 590; *McQueen v. Burns*, 1 Hawks, 476; *Doris v. Coleman*, 7 Ired. 424; *Hunt's Ex'r v. Hall*, 37 Ala. 702; *Barney v. Newcomb*, 9 Cush. 46; *Campbell v. Nichols*, 33 N. J. L. 81; *Lee v. Selleck*, 20 How. Pr. 275, 33 N. Y. 615; *Hyatt v. Bank of Kentucky*, 8 Bush, 193; *Cook v. Moffat*, 5 How. 295; *Bright v. Judson*, 47 Barb. 29; *Everett v. Vandryes*, 19 N. Y. 426; *Barley v. Heald*, 17 Tex. 102, 14 Tex. 226; *Lizarrli v. Cohen*, 3 Gill, 430; *Worcester Bank v. Wells*, 8 Met. 107;

Lewis v. Owen, 4 B. & Ald. 654; *Smith v. Buchanan*, 1 East, 6; *Quin v. Keefe*, 2 H. Black. 553; *Bainbridge v. Wilcocks*, Bald. 536; *Boyce v. Edwards*, 4 Pet. 111; *Cooper v. Waldegrave*, 2 Beav. 282; *Braynard v. Marshall*, 8 Pick. 194; *Wilde v. Sheridan*, 21 L. J. (Q. B.) 260, 16 Jur. 426, 11 Eng. L. & Eq. 380; *Barker v. Sterne*, 9 Ex. 684, 25 Eng. L. & Eq. 502; *Hanrick v. Andrews*, 9 Port. 9; *Healey v. Gorman*, 15 N. J. L. 328; *Evans v. Clark*, 1 Port. 388; *Evans v. Irwin*, id. 390; *Cluse v. Drew*, 47 N. H. 405; *Hoppins v. Miller*, 17 N. J. L. 185; *Butters v. Olds*, 11 Iowa, 1; *Burton v. Anderson*, 1 Tex. 93; *Lines v. Mack*, 19 Ind. 223; *Pencock v. Banks*, Minor, 387; *Peck v. Mayo*, 14 Vt. 33, 29 Am. Dec. 205; *Ramsey v. McCanley*, 2 Tex. 189; *Clumbliss v. Robertson*, 23 Miss. 502; *Jack v. Nichols*, 5 N. Y. 178; *Kavanaugh v.*

[153] made in one state or country and payable in another, and not made to evade the usury laws of one of them, it will be sustained if the rate of interest is valid by the laws of [154] either.¹ But the fate of a contract which violates the laws of both the country or the state where it is made and that where it is to be performed will be determined by those of the former.²

Where the rate is governed by any other than the law of which the court takes judicial notice it is for the jury to ascertain what the rate by that law is as a fact; but it is for the court, as a matter of law, to direct them as to the place according to the laws of which the interest is to be assessed.³

Day, 10 R. L. 393, 14 Am. Rep. 691; Hackettstown Bank v. Rea, 6 Lans. 455, 64 Barb. 175; Agricultural Nat. Bank v. Sheffield, 4 Hun. 421; Scofield v. Day, 20 Johns. 102; Newman v. Kershaw, 10 Wis. 333; Findlay v. Hall, 12 Ohio St. 610; McClintock v. Cummins, 3 McLean, 158; Consequa v. Willings, Pet. C. C. 229; Archer v. Dunn, 2 W. & S. 327; Ralph v. Brown, 3 id. 395; Anonymous, Mart. & Hayw. 149; Consequa v. Fanning, 3 Johns. Ch. 587, 17 Johns. 511, 8 Am. Dec. 442; Stewart v. Ellice, 2 Paige, 604; Pomeroy v. Ainsworth, 22 Barb. 118; Irvine v. Barrett, 2 Grant's Cas. 73; Roberts v. McNeely, 7 Jones, 506, 78 Am. Dec. 261; Swet v. Dodge, 4 Sm. & M. 667; Gaillard v. Ball, 1 N. & McC. 67; Jaffray v. Dennis, 2 Wash. C. C. 253; Cowqua v. Laudebrun, 1 id. 521; Busby v. Caracac, 4 id. 296; Bank of Illinois v. Brady, 3 McLean, 268; Moore v. Davidson, 18 Ala. 209; Leffer v. Dermotte, 18 Ind. 246; Von Hemert v. Porter, 11 Met. 210; Winthrop v. Carlton, 12 Mass. 4; Hawley v. Sloe, 12 La. Ann. 815; Little v. Riley, 43 N. H. 109; Bolton v. Street, 3 Cold. 31; Summers v. Mills, 21 Tex. 77; Whitlock v. Castro, 22 id. 108; Butler v. Meyer, 17 Ind. 77; Bent v. Lauve, 3 La. Ann. 88; Smith v. Smith, 2 Johns. 235, 3 Am. Dec. 410;

Don v. Lippmann, 5 Cl. & F. 1; Balme v. Wombough, 38 Barb. 352; Collins Iron Co. v. Burkam, 10 Mich. 283; Fergusson v. Fyffe, 8 Cl. & F. 121; Cash v. Kenion, 11 Ves. 314; Robinson v. Bland, 2 Burr. 1077; Ekins v. East India Co., 1 P. Wms. 395; Houghton v. Page, 2 N. H. 42, 9 Am. Dec. 30; Lapice v. Smith, 13 La. 91; Mullin v. Morris, 2 Pa. 85; Chapman v. Robertson, 6 Paige, 627; Richards v. Globe Bank, 12 Wis. 692; McAllister v. Smith, 17 Ill. 328, 65 Am. Dec. 651; Van Schaick v. Edwards, 2 Johns. Cas. 355; Pearce v. Wallace, 1 Har. & J. 48; Goddin v. Shipley, 7 B. Mon. 575.

¹ Andrews v. Pond, 13 Pet. 65; Richards v. Globe Bank, 12 Wis. 692; Jewell v. Wright, 12 Abb. Pr. 55, reversed, 30 N. Y. 259, 86 Am. Dec. 372; Kilgore v. Dempsey, 25 Ohio St. 413, 18 Am. Rep. 306; Bowen v. Bradley, 9 Abb. Pr. (N. S.) 395; Cope v. Wheeler, 41 N. Y. 303; Agricultural Nat. Bank v. Sheffield, 4 Hun. 421; Vliet v. Camp, 13 Wis. 198; Engler v. Ellis, 16 Ind. 475.

² Andrews v. Pond, *supra*; Pine v. Smith, 11 Gray, 38; Mix v. Madison Ins. Co., 11 Ind. 117; Adams v. Robertson, 37 Ill. 45.

³ Gibbs v. Fremont, 9 Ex. 25; Leavenworth v. Brockway, 2 Hill, 201;

Where the rate is governed by the laws of another jurisdiction they must be alleged and proved;¹ otherwise interest according to the law of the forum will be given.²

Under a code provision expressing the recognized principle of equity that "an honest mistake of the law as to the effect of an instrument on the part of both contracting parties, when such mistake operates as a gross injustice to one, and gives an unconscientious advantage to the other, may be relieved in equity," where both the maker and payee of a note intended that it should bear no interest, and ignorantly supposed that this would result from the omission in it of any reference concerning interest, equity will, on behalf of the maker, when sued upon the note by the indorsee of the payee, correct such mistake, the plaintiff having taken the note as a donation and with knowledge that the parties did not intend that it should bear interest.³

§ 557. Interest as damages to be paid by maker or acceptor. Where the note or bill is silent as to interest, none is payable until maturity. If it be not then paid, interest is universally allowed from maturity unless the delay is by the fault of the holder.⁴ And so much is interest the customary and invariable compensation for money delinquent on com-

Wheeler v. Pope, 5 Tex. 262; Hill v. George, id. 87; Pridgen v. McLean, 12 id. 420; Ingram v. Drinkard, 14 id. 351; Evans v. Clark, 1 Port. 388.

¹ Surlott v. Pratt, 3 A. K. Marsh. 174; Burton v. Anderson, 1 Tex. 93; Wheeler v. Pope, 5 Tex. 262; Hill v. George, id. 87; Abel v. McMurray, 10 id. 350; Pridgen v. McLean, 12 id. 420; Ingram v. Drinkard, 14 id. 351; Evans v. Clark, 1 Port. 388.

According to the foregoing cases, where the note sued on is payable in another state no interest at all can be allowed unless the law of the state where it is payable is proved and shows a right to interest. See § 358 *et seq.*

² Surlott v. Pratt, 3 A. K. Marsh. 174; Desnoyer v. McDonald, 4 Minn. 515; Martin v. Martin, 1 Sm. & M. 176; Brown v. Gracy, D. & R. N. P.

41, note; De La Chaumette v. Bank of England, 9 B. & C. 208; Fouke v. Fleming, 13 Md. 392; Whidden v. Seelye, 40 Me. 247, 63 Am. Dec. 661; Deem v. Crume, 46 Ill. 69; Prince v. Lamb, 1 id. 378; Chumasero v. Gilbert, 26 id. 39; Hall v. Kimball, 58 id. 58; Lougee v. Washburn, 16 N. H. 134; Hall v. Woodson, 13 Mo. 462; Gordon v. Phelps, 7 J. J. Marsh. 619; Leavenworth v. Brockway, 2 Hill, 201; Booty v. Cooper, 18 La. Ann. 565.

³ Loudermilk v. Loudermilk, 98 Ga. 780, 25 S. E. Rep. 927.

⁴ Gantt v. Mackenzie, 3 Camp. 51; Mayne on Dam. 105; Thorndike v. United States, 2 Mason, 1; Robinson v. Bland, 2 Burr. 1077; Bann v. Dalzel, M. & M. 228; Laing v. Stone, 2 M. & Ry. 561; Greenleaf v. Kellogg, 2 Mass. 568; Hastings v. Wiswall, 8 id. 455.

mercial paper that where a party undertakes to pay a debt by means of a bill or note and fails to do so, interest will be al-
[155] lowed as it would accrue upon such note or bill if it had been given according to the undertaking.¹ If paper is payable on demand interest does not run until demand is made by suit or otherwise.² But a note expressing no time when payable is due immediately, and bears interest from date.³ An instrument expressing that the maker owes the holder a sum named, for value received, is not a promissory note, but a mere acknowledgment of a debt, and although the maker was bound to pay on demand, if no demand was made, no time stipulated for payment, and no contract or usage requiring the payment of interest before judicial demand is shown the liability for interest does not antedate such demand.⁴

The rate of interest after maturity for default of payment, even when not expressly or by implication fixed by contract, is generally held to be that prescribed by the law of the place of contract; in other words, the law of the place where the note is made payable, or of the place on which the bill is drawn.⁵ If no place of payment is mentioned, that where the note is made or the bill accepted is the place of contract. But the place may be affected by circumstances, as the residence

¹ *Marshall v. Poole*, 13 East, 98; *Freeland v. Edwards*, id. 207; *Francis v. Castleman*, 4 Bibb, 282.
Slack v. Lowell, 3 Taunt. 157; *Farr v. Ward*, 3 M. & W. 25; *Rhoades v. Selsey*, 2 Beav. 350; *Beeher v. Jones*, 2 Camp. 428. note.

⁴ *Gay v. Rooke*, 151 Mass. 115, 23 N. E. Rep. 835, 21 Am. St. 434, 7 L. R. A. 392.

² *Hudson v. Daily*, 13 Ala. 722; *Vaughan v. Goode*, Minor, 417; *Freeland v. Edwards*, Mart. & Hayw. 207; *Lewis v. Lewis*, id. 191; *Hard v. Palmer*, 21 Up. Can. Q. B. 49; *Patrick v. Clay*, 4 Bibb, 246; *Bartlett v. Marshall*, 2 Bibb, 467; *Schmidt v. Limehouse*, 2 Bailey, 276; *Penn Safe Deposit & Trust Co. v. Thomas*, 4 Pa. Dist. Rep. 421. See *Darling v. Wooster*, 9 Ohio St. 517.

³ *Horn v. Hansen*, 56 Minn. 43, 57 N. W. Rep. 315, 22 L. R. A. 617; *Rogers v. Colt*, 21 N. J. L. 19; *Purdy v. Philips*, 11 N. Y. 406, 1 Duer, 369; *Gaylord v. Van Loan*, 15 Wend. 308; *Lewis v. Lewis*, Mart. & Hayw. 191;

⁵ *Campbell v. Nichols*, 33 N. J. L. 81; *Scofield v. Day*, 20 Johns. 102; *Mullen v. Morris*, 2 Pa. 85; *Boyce v. Edwards*, 4 Pet. 111; *Braynard v. Marshall*, 8 Pick. 194; *Chapman v. Robertson*, 6 Paige, 627; *Thompson v. Powles*, 2 Sim. 194; *Hosford v. Nichols*, 1 Paige, 220; *Gaylord v. Johnson*, 5 McLean, 448; *Bank of Illinois v. Brady*, 3 id. 268; *Bright v. Judson*, 47 Barb. 29; *Lee v. Selleck*, 33 N. Y. 615; *Cooke v. Crawford*, 1 Tex. 9, 46 Am. Dec. 93; *Burton v. Anderson*, 1 Tex. 93; *Wheeler v. Pope*, 5 id. 262; *Andrews v. Hoxie*, id. 171; *Barney v. Newcomb*, 9 Cush. 46; *Hunt v. Hall*, 37 Ala. 702; 2 Par-

of the parties, and the place where the money is to be used.¹ A bill was drawn on a resident of the state of New York, and by him accepted to be paid in that state, by a resident [156] of Illinois. The acceptance was for the accommodation of the drawer, and for the purpose of being afterwards negotiated by him to raise funds to be used in his business in Illinois, he to provide for its payment. After acceptance the acceptor placed the bill in the hands of the drawer, and he negotiated it for a greater rate of discount than was allowed by the laws of either state. It was held to be governed by the laws of Illinois. Strong, J., said: "The case is exactly the same as it would be if the defendants had been residents of Chicago, where the draft was drawn, and had accepted it at Chicago for the accommodation of the drawer, designating New York as the place of payment. It is plain, therefore, that the contract is an Illinois contract, and that the rights and liabilities of the parties must be determined according to the laws of that state." It was treated as a controlling fact that, before the acceptance had any operation, before the instrument became a bill, the defendants, who were the acceptors, sent it to Illinois for the purpose of having it negotiated in that state.²

§ 558. **Liability of drawer or indorser for interest as damages.** When not fixed by the contract, the liability is governed by the law of the place where the contract of the drawer or indorser is made; for their contract is implied, and the implication is that it is to be performed at the place where it is made.³ The rule of liability under the English and South Australian bills of exchange acts is stated in a note.⁴

sons on N. & B. 371. But see *Godard v. Foster*, 17 Wall. 123; *Wood v. Corl*, 4 Met. 203; *Ayer v. Tilden*, 15 Gray, 178, 77 Am. Dec. 355.

¹ *Davis v. Coleman*, 8 Ired. 424.

In *Austin v. Imus*, 23 Vt. 286, it was held that as between the parties to a promissory note executed in the state of New York and made payable generally, interest should be allowed at the Vermont rate, if it appears from the circumstances attending its execution that it was the expectation and intention that

it would be paid there. See *Thompson v. Ketcham*, 8 Johns. 189.

² *Tilden v. Blair*, 21 Wall. 241; *Farmers' Nat. Bank v. Sutton Manuf. Co.*, 3 C. C. A. 1, 52 Fed. Rep. 191, 17 L. R. A. 595. See § 364.

³ *Gibbs v. Fremont*, 9 Ex. 25; *Boyce v. Edwards*, 4 Pet. 111. See § 358.

⁴ The English bills of exchange act, 1852 (sec. 57, ch. 61, 45-46 Vict.), provides that where a bill is dishonored the measure of damages shall be:

(1) The holder may recover from

The liability of an acceptor of a bill for interest as damages will be determined upon equitable considerations. If the delay in payment has been caused by the fault of the drawer, interest will not be allowed, especially after the lapse of a long period of time, and the death of the parties to whom the acceptor might look for indemnity.¹ The holder of a note with interest payable annually loses no rights against the parties to it, whether they are makers or indorsers, by neglecting to demand interest, and he has the election to demand it or wait and collect it with the principal.² On the maturity of a note an indorser is liable for both principal and interest, upon demand and notice, although these measures had not been taken to make him chargeable as the interest fell due each year.³ If the indorser is a party to the original contract to pay interest annually, by his indorsement he guarantees the

any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser:

(a) The amount of the bill.

(b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case.

(c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

(2) In the case of a bill which has been dishonored abroad, in lieu of the above damages the holder may recover from the drawer or an indorser, and the drawer or indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

(3) Where by this act interest may be recovered as damages, such interest may, if justice require it, be

withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

The South Australian act (47-48 Vict., No. 312, sec. 57) is identical with the above except that sub-section 1 (b) contains the words after interest thereon, "at the rate of ten pounds per centum per annum." Under this act it has been ruled that when a bill of exchange has been dishonored out of that colony the only damages which the holder can recover are the amount of the re-exchange, with interest thereon, as provided by sub-section 2, and that he has no option to sue for interest under sub-section 1. *In re Commercial Bank of South Australia*, 36 Ch. Div. 522.

¹ *Spaethe v. Anderson*, 18 N. Z. 149.

² *National Bank v. Kirby*, 108 Mass. 497.

³ *Id.*; *Howe v. Bradley*, 19 Me. 31; *First Nat. Bank v. County Commissioners*, 14 Minn. 77.

performance of that contract; otherwise he would be liable only for part of the obligation assumed by the maker. But to impose liability for interest as it falls due demand must be made and notice given.¹

§ 559. Notes and bills are by definition payable only in money. Within the domain of the law merchant there is a great variety of moneys made legal tender by many sovereignties, and in many jurisdictions are other currencies not legal tender, but which, to a considerable extent, perform the functions of money by being freely paid and received as a substitute in all local transactions. When an instrument in the form of a note or bill is payable in some special currency, the question has often arisen whether it was payable in money.²

¹ *Mt. Mansfield Hotel Co. v. Bailey*, 64 Vt. 151, 24 Atl. Rep. 136, 16 L. R. A. 295.

² *Black v. Ward*, 27 Mich. 191. A note made and indorsed in Michigan and payable "in Canada currency" was held to be payable in money, and therefore negotiable. *Campbell, J.*, said: "The indorser's contract being governed by the laws of this state, and the note having been made here, its negotiability must in our courts be tested by our statute; but as that is like the statute of Anne, in requiring the paper to be payable in *money*, the only inquiry in this regard is what may be included in that term. It will be found by examining the authorities that the word 'money' has been used for some purposes in a very wide sense, and for others in a restricted sense. When questions have come up in construing negotiable paper it has never been extended beyond coin and paper at par value. In England, in the case of *Miller v. Race*, 1 Burr. 452, which involved the rights of holders of stolen Bank of England bills, the language of Lord Mansfield and of the judges was so pointed in treating such notes as cash, that if the question now discussed had been mooted, there can

be little doubt how it would have been decided. A series of decisions made afterwards sustained tenders in such bills, where no objection had been made to the medium in which the tender was made. *Polglass v. Oliver*, 2 Cr. & J. 15, 16; *Brown v. Saul*, 4 Esp. 267; *Wright v. Reed*, 3 T. R. 554. And these decisions have been followed universally in this country. The first time when the negotiability of a bill payable in Bank of England notes came up for decision was in the interval between 1797 and 1818, during which the bank was restrained from making specie payments. The statutes containing this restriction provided that if the amount of any debt were tendered in notes the debtor should not be arrested on the debt. *Tomlin's Law Dic.*, 'Bank of England.' It was held in *Grigby v. Oakes*, 2 B. & P. 526, that under this statute notes were not a legal tender. Reference was made by some of the court to the peculiar terms of the statute, as limiting the effect of the tender to an exemption from arrest. In *Ex parte Davison*, Buck, 31, and *Ex parte Ineson*, 2 Rose, 245, it was held that notes payable in 'cash or Bank of England notes' were not negotiable.

[157] The determination of this question in the affirmative places the instrument in the category of commercial paper; but if decided in the negative, it belongs to another class of contracts which are not governed by the law merchant. The

In 1834 the notes were made a legal tender; but by the present law they are not such in Scotland or Ireland. Fisher's Dig., 'Bank of England,' 'Tender.' No case has since been reported in which any such question was raised; and whether the silence of the courts arises from the change of the law, whereby the notes are made equivalent to coin, or from any custom excluding any mention of notes in drawing up negotiable paper, [158] we have no means of judging. Where the notes are always convertible and at par with gold, and are a legal tender, there does not seem to be any very good reason for holding a bill payable in notes to be any more objectionable than one payable in coin. In this country all paper not payable expressly in gold is impliedly payable in greenbacks; and we cannot conceive that it can change the legal character of any security to express in it precisely what the law implies. Where a promissory note is payable in anything which is not a legal tender, the authorities are generally, though not universally, against its negotiability. In New York and Ohio bank bills issued under state authority, and where the courts hold they are bound to recognize their quality judicially, have been held at par to represent money, so that notes payable in cash, or in such notes, have been adjudged negotiable. *Keith v. Jones*, 9 Johns. 120; *Judah v. Harris*, 19 Johns. 144; *Swetland v. Creigh*, 15 Ohio, 118. But in the same states paper payable expressly in any other bills, or in the bills of specified banks of the state, has been held not negotiable. *Leiber v. Goodrich*, 5 Cow. 186; *Shamokin Bank v.*

Street, 16 Ohio St. 1; *Thompson v. Sloan*, 23 Wend. 71, 35 Am. Dec. 546; *Little v. Phoenix Bank*, 2 Hill, 425, 7 id. 359. Elsewhere, except where there are statutes to the contrary, there is no considerable support for the doctrine that paper payable expressly in the bank notes of private corporations is negotiable.

"Under the laws of this state bank bills may be levied on, and may be paid over as cash, if the creditor is willing to receive them; but if he refuses they must be sold 'as other chattels.' Comp. L., §§ 6096, 6456. If the term 'Canada currency' should be confined to private bank notes it would be difficult to hold this paper negotiable. In *Thompson v. Sloan* the supreme court of New York held that a note payable in Buffalo in 'Canada money' was not negotiable. This, however, is not, as we think, in accordance with the general current of decision. Judge Story says: 'If it be payable in money it is of no consequence in the currency or money of what country it is payable; in the currency or money of England, France, Spain, Holland, Italy, America or any country.' Story on Bills, § 43; *Chitty on Bills*, 153, 158. We cannot, with any propriety, refuse to recognize the right of every country to fix its currency, and it is impossible for any civilized government to exist without some legal standard of money. The only question here is whether a note payable in 'Canada currency' is, or is not, payable in money. It is claimed on the one side and denied on the other that the term 'currency' is confined in our usage to paper which is not money. Upon this ques-

currency payable in order to give the contract the qualities of

tion many authorities have been cited, and we have examined each of them with such other references as we have been able to discover, and are led to the conclusion that there is no foundation for any such doctrine. The only cases in which it has been held that 'currency' does not mean money (except where it has been qualified by some further definition) are certain cases in Iowa and Wisconsin, all of which rest entirely upon decisions where the paper in question was expressly payable in bank notes. None of these decisions support the idea that 'currency' and 'bank notes' are purely convertible [159] terms, and the inference is unwarranted, unless founded on what does not appear in any of those decisions. The decision in *Wright v. Hart*, 44 Pa. 454. that paper payable '*in current funds at Pittsburgh*' was not negotiable, was also rested, without any further discussion, upon the authority of former decisions applicable to paper payable in bank notes.

"In *Dillard v. Evans*, 4 Ark. 175, the term 'common currency of Arkansas' (in which certain paper was made payable) was held designed to point out a different currency from that which was legal, and to refer to depreciated paper, which was then, in fact, the common medium of business. And in *Farwell v. Kennett*, 7 Mo. 595, it was held that the insertion of the words 'payable in currency' indicated a design to change the legal import which would have been found had no such words been inserted. And in *Conwell v. Pumphrey*, 9 Ind. 135, the use of the term 'current funds' was held for the same reason an intentional variation. Subsequent decisions in each of those states have either overruled those cases or so interpreted them as not to make them apply to a case like

the one before this court. Reference will be made presently to these later decisions. With these exceptions the general course of authority is in favor of the negotiability of paper payable in currency or current funds. And these decisions rest upon the ground that those terms mean 'money,' as the necessity of having negotiable paper, payable in money, is fully recognized. There is, however, some difference in the methods of arriving at this result, and it is proper to refer to the cases which have used careless language, as well as to those which have laid down rules cautiously. The fact that the bills of sound banks have been received promiscuously with the legal money of the country has led here, as in England, to remarks from courts, based on the assumption — which is well founded — that persons usually do not prefer one to the other, and they sometimes speak of payment in either as amounting to the same thing. It is only where the question is directly presented of a tender actually made in one or the other that discrimination becomes necessary. Thus in *Lacy v. Holbrook*, 4 Ala. 88, where a bill of exchange, payable 'in funds current in the city of New York,' was held negotiable, it was so held because deemed to be payable in cash, in gold or silver coin, 'or its equivalent.' So in *Bank of Peru v. Farnsworth*, 18 Ill. 563; *Laughlin v. Marshall*, 19 Ill. 390; *Swift v. Whitney*, 20 Ill. 141, and *Hunt v. Devine*, 37 Ill. 137, promissory notes or certificates of deposit, payable in 'currency,' were held to be negotiable on the same ground; but there is reference made to the equivalence of bank notes with other money, which are open to the same hyper-criticism that the court can founded real with conventional

negotiable paper, must be money, not in the popular sense

money. It is to be observed, however, that none of the cases called for any decision as to what would be a legal tender in payment of such notes.

"The decisions of other states are less open to remark. In Arkansas, where the rule is strict in denying negotiability of paper not payable in money (see *Hawkins v. Watkins*, 5 Ark. 481, and *Dillard v. Evans*, 4 Ark. 175), it was held in *Graham v. Adams*, 5 Ark. 261, that a note payable in 'good, current money of the state' was negotiable. The court, after some discussion, remark: 'A [160] good currency, then, in our opinion, means nothing more than a lawful currency, and that is current coin of the United States.' In *Wilburn v. Greer*, 6 Ark. 255, it was held a note payable in 'Arkansas money' was payable in current coin of the United States, and therefore negotiable. In *Burton v. Brooks*, 25 Ark. 215, it was held a note payable in 'greenback currency' was payable in the currency of the United States, and not in national or other bank notes, and that the meaning was the same as if it had been made payable in dollars only. In *Indiana*, in *Drake v. Markle*, 21 Ind. 433, it was held that the term 'currency' meant money, and that a note payable therein was negotiable. This case practically overrules *Conwell v. Pumphrey*, which, as we have seen, was decided on the assumption that parties never use unnecessary words in making negotiable paper. In *Mississippi*, in *Mitchell v. Hewitt*, 5 Sm. & M. 361, the note was payable in 'currency of the state of Mississippi.' The court say that this phrase 'can only mean that which has been declared to be a legal tender, because currency implies lawful money.' Reference was made to an

early Pennsylvania case, *Wharton v. Morris*, 1 Dall. 133, where, upon a similar state of facts, it became necessary to define the words of a note. The court there held that 'lawful' and 'current' were synonymous words, and said the 'lawful current money of Pennsylvania,' that which was declared to be a lawful tender, and consequently became the legal currency of the land, was the money emitted under the authority of congress. In *Lee v. Biddis*, 1 Dall. 188, it was further held (as must necessarily be the case if courts are to construe such language) that evidence could not be received to give any other explanation. In *Minnesota*, in *Butler v. Paine*, 8 Minn. 324, currency was held to be lawful money; and the following definition from *Bouvier's Law Dictionary* was approved: 'The money which passes at a fixed value from hand to hand; money which is authorized by law.' In *Missouri*, where, in an earlier case (*Farwell v. Kennett*, 7 Mo. 595), it had been held, as it had been in *Indiana*, that words of surplusage must have a controlling and repugnant meaning, and that a note payable 'in currency' was not payable in money, it was distinctly held in *Cockrill v. Kirkpatrick*, 9 Mo. 688, that paper payable in 'currency of Missouri' was payable in lawful money of the United States, and that Missouri currency could mean nothing else. In *Tennessee* it was held, in *Searcy v. Vance, Mart. & Y.* 225, that paper payable in 'Tennessee money' was only payable in gold and silver, and that those words would not include bank notes. The same state holds paper payable in current bank notes of Tennessee, or in such notes generally, not to be negotiable. *Kirkpatrick v. McCullough*, 3 Humph.

merely, but money which entitles the holder to legal tender

171, 39 Am. Dec. 158; *Whiteman v. Childress*, 6 Humph. 303; *Simpson v. Moulden*, 3 Cold. 429; *McDowell v. Keller*, 4 Cold. 258. In Louisiana it was held, in *Fry v. Dudley*, 20 La. Ann. 368, that a bill of exchange payable 'in currency' is payable in legal current money, and a person who receives such a bill for collection is not authorized to receive anything else. In *Ehle v. Chittengo Bank*, 24 N. Y. 548, a dividend [161] 'payable in New York state currency,' was held payable in cash. And it was held incompetent to inquire of a cashier what he understood that phrase to mean. The court say: "The term 'New York state currency' must be held to mean what the ordinary signification of those words implies, unless by some general known usage some other technical meaning can be attached to it."

"We have been referred to the case of *Gray v. Worden*, 29 Up. Can. Q. B. 535, as bearing adversely on this point. That case decides that a note payable 'in Canada bills' is not negotiable, even though construed to mean government legal tender notes. It is based upon the decisions made in England and America relative to paper payable in bank notes, and holds the official notes as mere promises to pay money, and not as money. That doctrine would not be admissible under our legal tender laws. But the case is chiefly relied on for some remarks it contains distinguishing the word 'currency' from 'money.' It seems to have been supposed by counsel that this distinction was the same as between bills and money; or, in other words, that currency and bills are synonymous. This is an evident misapprehension. The language used is this: 'There is a difference between money and currency.

In *Landsdowne v. Landsdowne*, 2 Bligh, 78, Lord Redesdale said, in 1820: "There is no lawful money of Ireland. It is merely conventional. There is neither gold nor silver coin of legal currency; nothing but copper. There is no such thing as Irish money; it is Irish currency." See, also, *Kearney v. King*, 2 B. & Ald. 301; *Sprowle v. Legge*, 1 B. & C. 16. The distinction which the Canada court points out is not one between paper and coin, but between the values of money in different countries. In the cases referred to it appears that the difference between the Irish pound sterling and the English pound sterling was such that twelve English pounds were equivalent to thirteen Irish pounds. In like manner, a Canadian pound represents only four-fifths of an English pound, and the old New York pound was but two dollars and a half; the New York shilling being twelve and a half cents, the Canadian shilling twenty cents, and the British shilling taken nominally at about twenty-five cents. The pound in Jamaica is five-sevenths of the English pound. *Scott v. Bevan*, 2 B. & Ad. 78. Judge Story has collected some learning on this subject in *Conflict of Laws*, §§ 308-313. See, also, *Taylor v. Booth*, 1 C. & P. 286; *Cope v. Cope*, 15 Sim. 118. In *Macrae v. Goodman*, 10 Jur. 555, 5 Moore, P. C. 315, a similar consideration came up in regard to 'Holland currency,' where that term was used in a contract made in Guiana, the colonial guilder being different from the Dutch guilder. In *Landsdowne v. Landsdowne* the question was whether, under a marriage settlement, a rent charge on lands in Ireland was payable in English currency, that is to say, whether the annuity of 3,000*l.* was to be in English pounds sterling or at a less rate

currency.¹ Notes payable in current bank notes are [162] not negotiable paper.² In an action on such a note or other form of agreement, the plaintiff must prove the value of such bank paper; otherwise, it has been held, he is not entitled to

The currencies of Ireland and England have, it is said, been equalized since that decision. But there was not then, as remarked by Lord Redesdale, any Irish coinage, and the difference was merely one of computation."

In *Hogue v. Williamson*, 85 Tex. 553, 22 S. W. Rep. 580, 34 Am. St. 823, 20 L. R. A. 481, the cases of *Black v. Ward* and *Thompson v. Sloan*, *supra*, are considered; it is said the latter was decided in 1840, and it was to be inferred that at that time the dollar was not a denomination of the lawful money of Canada, and that it was also to be inferred that when the Michigan case arose this had been changed, and the denomination of Canada money corresponded with that of the United States. Upon this theory these cases may be reconciled.

¹ *Black v. Ward*, *supra*.

² *Whiteman v. Childress*, 6 Humph. 303; *Looney v. Pinckston*, 1 Overt. 384; *Childress v. Stuart*, Peck, 276; *Gamble v. Hatton*, *id.* 130; *Lawrence v. Dougherty*, 5 Yerg. 435; *Kirkpatrick v. McCullough*, 3 Humph. 171, 39 Am. Dec. 158; *Hopson v. Fountain*, 5 Humph. 140; *Crawford's Neg. Inst. Law* (2d ed.), p. 9.

In the last case suit was brought on a note payable "in current bank money of the state of Mississippi." On the trial the jury were instructed that this did not entitle the holder to the numbers of dollars specified in it, with interest; that the word *money* had a technical legal meaning, signifying dollars and cents of constitutional currency, to wit, gold and silver. But on error this was held wrong. Reese, J., said: "We cannot

consent to the correctness of this definition of the word *money*. It is a generic term, embracing, according to the subject-matter of the discourse or writing, every species of coin or currency — guilders, guineas, Napoleons, eagles and bank notes as well as dollars. But if its meaning were, as the circuit court holds, when standing alone, *per se*, still, like all other words, its meaning will be modified by accompanying words or phrases. Here the accompanying and qualifying words are current *bank money* of the state of Mississippi. *Bank money* means that species of money called *bank notes*; and of that species the parties in this case meant that sort or variety called Mississippi bank notes. They may not be the very best, but, at all events, they are those about which the parties contracted. The meaning and intention of the parties on the face of the instrument it is not difficult to perceive. Whether, on the grounds of policy, it would originally have been better, in the construction of all such instruments, to have held the word *dollar* to have referred, not to the numerical amount of the bank notes, but to the standard of value, it is now useless to inquire. The principle in cases where it can apply has been long and well established. Society conforms to it in their contracts, and it must be adhered to. The measure of damages in this case is the value of the current Mississippi bank notes when the covenant was payable." *Hixon v. Hixon*, 7 Humph. 33. In *Baker v. Jordan*, 5 *id.* 85, in covenant, there was a plea of covenants performed; no proof was introduced except a

[163] judgment for any sum.¹ And it has been held, if payable in "current bank notes," without any other description, they would be regarded such as are convertible into specie at the counter where they are issued and pass at par in the ordi-

note for dollars payable in current bank notes. It was held that the jury was warranted in giving a verdict for the number of dollars called for.

Ward v. Latimer, 12 Tex. 438: Action on two notes payable in *cash notes*. The court charged the jury that if "cash notes at the time the notes sued on were due were the circulating medium of the country, and were generally the medium of trade, they thereby took the place of money and were to be considered its equivalent, provided the same value was attached to them by the community generally. Held, not error. The proper criterion of the value of "cash notes" is not the price at which they were purchasable at the time in cash, but the value at which they were used in the ordinary and general transactions of trade by the community.

A draft payable in Arkansas money, held not a bill of exchange. Hawkins v. Watkins, 5 Ark. 481. Nor will debt lie on a note payable in North Carolina bank notes. Derberry v. Darnell, 5 Yerg. 451. Bank notes are treated as depreciated currency. Gamble v. Hatton, Peck, 130; Kirkpatrick v. McCullough, 3 Humph. 171, 39 Am. Dec. 158. So current bank notes.

A note payable in current bankable funds, though given during the ascendancy of the confederacy for confederate money, held good for its face value in United States currency. Taylor v. Turley, 33 Md. 500. And so in Williams v. Moseley, 2 Fla. 304, it was held that a note payable in "cur-

rent Florida money" is payable in good funds.

A note payable in United States six per cent. interest-bearing bonds is not a promissory note. Easton v. Hyde, 13 Minn. 90. Nor is a note payable in commonwealth bank notes. Mitchell v. Waring, 4 J. J. Marsh. 233.

The holder of a check payable in *current funds* may demand current money par funds, money circulating without any discount, and cannot be compelled to take depreciated bank notes. Mare v. Kupfer, 34 Ill. 286; Galena Ins. Co. v. Kupfer, 28 Ill. 332, 81 Am. Dec. 284; Klauber v. Biggerstaff, 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. Rep. 357.

A certificate of deposit payable in "currency" is not negotiable. Huse v. Hamblin, 29 Iowa, 501, 4 Am. Rep. 244. A certificate of deposit payable in "current funds" is negotiable. The words quoted, when used in commercial transactions, as the expression of the medium of payment, mean current money, or funds which are current by law as money. Hatch v. First Nat. Bank, 94 Me. 348, 47 Atl. Rep. 908; Laird v. State, 61 Md. 311; Bull v. Bank of Kasson, 123 U. S. 105, 8 Sup. Ct. Rep. 62; Telford v. Patton, 144 Ill. 611, 33 N. E. Rep. 1119; Citizens' Nat. Bank v. Brown, 45 Ohio St. 39, 11 N. E. Rep. 799, 4 Am. St. 526. See 1 Dan. on Neg. Inst. (5th ed.) § 56. In Chicago F. & M. Ins. Co. v. Keuron, 27 Ill. 501, "*Illinois currency*" received the same construction. In Marine Bank v. Chandler, 27 id. 325, "current bank

¹ McKiel v. Porter, 4 Ark. 581; Elliott v. Chilton, 5 id. 181.

nary transactions of the country.¹ A note expressed to be payable in Mexican silver dollars is negotiable; the exchange into current coin is upon proof of their relative value.² But it is otherwise where a note is payable, principal and interest, in New York exchange, which is property.³ In an action on a note made in Alabama and payable in dollars at the end of two years from November 1, 1861, there then being very little, if any, confederate currency in circulation there, it was adjudged competent to look to the surrounding circumstances as well as the facts of the transaction and the understanding of the parties, as shown by parol, to ascertain what dollars were meant. These considerations induced the determination that the parties intended to pay and receive such currency as should be passing currently as money in ordinary transactions at the place of payment when the note should become due.⁴

§ 560. Re-exchange and damages on bills dishonored. A [164] bill of exchange, as its name imports, is generally to exchange a debt or credit due in one place or country for a debt or credit due in another place or country. Therefore, the drawers and indorsers are respectively liable thereon to the holder for all damages sustained by him in consequence of its dishonor.⁵ Among them is to be included a sum suffi-

notes" were given the same meaning. In *Marine & F. Ins. Co. v. Tincher*, 30 id. 399, and in *Swift v. Whitney*, 20 id. 144, held that currency is the same. In *Moore v. Morris*, id. 258, that a good current money is the same. *Trowbridge v. Seaman*, 21 Ill 101. *McCormick v. Trotter*, 10 S. & R. 94, holds that a note payable "in notes of the chartered banks of Pennsylvania" is not a negotiable note. *Confederate Note Case*, 19 Wall. 548, in "dollars," in a transaction occurring in insurgent states during the war, there was a latent ambiguity. Parol evidence might show to what currency it referred. A general deposit of the bills of the bank receiving it must be repaid at the nominal amount, although current at only one half their amount at the time of the deposit. *Bank of*

Ky. v. Wister, 2 Pet. 318. *State v. Cassel*, 2 Har. & G. 407, bank notes considered as money, and larceny graduated by their nominal value.

¹Id.: *Pierson v. Wallace*, 7 Ark. 282; *Bizzell v. Brewer*, 9 id. 58. See *Bush v. Canfield*, 2 Conn. 485.

It was held in *Edwards v. Morris*, 1 Ohio, 239, that an obligation to pay in the notes of a specified bank must be paid in the notes of that bank or their numerical value in money. Their price in money cannot be substituted.

²*Hogue v. Williamson*, 85 Tex. 553, 22 S. W. Rep. 580, 34 Am. St. 823, 20 L. R. A. 481.

³*Chandler v. Calvert*, 87 Mo. App. 368.

⁴*Smith v. Norman*, 3 Tenn. Cas. 419 (1875).

⁵*Edwards on Bills*, *730.

cient to cover the premium necessary to be paid in re-exchange,¹ for the engagement of the drawer and indorser of every bill is that it shall be paid at the proper time and place; and, if it be not so paid, the holder is entitled to indemnity for the loss arising from this breach of contract. The general law merchant of Europe authorizes the holder of a protested bill immediately to redraw from the place where the bill was payable, on the drawer or indorser, in order to reimburse himself for the principal of the bill protested, the contingent expenses attending it, and the new exchange which he pays.² His indemnity requires him to draw for such an amount as will make good the face of the bill, together with interest from the time it ought to have been paid, and the necessary charges of protest, postage, and brokers' commission, and the current rate of exchange at the place where the bill was to be demanded or payable, or the place where it was drawn or negotiated.³

Hence re-exchange is the expense incurred by the bill being dishonored in a foreign country in which it was payable, and returned to the country in which it was made or indorsed, and there taken up. The amount depends on the course of the exchange between the countries through which the bill has been negotiated. It is not necessary for the plaintiff to show that he has paid the re-exchange; it suffices if he is liable to pay it.⁴ Where a re-exchange bill is drawn, the payment of it fulfills the drawer's or indorser's engagement of indemnity; if not, the holder may sue on the original bill, and will be entitled to recover what the drawer or indorser ought to have paid; that is to say, the amount of the re-exchange bill. This is [165] the amount whether such a bill be in fact drawn or not.⁵

¹ Edwards on Bills, *730.

² Kent's Com. 115.

³ Id.

If a bank owning and holding a foreign bill remits it for collection to a correspondent abroad, and it is protested for non-payment, the latter cannot recover damages against the former on account of the protest, though the bank had failed before the protest was made and was then

indebted to its correspondent. *Hambro v. Casey*, 110 U. S. 216, 3 Sup. Ct. Rep. 583.

⁴ Chitty on Bills, 684.

⁵ *Suse v. Pompe*, 8 C. B. (N. S.) 537. In this case it is explained that the course of business as to the sale and purchase of foreign bills is as follows: When a London merchant has to receive money from a correspondent abroad, he instructs his

§ 561. Same subject. The doctrine of re-exchange [166] is founded upon equitable principles. A bill is drawn, for ex-

bill-broker to sell an amount of florins (or whatever is the current coin of the country on which the bills are to be drawn) sufficient at the current rate of exchange to raise the amount in sterling money which he has to receive. The rate of exchange is constantly varying; but usually the fluctuations do not amount to much. As soon as the seller (the merchant) knows at what rate of exchange the bills have been sold, he draws them in florins or other foreign money; and then the bills simply entitle the buyer of them to receive so many florins (or as the case may be), and they contain no allusion whatever to the amount of sterling money paid for them. Inasmuch, however, as there is no rate of exchange for foreign bills at Liverpool, or other places in the interior, and as, by reason of the fluctuations in the rate of exchange, merchants at these places do not know at what rate their bills will be sold in London, they are unable to draw them in foreign coin, it is usual to draw such bills in sterling money, but "payable at the exchange as per indorsement." The London correspondent, when he has sold the bill, and knows the amount of foreign money which the buyer is to have, indorses them payable at the agreed rate of exchange; and then the bills are practically turned into bills payable in foreign money. The action was brought by the indorsee against the indorser of two drafts similar in form, one of which was as follows:

"Liverpool, 21 Feb. 1859. For £750 stg. Four months after date pay this, our first of exchange (second and third not paid), to the order of ourselves, the sum of seven hundred and fifty pounds sterling, at the ex-

change as per indorsement, value in ourselves, and place to account as per advice from

"E. BUSCH & Co.

"To Carl Von Thornton, Vienna."
(Second and third of the same date and tenor.)

The following is a copy of the memoranda and indorsements on the second of the set:

"In need with Messrs. F. H. Hametz & Co. First for acceptance with M. G. Molle, 580 Jaquerielle. Pay Messrs. Wilh. Bunge & Co. or order, value in account.

"E. BUSCH & Co.

"Pay Messrs. Suse & Sebeth, or order, at the exchange of eleven guilders, five cents, new Austrian currency, per pound sterling, value of the same. London, 22d March, 1859.

"Pay to the order of Messrs. Kendler & Co. value in account.

"SUSE & SEBETH."

The bills were accepted but protested for non-payment. The particulars of the plaintiffs' claim under the money counts were for sums paid for the draft at its inception and protest charges, as follows:

"Messrs. Wilhelm, Bunge & Co. :
£750 0 0 } Bought 22d March.
£490 11 0 }

	£	s.	d.
Paid March 25th, 1859	1,240	11	0
Interest to June, 5 per cent.....	16	16	5
Brokerage, 1 per cent.		15	10
Protest charges fl. 3.82			
And			3.82
	Fl. 7.64		
	At fl. 14.5		
Postages.....		10	6
		5	4
	1,258 18 1 "		

The defendants insisted that they

ample, in this country, payable in Paris, France. The payee gives a premium for it under the expectation of receiving the amount at the time and place where the bill is made payable. It is protested for non-payment. Now, the payee and [167]

were only liable for the value in sterling money in florins, 13,708.7c, on the day the bills became due, with interest and expenses, which at the then rate of exchange would be 952l. 12s. 9d., and this latter sum having been paid into court, the amount in dispute between the parties was 306l. 5s. 4d. The plaintiffs' claim was that the holder had the option of demanding back the sum they paid for the purchase of the bills, or of having recourse to the *recambio* account, whichever they should find most to their advantage.

Byles, J.: "The main question in this case is this: When a bill drawn and indorsed in England, and payable abroad, is dishonored by the acceptor's non-payment, what is the extent of the indorser's liability to the holder? The defendants contend that the holder is entitled to the amount of the re-exchange, and to neither more nor less. This amount they have paid into court. The plaintiffs, on the other hand, contend that he (the holder) is entitled, at his option, either to the amount that he gave for the bill in England, or to the re-exchange. The solution of this question depends on the contract of the indorser. That contract is an engagement by the indorser that, if the drawee shall not at maturity pay the bill, he (the indorser) will, on due notice, pay the holder the sum which the drawee ought to have paid, together with such damages as the law prescribes or allows as an indemnity. Such also is the indorser's contract as understood in America. Story on Bills, 107. Apply this contract to the present case. The holders are entitled to receive a

certain number of Austrian florins in Vienna on the day when the bill is at maturity. They have, in effect, bought from the indorsers so many Austrian florins, to be received in Vienna on that day. It should seem to follow, that, on non-payment by the drawee, the holders are entitled, as against the indorsers, to so much English money as would have enabled them in Vienna, on that day, to purchase as many Austrian florins as they ought to have received from the drawee, and further, to the expenses necessary to obtain them. The most obvious and direct mode of obtaining that English money is to draw in Vienna on the indorsers in England a bill at sight for as much English money as will purchase the required number of Austrian florins at the actual rate of exchange on the day of dishonor, and to include in the amount of that bill the interest and necessary expenses of the transaction. The whole amount is called in law Latin '*recambium*,' in Italian '*recambio*,' in French '*rechange*,' and in English *re-exchange*. The bill itself is called in French '*retraito*.' This bill for re-exchange being negotiated at Vienna puts into the pocket of the holders at the proper time and place the exact sum which they ought to have received from the drawee . . . If the indorser were held liable for the amount which the indorsee gave for the bill, when the amount is more than the indorsee ought to have paid, the contract of the indorser would be extended; he would be held liable, not merely for the damages sustained by the breach of the contract, but for the damages sustained by the making

holder is entitled to the amount of the bill in Paris. The same sum paid in this country, including costs of protest and other charges, is not an indemnity. The holder can only be remunerated by paying him, at Paris, the principal, with costs and charges; or by paying him in this country those sums, together with the difference in value between the whole

of the contract. For a portion of these damages the holder must have sustained, though the contract had been performed by the drawee paying the bill."

The statement and illustration of the nature of the transaction which gives rise to the question of exchange and re-exchange by counsel, in *De Tastet v. Baring*, 11 East, 265, has been often quoted as apt and comprehensive: "A merchant in *London* draws on his debtor in *Lisbon* a bill in favor of another for so much in the currency of *Portugal*, for which he receives its corresponding value at the time in *English* currency; and that corresponding value fluctuates from time to time, according to the greater or less demand there may be in the *London* market for bills on *Lisbon*, and the facilities of obtaining them: the difference of that value constitutes the rate of exchange on *Lisbon*. The like circumstances and considerations take place at *Lisbon*, and constitute in like manner the rate of exchange on *London*. When the holder, therefore, of a *London* bill drawn on *Lisbon* is refused payment of it in *Lisbon*, the actual loss which he sustained is not the identical sum which he gave for the bill in *London*, but the amount of its contents if paid at *Lisbon*, where it was due, and the sum that it will cost him to replace the amount upon the spot by a bill upon *London*, which he is entitled to draw upon the persons there who are liable to him upon the former bill. That cost, whatever it may be, constitutes his

actual loss and the charge for re-exchange. And it is quite immaterial whether he in fact redraws such a bill on *London* and raises the money upon it in the *Lisbon* market; his loss by the dishonor of the *London* bill is exactly the same, and cannot depend on the circumstance whether he repays himself immediately by redrawing for the amount of the former bill, with the addition of the charges upon it, including the amount of re-exchange if unfavorable to this country at the time; or whether he wait till a future settlement of accounts with the party who is liable to him on the first bill here; but that party is at all events liable to him for the difference: for as soon as the bill was dishonored the holder was entitled to redraw. That, therefore, is the period to look to. It ought not to depend on the rise or fall of the bill market, or exchange afterwards; for, as he could not charge the increased difference by his own delay in waiting till the exchange grew more unfavorable to *England* before he redrew, so neither could the party here fairly insist on having the advantage if the exchange happened to be more favorable when the bill was actually drawn. Where re-exchange has been recovered on the dishonor of a foreign bill, it has not been usual to prove that in fact another bill was redrawn."

See *Bank of United States v. United States*, 2 How. 711; *Crawford v. Branch Bank*, 6 Ala. 15; *Mellish v. Simeon*, 2 H. Bl. 378; also, *Grimshaw v. Bender*, 6 Mass. 157.

sum at Paris and the same amount in this country. And this difference in value is ascertained by the premium on a bill drawn in Paris and payable in this country, which would sell at Paris for the sum claimed.¹ The exchange is sometimes direct, at other times circuitous, depending in some degree upon the commercial intercourse between the two countries where the bill is drawn and where it is made payable. Having engaged, as drawer or indorser of the bill, that it should be paid at the place on which it is drawn, he is bound to indemnify the holder for the loss sustained by him in consequence of the non-payment.² He must pay re-exchange according to the course of exchange between the countries through which the bill was actually negotiated.³ It has been said that the drawer ought not to be liable for any but the direct re-exchange between the place of drawing and the place of payment, unless he has given permission to negotiate the bill in other places. But such permission is implied by the drawer issuing a negotiable instrument, since the holder for the time is entitled to indorse it to any person he pleases; and, on the other hand, the last holder being entitled, in case of its dishonor, to redraw on any previous indorser in order to make good his recourse against the indorser, who again has a right to do the same with any prior indorser, the drawer, as he is liable for all the consequences of dishonor, must be liable for the accumulated re-exchange arising on the [169] successive redrafts, because that results from the negotiability of the document which he has issued.⁴

The acceptor by his acceptance binds himself to pay the bill, and as to its contents his undertaking is the same as though he had made his note for the specified sum. He is not bound by his acceptance beyond that, and is, therefore, not liable to the holder for re-exchange. The authorities are not numerous.⁵ Gibson, C. J., thought it a little remarkable that in so commercial a country as America the point had not been raised before; and not less so that it was first decided in England so late as

¹ *Bank of United States v. United States*, 2 How. 711.

² *Edwards on Bills*, *734; 2 *Daniel on Neg. Inst.*, p. 396.

³ *Mellish v. Simeon*, 2 H. Bl. 378.

⁴ *Thomson on Bills*, 445. But see *Story on Bills*, § 402.

⁵ *Watt v. Riddle*, 8 Watts, 545; *Trammell v. Hudmon*, 56 Ala. 235.

1810, and with so little remark as to the principle of the decision. It came up on a motion to direct that the master allow the expense of re-exchange in a judgment against the defendant as an acceptor; to which the court barely answered that it could not be done against one who charged himself by his acceptance with no more than a liability to pay according to the law of his country; and that if he do not, the holder has his remedy against the drawer.¹ It has, however, been supposed, in view of certain decisions, that the acceptor is not exempt from the payment of re-exchange, when sued by the drawer after the draft has been returned protested to him and he has [170] paid such damages.² If the acceptor by force of his ac-

¹ *Napier v. Schneider*, 12 East, 420. See *Woolsey v. Crawford*, 2 Camp. 445; *Bowen v. Stoddard*, 10 Met. 375; *Newman v. Goza*, 2 La. Ann. 642; *Hanrick v. Farmers' Bank*, 8 Port. 539; *Dawson v. Morgan*, 9 B. & C. 618; *Van Arsdale v. Boardman*, 3 How. Pr. 60; *King v. Phillips*, Pet. C. C. 350; *Armstrong v. Brown*, 1 Wash. C. C. 43, 321; *Watt v. Riddle*, 8 Watts, 545; *Bain v. Ackworth*, 1 S. C. Const. 107; *Sibely v. Tutt*, 1 McMull. Eq. 320; *Edwards on Bills*, 733; *Chitty on Bills*, *686.

In *Woosley v. Crawford*, 2 Camp. 445, an action by the payee against the acceptor, it was contended on behalf of the plaintiff that the defendant was answerable for all the damage that had been suffered by the plaintiff from the bill being dishonored. Lord Ellenborough answered: "You may as well state that by reason of the bill not being paid the plaintiff was obliged to raise money by mortgage. You must proceed for re-exchange against the drawer. He undertakes that the bill shall be paid, or that he will indemnify the holder against the consequences. The acceptor's contract cannot be carried further than to pay the sum specified in the bill, and interest according to the legal rate of interest where it is due."

² *Bayley on Bills*, p. 656, note: "It seems reasonable that the acceptor should be liable to all parties where he has effects, and to all excepting the drawer where he has not."

Mr. Parsons (1 Notes & B. 650) says: "The acceptor, it is said, is not liable for re-exchange, as he is bound only for the sum he promises to pay with legal interest. But for this he is bound to the holder; and also to the drawer if he pays the bill. And if the default of the acceptor compels the drawer to pay this bill, and these damages with it, it would seem on general principles that the drawer's claim on the acceptor should cover the whole amount."

Mr. Daniel (Neg. Inst., § 1450, 5th ed.) says: "Our view is this: If the drawee authorizes the bill to be drawn (which is a virtual acceptance as to the drawer who draws the bill, or the holder who takes it on the faith of the authority), or if there is an acceptance when the bill is presented for acceptance, the acceptor is bound for all damages, including re-exchange, which may result to the drawer immediately from the dishonor of the bill. If the holder sues the drawer and recovers re-exchange, the acceptor should reimburse him, as his own default occasioned the liability. If the holder sues

ceptance is liable to the drawer after the latter has been compelled to pay re-exchange, to avoid circuity he ought to be liable directly to the holder, who is entitled to recourse for it; but no case has yet occurred in which a claim of this kind has been sustained against the acceptor except in behalf of the drawer. And in the principal cases in which the drawer has been allowed to recover re-exchange from the acceptor, the obligation to pay such re-exchange has grown out of the special facts of the case,¹ as where money has been advanced for the acceptor at the place where the bills were drawn, and he had authorized his creditor to there draw for his reimbursement. On such facts, the debtor, as such, is under a legal obligation to replace the money at the place where it was advanced; [171] and any necessary loss on bills which he directs to be drawn, on account of the difference of exchange, is justly chargeable to him.² The latest decisions in England expressly affirm the liability of an acceptor to the drawer for re-exchange, or fixed damages in lieu thereof, as the natural and proximate consequence of the breach of his contract as acceptor.³ This liability

drawer and acceptor together, the acceptor would likewise be liable, because the drawer, on paying the amount, would immediately have a claim over against him. And even if the acceptor was sued alone, he should be held bound for the re-exchange. We can see no philosophy in the cases which hold him liable only when he has specially instructed the drawer to draw for a separate valuable consideration. His liability arises out of his contract to pay the bill. A precedent debt is a valuable consideration; and if he accepts to pay the debt in a particular way, he should bear the consequential damages which his default occasions: and as Thomson has well said: 'If the drawer or indorser is liable to such damage to the holder, there seems to be no reason why the acceptor, who is more immediately bound to him, should not also be liable for this direct consequence of his

breach of contract.'" Thomson on Bills, 447.

¹ *Bowen v. Stoddard*, 10 Met. 375.

² *Lanusse v. Barker*, 3 Wheat. 101; *Consequa v. Fanning*, 3 Johns. Ch. 587; *Coolidge v. Poor*, 15 Mass. 427; *Boyle v. Zacharie*, 6 Pet. 635; *Riggs v. Lindsay*, 7 Cranch, 500; *Francis v. Rucker*, 2 Amb. 672; *Walker v. Hamilton*, 1 De G., F. & J. 602.

³ *In re General South American Co.*, 7 Ch. Div. 637; *In re Gillespie*, 16 Q. B. Div. 702, 18 id. 286; *Prehn v. Royal Bank of England*, L. R. 5 Ex. 92; *Walker v. Hamilton*, 1 De G., F. & J. 602.

In *Prehn v. Royal Bank*, *supra*, the defendants, bankers at Liverpool, undertook to accept the drafts of plaintiffs, merchants at Alexandria and Liverpool, the plaintiffs undertaking to put the defendants in funds to meet the bills at maturity, and the defendants receiving one-half per cent. for the accommodation.

is not affected by the bills of exchange act.¹ It is limited, however, to the amount due on the bill at the time it is dishonored.²

Bills were accordingly accepted by the defendants, and the plaintiffs duly provided the defendants with funds exceeding the amount of the acceptances. Before the bills became due the defendants' bank had stopped and they gave notice to the plaintiffs that they would be unable to meet the bills. The plaintiffs arranged with another house in Liverpool to take up the bills, paying two and one-half per cent. commission, and they were also obliged to pay to the bankers the expenses of protesting the bills at Liverpool and Alexandria; and had also to incur expenses in telegraphic communications between those places. The decision was that the acceptors of the bills were liable for the commission and the notarial and telegraphic expenses which the drawers had incurred.

In *Walker v. Hamilton, supra*, the bills were drawn by a factor in Louisiana on his principals in England, by their direction, to cover his advances and commissions; they were protested after acceptance, and the drawer had taken them up and paid 10l. per cent. damages according to the laws of Louisiana. The Lord Chancellor (Campbell) said: "I am clearly of opinion that Mr. Hamilton had a right to prove for this 10l. per cent. under the deed. It would be a great injustice if he had not. He is employed by (the acceptors) to buy goods for them upon commission, to send these goods to Liverpool, in the United Kingdom, and he is desired by them to draw bills upon them for the price of the goods and commissions, which they undertake to accept and pay. He does buy the

goods; he does draw the bills. The bills are accepted, and when due are dishonored; and then what is the situation of Mr. Hamilton? He is sued and obliged to pay the amount of 10l. per cent. in consequence of a law subsisting in Louisiana. As the case was ingeniously put by Mr. Robinson, they asked him to be their surety, and he became their surety by drawing the bills, and in that character was called on to pay. But a surety has a right against his principals to be recouped what he has paid as surety at their request. Therefore, according to law and justice, this demand ought to be satisfied, and upon this general principle, that it is a damage naturally flowing from the breach of the contract. Where there is a contract, the party who breaks that contract is liable for what may be considered the natural and proximate consequence of that breach of contract. Here was a promise to pay the bills when they became due; that promise was broken; the payment of the 10l. per cent. was the natural and direct consequence of that breach of contract, and therefore the party to whom that promise was made, and who suffered from that breach of the promise, is very ill-used if he has not a right to be indemnified in respect of the loss which he has thus sustained.

"This reasoning, I think, applies generally to the drawer of a bill in a foreign country, or an acceptor in another foreign country, where there may be a re-exchange, or some law giving a fixed sum in payment of exchange; because what is paid under that law, in lieu of re-exchange, is a

¹ In *re Gillespie*, 16 Q. B. Div. 702.

² In *re Gillespie*, 19 Q. B. Div. 286. See next section and notes.

§ 562. When re-exchange or damages not recoverable.

• Re-exchange is not allowed on promissory notes. Where, [172] however, the maker of a note or other debtor has failed to pay money in the country where it was payable, and is sued on his

necessary consequence of the breach of the contract on the part of the acceptor of the bill; and I have no doubt that in an action at law in an English court it might be recovered on setting out the acceptance, the dishonor, and *per quod*, that the plaintiff was compelled to pay the 10% per cent. to the holder of the bill. That seems to me to be the correct principle, and we have the authority of Pothier (Cont. d' Exchange, par. Dapin. pl. 117) for its being the law of France, and it has been, I believe, since included in the commercial code of the Code Napoleon (Code de Commerce, liv. 1. tit. 8, § 13). We have the authority of Story, the great jurist (Story on Bills of Exchange, § 398), who gives countenance to the doctrine; and we have that which Mr. Daniel was unable to cope with, viz.: the express authority of an English court of justice in the case of Francis v. Rucker, 2 Amb. 672, which is expressly in point with the present. It was a case that was well considered by Lord Camden, who so felt the great importance of it that in order to settle the law solemnly and finally, he was not satisfied to do what I believe he might have done in bankruptcy, but he directed a bill to be filed so that his opinion might be reviewed, and the opinion of the House of Lords, if necessary, taken upon it. His decision, however, was not appealed against. It has, I believe, been considered law ever since, and is, in my opinion, consistent with reason and good sense.

"If there had been subsequent decisions which were at variance with it, we might have been bound by the more recent authorities; but

notwithstanding all the diligence which has been exercised by Mr. Daniel and his learned junior, they have brought no single authority that conflicts with that case; because in *Ex parte Moore*, 2 Bro. Ch. 597, the proof was allowed; some observations were made by Lord Thurlow respecting *Francis v. Rucker*, but he acquiesced in it, and the proof was allowed. In *Napier v. Schneider*, 12 East, 420, a gentleman at the bar asked for a reference to the master as to the amount that was due on a bill of exchange and for re-exchange (not 10% or 20% per cent. or any given percentage), and the court held that the master was not competent to enter into all this calculation. But if it had been a fixed sum of 10% per cent. the master would have had no difficulty; and I am inclined to believe that in such a case the counsel who made the application would have succeeded instead of failing. The case of *Woolsey v. Crawford*, 2 Camp. 445, is at most a *nisi prius* case, and the point there decided only applied to the re-exchange, not to a sum which was liquidated, which could have been easily ascertained; and as to this *nisi prius* case, if it had been expressly in point, I should have said that it could not at all outweigh the solemn decision of *Francis v. Rucker*. But the case before us is distinguishable from it, because it is only there said that a claim in respect to re-exchange could not be admitted, and here we are not upon re-exchange, but upon a liquidated sum of 10% per cent. I do not, therefore, find any authority at all to conflict with the case of *Francis v.*

contract in another country, he is probably liable not only to the par of exchange in the money of the forum, but to damages equal to the rate of exchange for obliging the creditor to receive payment at the place of recovery instead of at the place appointed in the contract for payment.¹ This liability does not depend on any rule applicable exclusively to commercial paper. Promissory notes may be drawn with an express provision that they are to be paid with exchange on a certain place.²

Where, after protest, a bill is paid by the acceptor in the country in which, according to its tenor, it was payable no exchange can be claimed by the holder against a prior indorser or drawer. It is only where the bill is returned home, and there taken up, that this allowance can be demanded. For the injury occasioned by the delay of payment the law deems the interest an equivalent.³ And where damages are given in lieu of re-exchange, as by the commercial usage of Massachusetts, and as is now the case by express provisions of the statutes of many states, the same principle of exemption applies.⁴ The payment of one of a set of bills is a payment of all, and a waiver of damages which may have accrued on the

Rucker, and upon that I think we may safely decide in favor of this demand."

Lord Justice Turner said: "I say nothing as to how this case would stand as between a holder and the acceptors, because that is not the case before us; but as between the drawer and the acceptor, in my opinion, there is a liability in the acceptors which would have been provable under a bankruptcy. Therefore the case of *Francis v. Rucker* is distinct upon this point; and I do not think that that authority, after having examined the petition which was presented in the bankruptcy, is confined at all to the special circumstances of the particular case. Whatever the effect of the case at law may be, as between the holder and the acceptor, they do not, in my judgment, affect the case

as between the drawer and the acceptor, and in my opinion, therefore, our answer must be in the affirmative."

¹*Grant v. Healey*, 3 Sumn. 523; *Scott v. Bevan*, 2 B. & Ad. 98; *Cash v. Kennion*, 11 Ves. 314; *Smith v. Shaw*, 2 Wash. C. C. 167; *Bank of Missouri v. Wright*, 10 Mo. 719; *Lee v. Wilcocks*, 5 S. & R. 48; 1 *Parsons on N. & B.* 664; *Edwards on Bills*, *726.

²*Pollard v. Herries*, 3 B. & P. 335; *Grutacap v. Woulluisse*, 2 McLean, 581; *Smith v. Kendall*, 9 Mich. 241, 80 Am. Dec. 83; *Leggett v. Jones*, 10 Wis. 34. But see *Atkinson v. Manks*, 1 Cow. 707.

³*Bangor Bank v. Hook*, 5 Me. 174; *Porter v. Ingraham*, 10 Mass. 88; *Bayley on Bills*, 387.

⁴*Bangor Bank v. Hook*, 5 Me. 174; *Page v. Warner*, 4 Cal. 395.

prior protest of another.¹ If the bill is, on presenta- [174] tion, paid in part and protested for the residue, the re-exchange is confined to the unpaid part, or the damage is apportioned thereto.² And if paid in part by the acceptor after protest, the damages or claim for re-exchange is discharged *pro tanto*. The damages are incident to the principal. If that be paid, or as far as paid at the place appointed, the incident or accretion which would otherwise attach to it ceases.³ Collection of the bills from the acceptor by execution has the same effect as payment by him. Nor will this effect be avoided by the fact that the former action against him was not in the name of the plaintiff if it was for his benefit.⁴

These damages are allowed only to the parties on whose account and risk the remittance is made. Parties receiving a bill as conditional payment of an antecedent debt, and not in satisfaction of it, are not entitled to damages.⁵ If bills are

¹ Id.

² In re Gillespie, 18 Q. B. Div. 286; Laing v. Barclay, 3 Stark. 38.

³ Bangor Bank v. Hook, 5 Me. 174.

⁴ Warren v. Coombs, 20 Me. 139.

In New York, by the former rule of damages on bills, the holder of a bill on London returned protested for non-payment was entitled to recover from the drawer or indorser there the contents of the bill at the *rate of exchange* at the time of the notice of dishonor, with twenty per cent. damages and interest. Graves v. Dash, 12 Johns. 17 (reversing Hendricks v. Franklin, 4 id. 119); Denton v. Henderson, 13 id. 322. And the same rule was applied when the protest was for non-acceptance. United States v. Barker, 1 Paine, 156. But in Pennsylvania the recovery on non-acceptance was only of interest from the time of protest. Tian v. Le Gaux, 1 Yeates, 204; Morris v. Tarin, 1 Dall. 147, 1 Am. Dec. 233.

In Hargous v. Labens, 3 Sandf. 213 the bill in question was drawn in New York on parties in France, and after acceptance was protested

for non-payment. Notwithstanding a subsequent part payment by the acceptor, it was held that the damages by the law of New York on the whole bill were recoverable from the drawers. The holder's right to recover from them, it was held, became perfect on the return of the draft, and a subsequent part payment had no influence in reducing that fixed and determinate liability. After being so returned, if the bill be sent back to the place of payment, and a partial payment thereon is then made by the acceptor, a tender of the balance due upon the face of the bill is defective if accompanied by the condition that the bill be delivered up without payment or offer to pay the damages. The holders are entitled to retain the bill to enforce their claims for damages against the proper party. He is entitled to his damages on non-payment, irrespective of the place where he may subsequently receive entire or partial payment. See De Rham v. Grove, 18 Abb. Pr. 45.

⁵ Chapman v. Stemmetz, 1 Dall. 261; Keppel v. Carr, 4 id. 155.

drawn by a party who has no purpose to transfer funds to a foreign country, nor to have the amount they represent employed there, but for the object of having such amount remitted to the country in which they are drawn, re-exchange is not recoverable.¹

[175] § 563. By what law liabilities governed. The contracts of the several parties to a bill, as well as to a note, are governed by the laws of the place where they are severally made.² Those of the maker and acceptor may be modified by expressly appointing a different place of payment.³ But the contract of the drawer and indorsers is implied, and they are presumed to contract with reference to the law of the place where the instrument is drawn or indorsed, for that is also the place where their several contracts are to be performed.⁴ It

In the last case Shippen, J., said: "It appears . . . to be settled law that where a bill of exchange is not paid and received in satisfaction of a debt due from a merchant to his correspondent, it goes at the risk of the debtor; and the creditor, who remits it for acceptance and payment, stands on the footing of an agent only until the bill is actually paid. Then, in point of justice, it seems but fair to allow every incidental or casual profit and emolument to the party who is exposed to all the hazard and inconvenience of the remittance. . . . He is entitled to damages on whose account and risk the bill is remitted." *Watts v. Willing*, 2 Dall. 100; *Evans v. Smith*, 4 Bin. 366; *Dehers v. Harriot*, 1 Showers, 163; *Brown v. Jackson*, 1 Wash. C. C. 512; *Hopkins v. Kenworthy*, 3 Johns. Cas. 436; *Thompson v. Robertson*, 4 Johns. 27.

¹ *Williams v. Ayers*, 3 App. Cas. 133, 24 Moak, 82.

² It is said in a recent Maine case: "It is true that the *lex loci contractus* governs as to the validity and construction of the contract. But the *lex fori* governs as to all matters pertaining to the remedy. That law

governs as to the negotiability of the contract, because upon it depends the question who has a right of action." *Roads v. Webb*, 91 Me. 406, 412, 40 Atl. Rep. 128, 64 Am. St. 246, citing *Pearsall v. Dwight*, 2 Mass. 90, 3 Am. Dec. 35, and referring to *McRae v. Mattoon*, 10 Pick. 53; *Warren v. Copelin*, 4 Met. 597; *Foss v. Nutting*, 14 Gray, 485; *Leach v. Greene*, 116 Mass. 534.

³ It is presumed that a note executed in the state of the parties' residence was delivered there; adding to the name of the payee his place of residence in another state does not make the note a contract of such state. *Strawberry Point Bank v. Lee*, 117 Mich. 122, 75 N. W. Rep. 444. See *Cox v. National Bank*, 100 U. S. 704.

⁴ *Guignon v. Union Trust Co.*, 156 Ill. 135, 40 N. E. Rep. 556, 47 Am. St. 186; *Brady v. McGehee*, 1 Tenn. Cas. 154; *Douglas v. Bank*, 97 Tenn. 133, 36 S. W. Rep. 874; *Farmers' Nat. Bank v. Sutton Manuf. Co.*, 52 Fed. Rep. 191, 3 C. C. A. 1, 17 L. R. A. 595; *Lockwood v. Lindsey*, 6 D. C. App. Cas. 396; *In re Commercial Bank of South Australia*, 36 Ch. Div. 522, 526; *Allen v. Kemble*, 6 Moore, P. C. 314;

must, therefore, often occur that the measure of damages will be different as to the several parties. The liability of the drawer will be governed by the law of the place where the bill is drawn, among other things, in respect to interest and exchange, or damages in lieu of it, and each of several successive indorsers may contract several and different liabilities, each being bound according to the law of the place where his indorsement is made.¹

Re-exchange varies with the fluctuations of commercial intercourse, influenced somewhat by local circumstances and [176] the general state of the money market. In some instances, owing to peculiar circumstances, it has been found to exceed forty or even fifty per cent. To avoid so ruinous a charge, so uncertain a rule of damages, and one so difficult to establish by evidence, the states of the Union have by legislation or commercial usage substituted a certain amount of damages on protested foreign bills in lieu of re-exchange.² Chief Justice Parsons said:³ "According to the law merchant, uncontrolled by any local usage, the holder is entitled to recover the face of the bill, and the charges of the protest, with interest from the time when the bill ought to have been paid, and also the price of re-exchange, so that he may purchase another good bill for the remittance of the money, and be indemnified for the damage arising from the delay of payment. But he cannot claim the ten per cent. of the bill which it is here the usage to pay. But the rule of damages established by the law merchant is, in our opinion, absolutely controlled by the im-

Gibbs v. Fremont, 9 Ex. 25; Freese v. Brownell, 35 N. J. L. 285, 10 Am. Rep. 239; Bank of United States v. United States, 2 How. 711; Hunt v. Standart, 15 Ind. 33, 77 Am. Dec. 79; Lennig v. Ralston, 23 Pa. 137; Price v. Page, 24 Mo. 67; Page v. Page, 24 Mo. 596; Bouldin v. Page, id. 595; Kuenzi v. Elvers, 14 La. Ann. 391, 74 Am. Dec. 434; Raymond v. Holmes, 11 Tex. 54; Everett v. Vendryes, 19 N. Y. 436; Slocum v. Pomroy, 6 Cranch, 221; Cook v. Litchfield, 9 N. Y. 279, 5 Sandf. 330; Dow v. Rowell, 12 N. H. 49; Aymar v. Shel-

don, 12 Wend. 443; Yeatman v. Cullen, 5 Blackf. 246; National Bank v. Green, 33 Iowa, 110; Trabue v. Short, 18 La. Ann. 257; Short v. Trabue, 4 Met. (Ky.) 299; Dundas v. Bowler, 3 McLean, 400; Williams v. Wade, 1 Met. 82; Artisans' Bank v. Park Bank, 41 Barb. 602; Ghilden v. Chamberlin, 167 Mass. 486, 494, 16 N. E. Rep. 103.

¹ 1 Daniel on Neg. Inst., p. 683.

² Bank of United States v. United States, 2 How. 711; Lennig v. Ralston, 23 Pa. 137.

³ Grimsbaw v. Bender, 6 Mass. 157.

memorial usage in this state. Here the usage is to allow the holder of the bill the money for which it was drawn, reduced to our currency at par, and also the charges of protest, with American interest on those sums from the time when the bill should have been paid; and the further sum of one-tenth of the money for which the bill was drawn, with interest upon it from the time payment of the dishonored bill was demanded of the drawer. But nothing has been allowed for re-exchange, whether it is below or at par. This usage is so ancient that we cannot trace its origin; and it forms part of the law merchant of the commonwealth. Courts of law have always recognized it, and juries have been instructed to govern themselves by it in finding their verdicts. . . . The origin of this usage was probably founded in the convenience of avoiding all disputes about the price of re-exchange, and to induce purchasers to take the bills by a liberal substitution of ten per cent. instead of a claim for re-exchange.”¹

¹ In *Hendricks v. Franklin*, 4 Johns. 119, Spencer, J., said: “The right to recover twenty per cent. damages on the protest of a foreign bill of exchange rests with us on immemorial commercial usage, sanctioned by a long course of judicial decisions. In Great Britain (2 H. Bl. 378) there is no such usage, and hence there the difference of exchange is always taken into consideration, and their courts of justice allow the usual rate of re-exchange upon the protest of a foreign bill. In Pennsylvania, as early as the year 1700, the legislature enacted that if any person within that province should draw or indorse any bill of exchange upon any person in England or other parts of Europe, and the same be returned unpaid with a legal protest, the drawer and all concerned should pay the contents of the bill, together with twenty per cent. advance for the damage thereof in the same specie as the bill was drawn, or current money of that province equivalent to that which was first paid to the

drawer or indorser. It is presumed that our rule to allow twenty per cent. on the protest of a foreign bill was originally co-extensive with the rule established in Pennsylvania, and that the same reason induced both rules. The twenty per cent. was in lieu of damages, in case of re-exchange, and because there was no course of exchange from London to New York, and to avoid the constant uncertainty and fluctuation of exchange. If these were not the inducements to the allowance of such heavy damages as twenty per cent., I confess myself unable to discover them. It certainly could not be intended merely as a mulct, nor with any other view than to remunerate the party for all his damages in being disappointed in the honoring of his bill.”

Morris v. Stokes, Mart. & Hayw. 4, was a default and inquiry. The court ruled that evidence might be given of the difference of exchange between this country and Philadelphia, and in the charge (as bills had

The damages now allowed in this country are regulated [177] by statutes in several states, though not as generally as before the enactment of the negotiable instruments law; these establish different rates in the several states, and in some in- [178] stances give damages on inland bills. In a note the substance of the statutes in force as disclosed by the latest accessible revisions or compilations is given.¹ These have no extraterri-

not been usually drawn in Edenton, and no one knew the exchange) the court said to the jury that they might discover the exchange by attending to the value of hard money in this country, and knowing what dollars passed at in Philadelphia.

In New York the holder was entitled to recover not only the twenty per cent. damages, together with the interest and charges, but also the amount of the bill liquidated by the rate of exchange, or price of bills on England, or other places of demand in Europe, at the time of the return and notice to the party to be charged. 3 Kent's Com. 115-117; Denston v. Henderson, 13 Johns. 321; Graves v. Dash, 12 id. 16; Hendricks v. Franklin, 4 id. 119; Scofield v. Day, 20 id. 102; Bank of Chenango v. Osgood, 4 Wend. 607; Wendell v. Washington & W. Bank, 5 Cow. 161.

Appleton, C. J., in Wood v. Watson, 53 Me. 300 (1865), said: "Damages given on foreign bills of exchange for non-payment are as much part of the contract as interest. Bank of United States v. United States, 2 How. 711, 727. The percentage allowed by statute on the protest of a foreign bill is a commutation for interest, damage and re-exchange. It is a statutory liquidation of damages by which the parties are to be governed. Lloyd v. McGarr, 3 Pn. 482. Now mercantile usage has established the damages on bills on London, in case of dishonor in Massachusetts, as determined in Grimshaw v. Bender, 6

Mass. 157; and in this state, in Snow v. Goodrich, 14 Me. 235, at ten per cent., instead of re-exchange. This usage forms part of the law of the state. It had been of so long continuance that, in 1809, when the judgment of the court in Grimshaw v. Bender was pronounced, Mr. Chief Justice Parsons said that its origin could not be ascertained. It must, therefore, be deemed a part of the law merchant, and as obligatory as any portion of the common law until it shall be modified or changed by the legislature. Whether the rule of damages is established by statute, or by a long-continued usage having the force of law, it is to be deemed part of the contract of indorsement. The rule referred to, not having been altered by the liquidation, must be regarded as remaining in full force. It is not for the court to change the law whenever a monetary crisis occurs." See Bowen v. Stoddard, 10 Met. 375.

¹Alabama: Five per cent. on the amount drawn for, whether the bill be inland or foreign, or whether protested for non-acceptance or non-payment. Code, 1896, § 885.

Alaska: Ten per cent., if payable without the limits of the United States; five per cent. if payable therein. Carter's Code, 1900, § 196, 197.

Arizona: Ten per cent. on the amount drawn for by any merchant upon his non-resident agent or factor, with interest and costs of suit. R. S. 1887, § 131, p. 79. The R. S. of

torial effect,¹ and are not to be extended by construction so as to include parties not within their terms. Guarantors are not entitled to the statutory damages if the act is limited to drawers, indorsers, makers and obligors.²

1901 appear to be silent on the subject.

Arkansas: On protested bills drawn or negotiated in the state, if payable in the state, two per cent. If payable in Alabama, Louisiana, Mississippi, Tennessee, Kentucky, Ohio, Indiana, Illinois, or Missouri, or any point on the Ohio river, at the rate of four per cent. If payable at any other place in the United States, five per cent. If payable at any post or place beyond the limits of the United States, ten per cent. If accepted and protested for non-payment, when drawn by a person without the state and within the United States, six per cent.; and if drawn by a person without the United States, ten per cent. These damages are in addition to expense of protest, and interest at the rate of ten per cent. per annum on the amount specified in the bill. Dig. of Stats. 1894, §§ 482-484.

Interest is allowed on the principal only; not on the damages. *Craig v. Price*, 23 Ark. 663.

California: For interest accrued before notice of dishonor, re-exchange, expenses, and all other damages in favor of holders for value only, on non-acceptance or non-payment of any bill drawn or negotiated in the state, damages are given as follows: On bills drawn upon any person within the state, two per cent.; drawn upon any person out of the state, five per cent.; drawn upon any person in a foreign country, fifteen per cent. upon the amount of the bill; interest is al-

lowed from the time of notice of the the dishonor and demand of payment. Civil Code, 1901, §§ 3234-3236. See *Pratalongo v. Larco*, 47 Cal. 379; *Page v. Warner*, 4 id. 395.

Colorado: On foreign bills, or those drawn upon any person out of the state, on non-acceptance or non-payment, ten per cent. with legal interest from the time the bill ought to have been paid, and costs of protest. 1 Mills' Ann. Stats. 1891, ¶ 241, p. 491.

Connecticut: On protest of a bill of exchange drawn on a person in the city of New York, two per cent. on the principal sum; drawn on a person in New Hampshire, Vermont, Maine, Massachusetts, Rhode Island, New York (except the city), New Jersey, Pennsylvania, Delaware, Maryland or Virginia, or in the District of Columbia, three per cent.; drawn upon a person in North Carolina, South Carolina, Ohio, Illinois, Indiana, Michigan, Kentucky or Georgia, five per cent.; drawn upon a person in any other state, territory or district of the United States, eight percent. Such damages stand in the place of interest and all other charges to the time when notice of protest is given, and demand of payment made, and such damages are to be determined without reference to the rate of exchange. Gen. Stats. 1902, § 4361.

Delaware: On bills drawn on a person beyond the seas and returned unpaid with legal protest, twenty per cent. Rev. Code (1893), p. 526, § 3.

¹ *Fieske v. Foster*, 10 Met. 597.

² *Woolley v. Van Volkenburgh*, 16 Kan. 20.

§ 564. Stipulations for attorneys' fees and costs. [185] Notes are not unfrequently drawn to include not only an increased rate of interest, in case of default at maturity, [186] but also attorney fees. These stipulations in notes, as well as

Florida: On foreign protested bills, five per cent. R. S. of 1892, § 2317.

Georgia: On any bill, draft or order protested for non-acceptance or non-payment payable out of the state and within the United States, five per cent. on the principal, in addition to interest and protest fees, for which the drawer, indorser or acceptor is liable; if payable without the limits of the United States, ten per cent. Code of 1895, vol. 2, §§ 3689, 3690.

Idaho: On bills drawn on any person in the state if they are protested for non-acceptance or non-payment, two per cent.; on any person out of the state but in any other of the states or territories west of the Rocky Mountains, five per cent.; on any person in the United States east of the Rocky Mountains, ten per cent.; on any person in any foreign country, fifteen per cent., and in all cases lawful interest upon the principal sum specified and the damages. Interest is allowed upon the aggregate sum of the bill and such damages from the time of demanding payment. Civil Code, 1901, §§ 2952, 2953. See *Hazard v. Cole*, 1 Idaho, 276.

Illinois: On protested bills payable without the United States the drawer or indorser is liable for the principal sum, interest, ten per cent. damages, costs and charges of protest; when payable at any place within the United States but out of the state, five per cent. in addition to principal, interest and costs of protest. 2 Starr & Curtiss' Ann. Stats. (1896), pp. 2780, 2781.

Indiana: On protested bills drawn or negotiated within, payable out of, the state and in the United States,

five per cent.; payable out of the United States, ten per cent. on the principal sum. Beyond such damages no interest or charges, accruing prior to protest, allowed, but interest may be recovered from the date of protest, but no damages beyond cost of protest, if upon notice of protest and demand of principal the same be paid. And a holder to recover damages must have paid value. On any bill drawn or negotiated in the state, and payable at any place without the state, but in regard to which it shall appear that it was not to be presented for acceptance or payment at that place, if means were provided for its discharge within the state, no damages or charges for protest are allowed. 3 Burns' Stats. (1901), §§ 7521-7526.

Indian Territory: Same as Arkansas, *supra*. Stats. of 1899, §§ 448-450.

Iowa: The provisions of the code fixing the damages were repealed by the negotiable instruments law. See Supplement to Code (1902), p. 352.

Kansas: On all bonds, notes and bills negotiable by the act, drawn for the payment of any sum of money legally protested for non-acceptance or non-payment, the drawer or drawers, indorser or indorsers, maker or makers, obligor or obligors, shall be subject to the payment of six per cent. damages, if drawn upon any person within or without the jurisdiction of the United States and beyond the limits of the state, and interest at the rate of seven per cent. from the date of protest until paid, unless a different rate is stipulated in such bill, note or bond; but no person residing within the state is liable for protest damages. Gen. Stats.

in mortgages, have been the subject of some judicial discussion and conflict of decision. In Illinois it is held that a stipulation to pay a specified sum as an attorney fee, if the note be not paid *without suit*, is not recoverable in the suit on the

1901, § 553. See *Cramer v. Eagle Manuf. Co.*, 23 Kan. 399; *Wooley v. Van Volkenburgh*, 16 id. 20; *Knowles v. Armstrong*, 15 id. 371; *German v. Ritchie*, 9 id. 106; *Noyes v. White*, id. 640.

Louisiana: The rate of damages to be allowed upon the usual protest for non-acceptance or non-payment of bills of exchange drawn or negotiated in the state is, on bills drawn on and payable in foreign countries, ten per cent.; on all bills drawn on and payable in any other state in the United States, five per cent. on the principal sum specified in such bill. Damages are in lieu of interest, charges of protest and all other charges incurred previous to and at the time of giving notice of non-acceptance or non-payment, but the holder is entitled to recover lawful interest upon the aggregate amount of the principal sum, and of the damages thereon from the time at which notice of protest for non-acceptance or non-payment shall have been given and payment demanded. When the contents of the bill are expressed in the money of the United States, the amount of the principal and of the damage is ascertained without any reference to the rate of exchange; but when expressed in foreign currency the principal and damages are determined by the rate of exchange; but when the value of such foreign coin is fixed by the laws of the United States, the value thus fixed must prevail. *Rev. Laws* (1897), §§ 320-323.

Maine: Damages on protest of bills of exchange of a hundred dollars or more, payable by the acceptor, drawer or indorser of one in the

state, are, if payable at a place seventy-five miles distant, one per cent.; if payable in the state of New York, or in any state northerly of it and not in the state, three per cent.; if payable in any Atlantic state or territory southerly of New York and northerly of Florida, six per cent.; and in any other state or territory, nine per cent. *R. S.* 1883, p. 700, § 42.

Maryland: The holder of a bill of exchange, drawn in the state, on any person in a foreign country, regularly protested, is entitled to recover so much current money as will purchase a good bill of exchange of the same time of payment and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum, with costs of protest and legal interest; if drawn on any person in any other of the United States and protested, the holder may recover in the same way a sum sufficient to buy another bill of the same tenor, and eight per cent. damages on the principal sum, and interest from the time of protest and costs. It is also provided that indorsers of such bills, who shall have paid the principal and the damages prescribed by statute, may recover the same with interest from the drawer, or any other person liable to him on the bill. *1 Public Gen. Laws* (1888), pp. 113, 114.

The indorser of a bill, remitted to his original character as holder and payee, cannot recover under the last section of this statute, but only as holder. *Bank of United States v. United States*, 2 How. 711; *1 Parsons on N. & B.* 657-8, note.

Massachusetts: The holders of

note because not due until after suit is commenced.¹ But it is held there to be recoverable if payable on default at maturity instead of on the event of bringing suit.² A note payable with eight per cent. interest per annum after maturity, and, if suit

bills drawn or indorsed in the state and payable without the United States, duly protested for non-acceptance or non-payment, are entitled to the current rate of exchange at the time of the demand, and five per cent. on the contents thereof, and interest on the contents from the date of the protest. The amount of contents, damages and interest are in full of all damages, charges and expenses. If the bill is payable within the states of Maine, New Hampshire, Vermont, Rhode Island, Connecticut or New York, two per cent.; New Jersey, Pennsylvania, Maryland or Delaware, three per cent.; Virginia, West Virginia, North Carolina, South Carolina or Georgia, or the District of Columbia, four per cent.; if in any other of the United States, or the territories thereof, five per cent. If the bill is for a sum not less than one hundred dollars, and payable within the state at a place not less than seventy-five miles from the place where drawn or indorsed, one per cent. in addition to the contents thereof, and interest on the contents. 1 Revised Laws, 1902, pp. 626-7.

Michigan: Damages on bills duly protested, in addition to the contents of the bill and interest and costs: On bills payable at any place without the state, but within Wisconsin, Illinois, Indiana, Pennsylvania, Ohio or New York, three per cent. on the contents of the bill; if payable within either of the states of Missouri, Kentucky, Maine, New Hamp-

shire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, Virginia, or the District of Columbia, five per cent.; and if payable elsewhere within any of the United States or the territories thereof, ten per cent. If the bill is payable without the limits of the United States the [182] holder may recover the same, with the current rate of exchange at the time of the demand, and damages at the rate of five per cent. upon the contents thereof, together with interest on said contents from the date of protest; said sum to be in full of damages, charges and expenses. 2 Comp. Laws (1897), § 4874, 4875.

Minnesota: Damages on protested bills payable without the limits of the United States are the bills with the current rate of exchange at the time of the demand and ten per cent. on the contents, with interest thereon from the time of protest, to be in full of all damages, charges and expenses. If the bill is drawn on any person in the United States, but out of the state, five per cent. damages, together with costs and charges of protest, besides the amount of the bill and legal interest. 1 Stats. of 1894, §§ 2234, 2235.

Mississippi: Damages on bills drawn on any person out of the state but within the United States, five per cent. on the amount, besides interest on the same; out of the United States, ten per cent., besides interest, and the holder is also entitled to all

¹ Nickerson v. Babcock, 29 Ill. 497; Easter v. Boyd, 79 id. 325.

² Id.; Dunn v. Rodgers, 43 Ill. 260;

Clawson v. Munson, 55 id. 394; Barton v. Farmers' & Merchants' Nat. Bank, 122 id. 352, 13 N. E. Rep. 503.

is brought on it, ten per cent. on the amount due as an attorney's fee, to be recovered as part of it or by separate suit, is not usurious because of the conditions as to the fee, it not being shown that ten per cent. was an unreasonable proportion. The

costs and charges. No damages on domestic bills. Ann. Code (1892), §§ 3506, 3507.

Missouri: When any bill of exchange, expressed to be for value received, drawn and negotiated within the state, is duly presented for acceptance or payment, and protested for non-acceptance or non-payment, the drawer and indorsers, having due notice of the dishonor, are required to pay damages as follows: If drawn on any person at any place within the state, four per cent. on the principal sum. If drawn on any person out of the state but within the United States or the territories, ten per cent. If drawn on any person without the United States or the territories thereof, twenty per cent. If accepted and not paid, the damages allowed are four per cent., if drawn by any person within the state; if drawn by any person without the state, but within the United States, damages are allowed at the rate of ten per cent.; if drawn without the United States, at the rate of twenty per cent. The damages can be recovered only by the holder of a bill who has paid a valuable consideration for it or for some interest in it. If payment is made of a bill, with the interest and protest charges, drawn within the state on any person at a place in it, within twenty days after demand, no damages are recoverable. If a bill is expressed to be paid in the money of the United States, the amount due and damages are to be determined without reference to the rate of exchange between this state and the place on which it is drawn; if in the money or currency of any

foreign country, then the amount due, exclusive of damages, is to be ascertained by the rate of exchange, or the value of such foreign currency at the time of payment. 1 R. S. 1899, §§ 449, 450, 452, 453.

Nebraska: The drawer or drawers, indorser or indorsers are liable on bills legally protested for non-acceptance or non-payment to twelve per cent. damages thereon, if drawn upon any person without the United States, and six per cent. damages if drawn upon any person within the United States and without the state. Comp. Stats. 1901, p. 719, sec. 7.

Nevada: Bills drawn upon any person in any of the United States east of the Rocky Mountains, fifteen per cent.; if upon a person in any foreign country, twenty per cent. Such damages are in lieu of interest, charges of protest and all other charges incurred previous to and at the time of giving notice of non-payment: but the holder is entitled to recover lawful interest upon the principal sum specified in such bill and damages thereon from the time of giving notice of protest. If the contents of the bill are expressed in money of account of the United States the sum due thereon and the damages allowed for its non-payment shall be determined without any reference to the rate of exchange between the state and the place where the bill was drawn. If the contents be expressed in the money or currency of any foreign country, the amount due, exclusive of the damages, is ascertainable by the rate of exchange or the value of such foreign money at the time payment

right to recover such fee passes to the assignee of the note as an incident to the main debt. Such condition does not affect the negotiability of the note because it is inoperative until after the obligation matures.¹

was demanded. The damages are recoverable only by a holder who has paid value. Comp. Laws, 1900, §§ 2758, 2759, 2760, 2761, 2763.

New Mexico: On bills drawn upon a person out of the United States, twelve per cent. upon the principal sum, with interest on the same from the time of protest; if upon a person in any of the United States or territories thereof, six per cent., with interest. Comp. Laws (1897), § 2543.

North Carolina: The damages on protested bills of exchange, drawn or indorsed in the state, are as follows: For bills upon any person in any other of the United States or in any of the territories thereof, three per cent.; for bills payable in any other place in North America (excepting the northwest coast of America), or in any of the West India or Bahama Islands, ten per cent.; for bills payable in the islands of Madeira, the Canaries, the Azores, the Cape de Verde Islands, or in any other state or place in Europe or South America, fifteen per cent.; if payable in any other part of the world, twenty per cent. on the principal sum. 1 Code of 1883, § 48.

North Dakota: On bills drawn upon any person in the state, two per cent.; on any person in the states of South Dakota, Nebraska, Iowa, Minnesota, Wisconsin, Illinois, Missouri or Montana, three per cent.; on any person in any other of the United States or territories, five per cent.; on any person in any place in a foreign country, ten per cent.; and from the time of notice of dishonor and demand of payment, lawful in-

terest upon the aggregate amount of the principal sum specified in the bill and the damages. Rev. Codes, 1899, § 4957.

Ohio: No damages are allowed by statute now on bills drawn or negotiated in this state. The former statutes imposed twelve per cent. damages when any bill was legally protested for non-acceptance or non-payment, if drawn on any person without the jurisdiction of the United States; and six per cent. if drawn on any person within the jurisdiction of the United States and without the jurisdiction of that state, and such bills bore six per cent. interest from the date of the protest until paid. But no damages were allowed if there was an agreement or understanding that the bill might be paid at any other place than that on which it was drawn. Swan's R. S., Derby's ed. (1854), 576.

In *Farmers' Bank v. Brainerd*, 8 Ohio, 292, a bill drawn upon a person in Ohio payable in New York, and protested for non-payment, was held not to entitle the holder to six per cent. damages for protest. And in *Commercial Bank v. Reed*, 11 Ohio, 498, six per cent. damages on a protested bill addressed by mistake to the defendant in Ohio, instead of at Philadelphia, where the bill was payable, could not be recovered, nor be set off against a subsequent claim, if paid with a full knowledge of the facts.

Oklahoma: Damages are allowed as full compensation for interest accrued before notice of dishonor, re-exchange, expense and all other

¹ *Dorsey v. Wolff*, 142 Ill. 589, 32 N. E. Rep. 49, 34 Am. St. 99, 18 L. R. A. 428.

In Indiana if the note does not specify the amount of the fee the holder of it cannot recover unless he proves what a reasonable fee would be to make the collection; and his recovery will be limited accordingly.¹ If the complaint claims damages

damages, in favor of holders for value only, as follows: if drawn upon a person within the territory, two per cent.; on a person in Nebraska, Iowa, Minnesota, Wisconsin, Illinois, Missouri or Montana, three per cent.; if drawn upon a person in any other of the states or territories, five per cent.; upon a person in a foreign country, ten per cent. From the time of notice of dishonor and demand of payment interest is recoverable upon the principal sum and the damages. If the amount of the bill is expressed in United States money, damages are to be estimated upon it without regard to the rate of exchange; if in foreign money, the estimate is to be made upon the value of a similar bill at the time of protest in the place nearest to that where the bill was negotiated and where such bills are currently sold. 1 Stats. of 1903, p. 679.

Pennsylvania: The holder of bills of exchange drawn or indorsed in the state, and returned unpaid with a legal protest, may recover from the drawer or indorser the damages hereafter specified, over and above the amount of the bill and the charges of protest, with interest thereon from the time of protest and notice; that is to say, if such bill shall have been drawn upon any person in any of the United States or the territories thereof, except Upper and Lower California, New Mexico and Oregon, five per cent.; for bills payable in these excepted states and territories, ten per cent.;

for bills payable in China, India, or other parts of Asia, Africa, or islands in the Pacific ocean, twenty per cent.; for bills upon Mexico, the Spanish Main, West Indies, or other Atlantic islands, east coast of South America, Great Britain, or other places in Europe, ten per cent.; for bills upon places on the west coast of South America, fifteen per cent.; and for bills upon any other part of the world, ten per cent. upon such principal sum. The amount of such bill, and of the damages payable thereon, is ascertained by the rate of exchange or value of the money or currency mentioned in such bill at the time of notice of protest and demand of payment. 1 Purdon's Dig. (1894), p. 221, ¶¶ 7, 8.

An act of 1849 allows bills to be drawn payable in particular funds with the current rate of exchange in Philadelphia or any other place in the state, and leaves the parties to specify, as they might do at common law, the rate of damages to be recovered on the bill. Dunlop's Comp. 1156-7.

A bill drawn in the state and signed in blank, though sent abroad to be filled up and negotiated, is within the statute. Lennig v. Ralston, 23 Pa. 137.

Interest is recoverable on the damages as well as on the amount of the bill. Lloyd v. McGarr, 3 Pa. 474, 482. See Watt v. Riddle, 8 Watts, 545.

Rhode Island: Damages on protested bills returned for non-acceptance or non-payment from any place

¹ Harvey v. Baldwin, 124 Ind. 59, 24 N. E. Rep. 347; Kennedy v. Richardson, 70 Ind. 524; Goss v. Bowen,

104 id. 207, 2 N. E. Rep. 704; Starnes v. Schofield, 5 Ind. App. 4, 31 N. E. Rep. 480.

generally in a sum sufficient to cover the amount of the note and the fee proof may be made and recovery had for the damages directly sustained by reason of the non-payment of the note.¹ If the note has been placed in the hands of an attor-

without the United States, ten per cent. besides charges of protest. After protest, six per cent. interest. On bills drawn on parties in other states of the United States, returned under protest, five per cent., and charges of protest, besides interest from the time of protest. Gen. Laws, 1896, p. 493.

South Carolina: Damages on protested bills drawn upon persons in the United States but out of the state, ten per cent.; on all bills drawn on persons in any other portion of North America, or within any portion of the West India Islands, twelve and a half per cent.; if drawn upon any person in any other part of the world, fifteen per cent., besides the charges incidental thereto, and lawful interest until payment. Code of Laws, 1902, § 1673.

South Dakota: Same as North Dakota, *supra*. See 2 Ann. Stats. S. D., 1901, ¶ 5763.

Tennessee: Damages on protested bills drawn on persons out of the state but within the United States, three per cent.; drawn on any person in any other state or place in North America bordering on the Gulf of Mexico, or in any of the West India Islands, fifteen per cent.; drawn on any person in any other part of the world, twenty per cent. These damages are in lien of interest, and all other charges except charges of protest to the time when the notice of protest and demand of payment shall have been given; but interest is to be computed from that time on the aggregate of principal, damages and

charges of protest. Code, 1896, ¶¶ 3512, 3513.

Texas: Damages on protested bills drawn by a merchant within the state upon his agent or factor, living beyond its limits, are ten per cent. on the amount of the bill, with interest and costs of suit. 1 Sayles' Stats., 1897, art. 317.

Utah: As full compensation for interest accrued before notice of dishonor, re-exchange, expenses and all other damages in favor of holders for value only, if drawn upon a person in the state, one per cent.; if upon a person elsewhere within the United States, two and a half per cent.; if upon a person in a foreign country, five per cent. Interest may be recovered upon the principal sum and the damages from the time of notice of dishonor and demand of payment. If the amount of the bill is expressed in United States money damages are estimated upon it without regard to the rate of exchange; if in foreign money, upon the value of a similar bill at the time of protest in the place nearest to that where the bill was negotiated and where such bills are currently sold. R. S., 1898, ¶¶ 1653-1657.

Virginia: Damages on protested bills, drawn or indorsed within the state and payable without the state but within the United States, three per cent.; if payable without the United States, ten per cent. Code, 1887, § 2851.

Washington: On bills protested for non-payment, drawn or indorsed within the state, payable out of the United States, ten per cent.; and if

¹ *Starnes v. Schofield, supra.*

ney for collection and is past due the maker is liable for the fee although suit is not brought.¹ If the amount of the fee is specified, *prima facie*, that is the sum recoverable, but it may be reduced by proof that it is excessive, or that the plaintiff has not incurred liability to that extent.² The stipulated sums, although payable in the event of a suit, are recoverable in a suit on the note. They are a part of the damages which the maker has stipulated to pay and may be included therein with the principal and interest of the note; they are incident to the main debt, and cannot be sued for in a separate action.³ The holder of a note cannot recover as attorneys' fees any sum in excess of that he has agreed to pay as such.⁴ But this view does not prevail in Georgia. Where the stipulation was to pay all cost of collection, including attorneys' fees, the plaintiff recovered such fees although the contract between him and his attorney provided that the latter's compensation should be limited to what might be recovered from the defendant.⁵ In Minnesota the stipulated fees are not a part of the original debt; the right to them does not accrue until the payee of the note incurs liability, and then only to the extent of the reasonable value of the attorney's services actually performed, or to be performed, which must be proved.⁶

payable out of the state, but within some state or territory of the United States, five per cent. Such damages are in lieu of interest, and all other charges incurred previous to and at the time of giving notice of non-payment, but the holder is entitled to receive lawful interest upon the principal and damages thereon from the time of giving notice of protest for non-payment. *Pierce's Code*, 1902, §§ 6778-6779.

West Virginia: Damages on protested bills, if payable out of the state and within the United States, three per cent.; if payable out of the United States, ten per cent. *Code*, 1899, p. 766. ¶ 9.

¹ *Moore v. Staser*, 6 Ind. App. 364, 33 N. E. Rep. 665; *Rouyer v. Miller*, 16 Ind. App. 519, 44 N. E. Rep. 51, 45 id. 674.

² *Rouyer v. Miller*, *supra*.

³ *Smiley v. Meir*, 47 Ind. 559; *Roberts v. Comer*, 41 id. 475, 13 Am. Rep. 346; *Wyant v. Pottorff*, 37 Ind. 512; *Johnson v. Crossland*, 34 id. 334; *Matthews v. Norman*, 42 id. 176; *First Nat. Bank v. Indianapolis Piano Manuf. Co.*, 45 id. 5; *Garver v. Pontious*, 66 id. 191; *Smock v. Ripley*, 63 id. 814; *Tuley v. McClung*, 67 id. 10; *Reisterer v. Carpenter*, 124 id. 30, 24 N. E. Rep. 371.

In Wisconsin the fee must be recovered in the suit on the note. *Vipond v. Townsend*, 88 Wis. 285, 60 N. W. Rep. 430.

⁴ *Harvey v. Baldwin*, *supra*.

⁵ *Ray v. Pease*, 97 Ga. 618, 25 S. E. Rep. 360.

⁶ *Pinney v. Jorgenson*, 27 Minn. 26, 6 N. W. Rep. 376; *Johnston Harvester Co. v. Clark*, 30 Minn. 308, 15 N. W.

Under a statute providing that a fee may be allowed when specially contracted to be paid in any amount so contracted, the right to the designated sum exists although the court may deem it excessive.¹ This rule applies to stipulations made before the taking effect of a statute permitting the court to fix such sum as it may deem reasonable.² In Alabama the contracting parties may fix the amount of the fee, and it is not necessary to make proof of the employment of the attorney and the value of his services.³ The attorney's fee stipulated for may be collected notwithstanding the payment of the principal and interest on the note after its maturity.⁴

In Texas there may be a recovery of the fee for the sole benefit of the payee, and the amount thereof may be properly included in a note given for the original. The contract in question provided for the payment of ten per cent. for attorney's fee, if collected by law or placed in the hands of an attorney for collection. It was said: The parties had the legal right to so contract, and upon the happening of the contingency upon which the stipulated attorney's fees were made to depend the obligation became absolute, and such additional sum became a part of the sum due. It would not affect the legality of the demand if it were true, as alleged by the defendants, that the provision was inserted in the contract for the sole benefit of the plaintiff, and not with any purpose of paying that amount for the service of an attorney. If the plaintiff could and did obtain the service of an attorney free, that fact would not relieve the defendants of their obligation.⁵

There is, generally, a noticeable tendency to strictly construe stipulations for the payment of fees. In Iowa fees cannot be recovered under a condition providing therefor, "if sued," where judgment is confessed. The filing of a statement for, and the entering of, judgment is not an action or suit.⁶ In Mississippi the novation of a debt is not a collection

Rep. 252; *Campbell v. Worman*, 58 Minn. 561, 60 N. W. Rep. 668.

¹ *Exchange Nat. Bank v. Wolverton*, 11 Wash. 109, 39 Pac. Rep. 248.

² *Gordon v. Decker*, 19 Wash. 188, 52 Pac. Rep. 856.

³ *Stephenson v. Allison*, 133 Ala. 439, 26 So. Rep. 290.

⁴ *Cowan v. Campbell*, 131 Ala. 211, 32 So. Rep. 429.

⁵ *Sturgis Nat. Bank v. Smith*, 9 Tex. Civ. App. 540, 30 S. W. Rep. 678.

⁶ *Dullard v. Phelan*, 83 Iowa, 471, 50 N. W. Rep. 204.

of it so as to entitle the payee to an attorney's fee.¹ "Legal proceedings are instituted" by proving up a claim for the money due on a note and presenting it to an administrator.²

Agreements to pay attorneys' fees are sustained in Iowa, Dakota, Minnesota, Pennsylvania, New Mexico, Louisiana, Maryland, Texas, Oregon, Mississippi, California, Georgia (if a plea is filed by the defendant and not sustained), Missouri, Washington (by statute), Alabama, Wisconsin, Texas, Illinois, Indiana, Tennessee, and some of the federal courts, the latter following the local law.³ In Tennessee the condition is valid where suit is necessary and is brought in good faith, if the stipulation is not a device to cover up and collect usury. The right to recover the fee is forfeited if the holder of the note refuses to credit the maker upon the principal with usurious payments.⁴ In Oregon a provision for a stipulated sum is of

¹ Davis v. Cochran, 76 Miss. 439, 24 So. Rep. 168, 906.

² Simmons v. Terrell, 75 Tex. 275, 12 S. W. Rep. 854; Morrill v. Hoyt, 83 Tex. 59, 18 S. W. Rep. 424, 29 Am. St. 630.

³ Campbell v. Worman, 58 Minn. 561, 60 N. W. Rep. 668; Brahan v. First Nat. Bank, 72 Miss. 266, 16 So. Rep. 203; Millsaps v. Chapman, 76 Miss. 942, 26 So. Rep. 369, 71 Am. St. 549; Benn v. Kutzchan, 24 Ore. 29, 32 Pac. Rep. 763; Laning v. Iron City Nat. Bank, 89 Tex. 601, 35 S. W. Rep. 1048; Mason v. Luce, 116 Cal. 232, 48 Pac. Rep. 72; De Jarnatt v. Marquez, 127 Cal. 558, 78 Am. St. 90, 60 Pac. Rep. 45 (the fees are in the nature of special damage under the contract); Hall v. Pratt, 103 Ga. 255, 29 S. E. Rep. 764; Jones v. Crawford, 107 Ga. 318, 33 S. E. Rep. 51, 45 L. R. A. 105; North Atchison Bank v. Gay, 114 Mo. 203, 21 S. W. Rep. 479; Yakima Nat. Bank v. Knipe, 6 Wash. 348, 33 Pac. Rep. 834; Hardy v. Hohl, 11 Wash. 1, 39 Pac. Rep. 277; Vipond v. Townsend, 88 Wis. 235, 60 N. W. Rep. 430; Stephenson v. Allison, 123 Ala. 439, 26 So. Rep. 290, and local

cases cited: Williams v. Meeker, 29 Iowa, 292; Nelson v. Everett, id. 184 (see Miller v. Gardner, 49 id. 234; Davidson v. Vorse, 52 id. 384, 3 N. W. Rep. 477); Farmers' Nat. Bank v. Rassmussen, 1 Dak. 60, 46 N. W. Rep. 574; Johnston Harvester Co. v. Clark, 30 Minn. 308, 15 N. W. Rep. 252 (upon proof of value of the attorney's services and plaintiff's liability therefor); Imler v. Imler, 94 Pa. 372; Daily v. Maitland, 88 id. 384, 32 Am. Rep. 457; Exchange Bank v. Tuttle, 5 N. M. 427, 7 L. R. A. 445, 23 Pac. Rep. 241; Siegel v. Drumm, 21 La. Ann. 8; Bowie v. Hall, 69 Md. 433, 9 Am. St. 433; Miner v. Paris Exchange Bank, 53 Tex. 559; Hamilton Gin & Mill Co. v. Sinker, 74 id. 51, 11 S. W. Rep. 1056; Peyser v. Cole, 11 Ore. 38, 4 Pac. Rep. 520; Eyrich v. Capital State Bank, 67 Miss. 60, 6 So. Rep. 615; Wilson Sewing Machine Co. v. Moreno, 7 Fed. Rep. 806 (Deady, J.); Bank of British North America v. Ellis, 2 id. 44 (holding accommodation indorsers liable for the stipulated fee).

⁴ Tyler v. Walker, 101 Tenn. 306, 47 S. W. Rep. 424.

no effect if it is unreasonable. The court will not modify it and then enforce it, except so far as the defendant may consent thereto,¹ and a stipulation to pay a specified percentage as attorney's fee is void and no fee will be allowed.² In Texas if default in payment of the note results from the wrongful act of the payee, as where it is caused by levying an attachment upon the goods of the former before the note matures, and the debtor recovers damages therefor in excess of the amount due on the note, there cannot be a recovery of the fee.³ If liability for the fee is conditioned upon placing the note in the hands of an attorney for collection, it must be alleged in the complaint in the action to recover on the note that this had been done, otherwise a judgment by default for the stipulated fee will not be sustained.⁴ Under such a condition the fee may be recovered on the bringing of an attachment before the maturity of the note.⁵ The necessity of resorting to a suit must be shown, the note being so conditioned.⁶ Under a condition for the payment of a fee in case of suit to collect the note or any portion thereof, the fee is collectible only when the note is dishonored, and not in a suit to collect an instalment of interest due.⁷ Liability under a stipulation to pay "attorneys' fees" is limited to such fees in the trial court.⁸ What is "a reasonable fee" must be determined by the jury.⁹

In Ohio, Michigan, Nebraska, Kentucky, North Carolina and Virginia stipulations in notes for the payment of attorneys' fees are held to be against public policy and therefore void.¹⁰ The same rule is held in the federal circuit court

¹ *Kimball v. Moir*, 15 Ore. 427, 15 Pac. Rep. 669.

² *Levens v. Briggs*, 21 Ore. 333, 28 Pac. Rep. 15, 14 L. R. A. 188.

³ *Laning v. Iron City Nat. Bank*, 89 Tex. 601, 35 S. W. Rep. 1048.

⁴ *Jones v. Smith*, 4 Tex. Civ. App. 353, 26 S. W. Rep. 240.

⁵ *Smith v. Pickham*, 8 Tex. Civ. App. 326, 28 S. W. Rep. 565.

⁶ *Clark v. Jones*, 93 Tenn. 638, 27 S. W. Rep. 1099.

⁷ *Merrill v. Muzzy*, 11 Wash. 16, 39 Pac. Rep. 277.

⁸ *McCormick v. Falls City Bank*, 57 Fed. Rep. 107.

⁹ *Cox v. Alexander*, 30 Ore. 438, 46 Pac. Rep. 794; *First Nat. Bank v. Mack*, 35 Ore. 122, 57 Pac. Rep. 326.

¹⁰ *Dow v. Updike*, 11 Neb. 35, 7 N. W. Rep. 857; *State v. Taylor*, 10 Ohio, 378; *Shelton v. Gill*, 11 id. 417; *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356; *Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553; *Wright v. Traver*, 73 Mich. 493, 41 N. W. Rep. 517, 3 L. R. A. 59; *Witherpoon v. Musselman*, 14 Bush, 214; *Security Co. v. Fyer*, 36

of Arkansas.¹ A note providing for such fees, although made in a state in which such a stipulation is valid, will not be enforced in Kentucky. It has been said that comity should not, nor does it, require a contract made in one state to be enforced by the courts of another state that treat a similar one as absolutely void because it is an agreement to pay a penalty, tends to oppress the debtor and encourage litigation.² In Michigan such a note is not negotiable, if made there and payable there; but if payable in another state its quality as to negotiability will be determined by the laws thereof.³ In Nebraska the reasonable view is taken that such stipulation relates to the remedy, and is therefore not binding beyond the jurisdiction in which it was made.⁴ And so in North Carolina⁵ and Maine.⁶ In the District of Columbia the law of the place of contract will determine the negotiability of a note with a promise to pay attorneys' fees.⁷

In Illinois, where an attorney fee of ten per cent. was stipulated to be paid as liquidated damages, in addition to principal and interest in case of collection "by suit at law or otherwise," it was held that the stipulation did not affect the liability of an indorser; the measure of damages as to him, as has been before stated, is the amount paid by the indorsee and interest.⁸ But the more generally approved rule holds an indorser liable for the fee.⁹ A recently enacted Georgia statute is to the effect that all contracts to pay attorneys' fees shall be void unless a plea or pleas be filed by the defendant and not

Neb. 507, 54 N. W. Rep. 833, 38 Am. St. 735 (statute allowing such fees repealed in 1879); *Tinsley v. Hoskins*, 111 N. C. 340, 16 S. E. Rep. 325, 32 Am. St. 801; *Exchange Bank v. Apalachian Land & Lumber Co.*, 128 N. C. 193, 38 S. E. Rep. 813; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. Rep. 498.

¹ *Merchants' Nat. Bank v. Sevier*, 14 Fed. Rep. 662.

² *Clark v. Tanner*, 100 Ky. 275, 38 S. W. Rep. 11; *Rogers v. Rains*, 100 Ky. 295, 38 S. W. Rep. 483.

³ *Strawberry Point Bank v. Lee*, 117 Mich. 122, 75 N. W. Rep. 414; *Clark v. Porter*, 90 Mo. App. 143.

⁴ *Hallam v. Telleren*, 55 Neb. 255, 75 N. W. Rep. 560.

⁵ *Exchange Bank v. Apalachian Land & Lumber Co.*, 128 N. C. 193, 38 S. E. Rep. 813.

⁶ *Roads v. Webb*, 91 Me. 406, 412, 40 Atl. Rep. 128, 64 Am. St. 246.

⁷ *Lockwood v. Lindsey*, 6 D. C. App. Cas. 396.

⁸ *Short v. Coffeen*, 76 Ill. 245.

⁹ *Benn v. Kutzchan*, 24 Ore. 28, 32 Pac. Rep. 763; *Jones v. Smith*, 4 Tex. Civ. App. 353, 26 S. W. Rep. 240; *Smith v. Pickham*, 8 Tex. Civ. App. 326, 28 S. W. Rep. 565.

sustained. Where no plea was filed by the principal and the indorser filed but failed to sustain his plea, he was liable for such fees.¹ One who assumes the payment of a note is not liable for the attorney's fee stipulated for although he does not pay until after suit is brought.² An action by the guarantor of a note to recover money paid upon it is not upon the note, and there cannot be a recovery of the fee stipulated for.³

The effect of such a stipulation upon the negotiability of a note is a question on which the authorities are in hopeless conflict, though this conflict will probably be lessened by the negotiable instruments act which has become the law of several states, and which expresses that a note is negotiable although it provides for the payment of an attorney's fee or costs of collection in case payment shall not be made at maturity.⁴

On the ground that the stipulation only becomes operative after default in payment of the note, some courts have held that its negotiability is not thereby affected;⁵ others hold the contrary.⁶ In Kentucky such a stipulation was origi-

¹ Hall v. Pratt, 103 Ga. 255, 29 S. E. Rep. 764.

² Galvin v. Mac Mining & Milling Co., 14 Mont. 503, 37 Pac. Rep. 366.

³ Austin v. Hamilton, 7 Wash. 382, 34 Pac. Rep. 1097.

⁴ Crawford's Neg. Inst. Law (2d ed.), p. 10.

⁵ Dorsey v. Wolff, 142 Ill. 589, 32 N. E. Rep. 495, 34 Am. St. 99, 18 L. R. A. 428; Clifton v. Bank of Aberdeen, 75 Miss. 929, 23 So. Rep. 394; Benn v. Kutzchan, 24 Ore. 29, 32 Pac. Rep. 763; Oppenheimer v. Bank, 97 Tenn. 19, 56 Am. St. 778, 33 L. R. A. 767, 36 S. W. Rep. 705; Farmers' Nat. Bank v. Sutton Manuf. Co., 3 C. C. A. 1, 52 Fed. Rep. 191, 17 L. R. A. 595; Gaar v. Louisville Banking Co., 11 Bush, 180; Sperry v. Horr, 32 Iowa, 184; Seaton v. Scovill, 18 Kan. 433, 26 Am. Rep. 779; Schlesinger v. Arline, 31 Fed. Rep. 681 (a fixed per cent. as fees); Howenstein v. Barnes, 5 Dill. 482; Adams v. Addington, 16 Fed. Rep. 89 (fixed per cent.); Heard

v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811; Trader v. Cludester, 41 Ark. 242 (stipulated fee); Roberts v. Snow, 27 Neb. 425, 43 Am. Rep. 38, 43 N. W. Rep. 241; Hamilton Gin & Mill Co. v. Sinker, 74 Tex. 51, 11 S. W. Rep. 1056.

⁶ Strawberry Point Bank v. Lee, 117 Mich. 122, 75 N. W. Rep. 444; Lippincott v. Rich, 22 Utah, 196, 61 Pac. Rep. 526 (reasonable attorney's fee and cost of collection); Mason v. Luce, 116 Cal. 232, 48 Pac. Rep. 72; Roads v. Webb, 94 Me. 406, 40 Atl. Rep. 128, 61 Am. St. 246; Carroll County Savings Bank v. Strother, 28 S. C. 504, 6 S. E. Rep. 313 ("all counsel fees and expenses in collecting"); Altman v. Rittershofer, 68 Mich. 287, 43 Am. St. 341, 36 N. W. Rep. 74 (stipulation to pay "attorneys' fees"); Altman v. Fowler, 70 Mich. 57, 37 N. W. Rep. 708; Garretson v. Purdy, 3 Dak. 178, 14 N. W. Rep. 400 (reasonable attorney's fee); Jones v. Radtitz, 27 Minn. 240, 6 N. W.

inally treated as a penalty, and although recoverable under appropriate pleading when judgment went by default, yet if resisted by invoking the equitable jurisdiction of the court, relief might be had against it;¹ but later such stipulations in that state have been held to be against public policy and void.² Separate suits may be brought at the same time by an indorsee against the maker and indorsers, and recoveries had against each. And in that case, payment of the debt in one case, with the costs of the same, will not discharge the other judgments; but the costs of each action must be also paid.³

The maker's liability for the fee is not affected because he has been garnished in respect to the debt, if he fails to avail himself of the privilege of paying the money into court as it fell due and suggesting the fact of the negotiation of the note if it was known to him.⁴ A stipulation to pay all cost of collection, including attorneys' fees, covers such fees for services rendered by the payee in defending equitable petitions sued out by the maker to restrain the collection of the note, the only result of these being to delay the obtaining of judgment

Rep. 800; *Hardin v. Olson*, 14 Fed. Rep. 705; *Chase v. Whitmore*, 68 Cal. 545, 9 Pac. Rep. 942; *First Nat. Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604 (*semble*); *First Nat. Bank v. Jacobs*, 73 Mo. 35, and other cases in that state there cited; *Adams v. Seaman*, 82 Cal. 636, 23 Pac. Rep. 53, 7 L. R. A. 224; *Woods v. North*, 84 Pa. 407, 24 Am. Rep. 201; *First Nat. Bank v. Larsen*, 60 Wis. 206, 50 Am. Rep. 363, 19 N. W. Rep. 67 (in the two last cases the per cent. to be recovered as a fee was fixed); *Maryland Fertilizer & Manuf. Co. v. Newman*, 60 Md. 584, 45 Am. Rep. 750.

¹ *Gaar v. Louisville Banking Co.*, 11 Bush, 180; *Thomassen v. Townsend*, 10 id. 114.

² *Witherspoon v. Musselman*, 14 Bush, 214.

³ In *Wattles v. Laird*, 9 Johns. 326, it appears that separate suits had been brought by the indorsee of a promissory note against the indorser and maker. In the suit against the

former, A. became special bail. The plaintiff recovered judgment in both actions. Afterwards a *fi. fa.* issued against the maker, and was returned satisfied. A *ca. sa.* was issued against the indorser, and after return of the execution in the other action, was returned *non est.* In an action of debt on the recognizance of bail, his bail pleaded payment and set-off of the amount paid by the maker as money paid to his use. It was held that the recognizance being forfeited, the matters pleaded by the defendant could not be set up in bar of the suit on the recognizance, in which a judgment must be given for the penalty; but the defendant might show the payment by the maker in mitigation, so that the damages should be assessed for costs only of the suit against the principals.

⁴ *Braham v. First Nat. Bank*, 72 Miss. 266, 16 So. Rep. 203.

on the note. The maker of the note could not recoup against such fees expenses incurred by him in an unsuccessful litigation in which he attempted to establish a failure of consideration for the note.¹ Under a statute providing that there may be recovered on contracts stipulating for attorneys' fees a graduated per cent. of the amount of the note, if judgment is entered on several notes, declared on in separate counts of a petition and executed at different times, the fee may be computed on each note separately, rather than on the total amount of all the notes, although the result is to increase the recovery.² In estimating the amount due as attorneys' fees under a note conditioned to pay all costs of collection, including ten per cent. attorneys' fees, the computation is to be based on the principal and interest due.³ Where the promise in the note was to pay attorneys' fees to the extent of ten per cent. of the amount due at time of suit, and a bond conditioned for the payment of the note according to its tenor, true intent and meaning was given, the language of the note and bond prevailed over that of a mortgage given to secure their payment, which expressed that attorneys' fees were payable on the amount for which foreclosure may be had. The fee was computable on the sum due when action was begun, and not on the sum for which foreclosure was adjudged, payments having been made intermediate these events.⁴ In California a stipulation in a note secured by a mortgage for the payment of five per cent. of the sum due and unpaid, as attorneys' fees, may be enforced in an action to foreclose the mortgage although the latter secures only the principal and interest of the note; a personal judgment may be rendered against the mortgagor for the stipulated fee.⁵ If a note is given for the purchase price of machinery which is proven to be defective, the fees should not be estimated upon the sum expressed in the note, but for such sum less the amount

¹ Ray v. Pease, 97 Ga. 618, 25 S. E. Rep. 360.

² Bankers' Iowa State Bank v. Jordan, 111 Iowa, 324, 82 N. W. Rep. 779.

³ Morgan v. Kiser, 105 Ga. 104, 31 S. E. Rep. 45; McCormick v. Blum, 4 Tex. Civ. App. 9, 22 S. W. Rep. 1120;

Hopkins v. Halliburton, 6 Tex. Civ. App. 451, 25 S. W. Rep. 1005; Carver v. J. S. Mayfield Lumber Co., 68 S. W. Rep. 711 (Tex. Ct. Civ. App.).

⁴ Montague v. Stelts, 37 S. C. 200, 15 S. E. Rep. 968, 34 Am. St. 736.

⁵ Mason v. Luce, 116 Cal. 202, 48 Pac. Rep. 72.

recovered by the maker as damages.¹ The amount recovered as attorney's fee bears interest at the rate stipulated.²

An indorser who has been compelled to pay a bill or note by suit against him cannot recover the costs thereof from prior parties.³ But an accommodation party, who has been compelled by suit to pay, may, doubtless, recover the costs, as well as the face of the paper, from the party whose legal duty it was to provide for and pay it.⁴ After the dishonor of a bill by the acceptor's non-payment the holder cannot charge the drawer or indorser commissions and expenses paid an agent for subsequently collecting a part of it from the acceptor.⁵

[188] § 565. *Value of notes and bills.* Notes against solvent parties, or those able and willing to pay them at maturity, possess value, which approximates to the sum they call for, according to the credit and responsibility of the parties liable on them. In Kentucky, Tennessee and some other states, a class of contracts has existed in the form of notes payable in cash-notes of third persons, generally designated as cash-notes of good solvent men — indicating that such notes were in circulation, in some sort a substitute for money as a medium of exchange. Contracts so payable have generally been construed as promises to pay the amount specified in notes of the description mentioned at par value. And for failure to make such payment, the measure of damages recoverable in legal currency is the actual value of the cash-notes when they should have been paid over;⁶ not the rate at which shavers purchase them, nor their par value. The expense of collecting is to be considered; and the difference made in every-day transactions between them and money in the sale of property is the true criterion of value.⁷ The court said such commodities as individual promissory notes have no fixed value ascribed to them by law. Money, alone, being the legal standard of

¹ *Tompkins Co. v. Galveston Street R. Co.*, 4 Tex. Civ. App. 1, 23 S. W. Rep. 25. *Roach v. Thompson*, 4 C. & P. 194; *Steele v. Sawyer*, 2 McCord, 459.

² *Llano Improvement & Furnace Co. v. Eubanks*, 5 Tex. Civ. App. 108, 23 S. W. Rep. 613.

³ *Dawson v. Morgan*, 9 B. & C. 618; *Simpson v. Griffin*, 9 Johns. 131;

⁴ 1 Parsons on N. & B. 662.

⁵ *Bangor Bank v. Hook*, 5 Me. 174.

⁶ *Gholson v. Brown*, 4 Yerg. 496; *Murray v. McMackin*, id. 41; *Ward v. Latimer*, 12 Tex. 438.

⁷ *Williams v. Brasfield*, 9 Yerg. 270; *Younger v. Givens*, 6 Dana, 1.

values, that alone is, in judgment of law, necessarily equivalent to its actual denominations.¹ In the absence of any [189] other proof, the jury may infer from the terms *good notes then due* that they were to be equal to money, and a verdict so found will stand; for the court cannot judicially know that the assessed value was too high.² And a promise to pay a given amount in the note or other pecuniary obligation of the promisor is valued at the sum which would be payable by such note or obligation.³

A party having, as agent, pledgee, borrower, or otherwise, the possession of a note or bill belonging to another, and

¹ Id.

In *Murray v. Pate*, 6 Dana, 335, upon a verbal agreement for the sale of land by P. to T. at the price of \$500, the latter placed in the hands of M., the defendant, a single bank note for \$500, upon a southern bank, to be delivered to the plaintiff upon his making a deed for the land, provided another person designated should say that the plaintiff's title was good: the person so designated having pronounced the title good, a deed was executed by the plaintiff, and tendered, but refused by both the purchaser and the defendant. T. told the defendant not to pay the money to the plaintiff. The defendant delivered up the money on the purchaser's order and indemnity. The action was for money had and received, and the court instructed the jury "that if the \$500 was received in bank paper, but was considered as money, and received as money, and had been used by M., then he is liable in this action for it as money." The court of appeals, by Judge Marshall, said: "To the instruction given there are several objections. First. There is no evidence conducing to prove that the bank note was received as so much money; or that it was used, in any proper sense of that term, by M. himself; and he being a mere depository

or stakeholder of the specific article, could not be liable for more than its value, for failing to deliver it to the person for whose use he held it. Second. The note not having been received *expressly* as money by M., nor expressly agreed to be so received by P., neither its nominal amount nor its value could have been recoverable in this action for money had and received." 1 Chitty, Pl. 385.

² *Sirlott v. Tandy*, 3 Dana, 142.

³ In *Memphis, etc. R. Co. v. Walker*, 2 Head, 467, a set-off was offered of the following obligation: "Six months from date, or sooner if practicable, the M. & L. R. R. Co. promise to pay to the order of H. & A. \$5,000 in the bonds of said company, *at par*; of equal character with any bonds issued by said company; to bear interest, etc., in part payment of the award made," etc. It was held that on default in paying the obligation the measure of damages was the nominal value, \$5,000, not the value at which the bonds might be rated in the market.

A general deposit of bills of the bank receiving them must be repaid at the nominal amount, although current at half their amount at the time of the deposit. *Bank of Kentucky v. Wister*, 2 Pet. 318.

bound to diligence in collecting it, or to take the proper steps to charge indorsers or other secondary parties, and who is guilty of negligence in the performance of that duty by which the paper becomes worthless is, *prima facie*, liable for its amount. His liability is to compensate the actual loss; and it devolves on him to show, if he can, that the paper would be, with the diligence he was bound to exercise, worth less than its face.¹ Thus, if A. loan the note of a third person to B., the latter must use due diligence to recover the amount due upon it; and if the debt be lost by the insolvency of the maker and by B.'s want of diligence, he must pay the amount of the note to A.² And the same rule applies in assessing [190] damages for the wrongful conversion of a note; that is to say, the face of the note is *prima facie* recoverable; but the defendant may show that it was worth less.³

It devolves on the plaintiff suing for want of diligence to show that the primary party is insolvent; or in other words, that by the negligence of the defendant the paper is of no value.⁴ A recovery may be had for the full amount of the paper if a pledgee converts it to his own use, unless he shows that the promisor is unable to pay it.⁵ The same rule of damages applies in favor of a purchaser to whom the defendant has fraudulently sold a note which had been paid. The measure of damages is *prima facie* its amount. The ability of the maker to pay will be presumed until the contrary is shown.⁶ But the damages for breach of an agreement to return to the maker a paid or released note, already past due, cannot be its full amount unless it be shown that in consequence of the breach the plaintiff has been, by force of the *prima facie* import of the paper and its apparent negotiability, compelled to pay it to some subsequent holder in spite of a diligent endeavor to prove the facts which, if proved, would constitute a complete defense.⁷

¹ Shipsey v. Bowery Nat. Bank, 59 N. Y. 485; Downer v. Madison County Bank, 6 Hill, 648.

² Higbee v. Hopkins, 1 Wash. C. C. 230.

³ McPeters v. Phillips, 46 Ala. 496;

Anderson v. First Nat. Bank, 6 N. D. 497, 72 N. W. Rep. 916. See § 1132.

⁴ Hough v. Hunt, 1 Ohio, 504.

⁵ Thomas v. Waterman, 7 Met. 227; Latham v. Brown, 16 Iowa, 118.

⁶ Neff v. Clute, 12 Barb. 466.

⁷ Barmon v. Lithauer, 4 Keyes, 317.

CHAPTER XIII.

VENDOR AND PURCHASER.

§ 566. Damages for breach of contracts for sale of realty.

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VENDOR AGAINST PURCHASER.

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§ 566. Damages for breach of contracts for sale of realty.
[191] Under this general head it will be convenient and appropriate to present consecutively the law of damages appli-

cable to contracts of sale and purchase of both realty and personalty, as well as the obligations for assuring quality, quantity and title. Those which relate to lands require separate treatment, and will be first considered; then those which relate to things of a personal nature.

The sense and aim of the law in respect to contracts generally are well expressed by Hosmer, C. J.: "The rule of damages on the breach of an express contract has long been established; and whether it relate to real or personal estate, it must necessarily be the same. Whenever a person for a legal consideration agrees to do a certain act, and, in the event of his not doing it, the damages are not stipulated by the parties, the law, on the ground of reason and natural justice, implies that the person in default shall pay the damages accruing from the non-performance. The object of the parties ought to be attained as nearly as possible; and that is, that the specific act agreed to be done should be performed. If the party omits to do what he stipulated, it is just, as a reasonable substitute, that he should pay the precise value of the thing which he contracted to do, and such value to be estimated at the time when the act in question should have been executed."¹ These principles, for the most part, apply to contracts relating to real estate. But an exceptional rule of damages to some extent has been applied, by which, instead of allowing the purchaser, as the injured party, damages equal to the benefit he would derive from performance, the amount allowed him has been fixed on the standard of rescission. This rule does not gainsay the principle of compensation, but is based on considerations of policy; and in this country is treated as an exception.

SECTION 1.

VENDOR AGAINST PURCHASER.

§ 567. Seller entitled to purchase price and interest; abatement of price. The utmost pecuniary redress which a vendor may claim against a vendee in respect of a con- [192] tract of purchase is the agreed price, and interest upon it from

¹ Wells v. Abernethy, 5 Conn. 222; Warren v. Chandler, 98 Iowa, 237, 67 N. W. Rep. 242.

the time it became due.¹ Collection thereof accomplishes specific performance. Where the promises to convey and to pay are to be performed simultaneously, and are, therefore, mutually dependent, a court of equity will not decree performance against the vendee by requiring him to pay, except upon the terms of the vendor doing equity on his part by making effectual conveyance of the title according to the contract.²

The obligation of the purchaser to pay a stipulated sum survives the delivery of the deed unless he has discharged it by compliance with the contract or has been released from it, and payment of the consideration specified in the deed is not conclusive. The rule that the contract is superseded by or merged in the deed has no application in such a case.³ Although a purchaser of land acquires the right to the bed of streets adjoining it, if they should be vacated, yet if he buys by the acre and the contract describes the land as bounded by the street line the purchaser is liable only for so much land as he is put in possession.⁴ A vendor may waive the right to declare a forfeiture of the contract of sale because of the default of the purchaser in making payments; such waiver does not rescind the contract or affect the right to enforce payment of the purchase price.⁵

A vendor who has not faithfully performed his contract and who sues on equitable grounds to recover the purchase-money

¹ Under a contract for the sale of land and a house to be erected thereon, which provided that the house was to be completed, payment made and title passed on a fixed day, and that the purchaser should pay any increase in the cost of the house caused by alterations, he was not liable for interest which accrued on a mortgage or taxes previously assessed, but which, by delay of the tax officials, became payable during an extension of the time for passing title caused by making alterations. *Woolley v. Friedlander*, 67 Hun, 321, 22 N. Y. Supp. 313, affirmed without opinion, 143 N. Y. 626.

² *Gaines v. Bryant*, 4 Dana, 395.

³ *Wilson v. Pearl*, 12 Pa. Super. Ct.

66; *Schotte v. Meredith*, 192 Pa. 159, 43 Atl. Rep. 952; *Buckley's Appeal*, 48 Pa. 491, 88 Am. Dec. 468; *Close v. Zell*, 141 Pa. 390, 21 Atl. Rep. 720.

⁴ *Firminstone v. Spaeter*, 1 Pa. Dist. Rep. 39.

⁵ *Bohart v. Republic Investment Co.*, 49 Kan. 94, 30 Pac. Rep. 180; *Barrett v. Dean*, 21 Iowa. 423; *Niles v. Phinney*, 90 Me. 122, 37 Atl. Rep. 880; *Canfield v. Westcott*, 5 Cow. 270; *Folts v. Huntley*, 7 Wend. 210; *Barbour v. Brookie*, 3 J. J. Marsh. 511; *Mason v. Caldwell*, 10 Ill. 196, 48 Am. Dec. 330; *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. Rep. 629, 52 Am. Rep. 310; *Meagher v. Hoyle*, 173 Mass. 577, 54 N. E. Rep. 347.

due may be held for the entire costs of a reference and of the litigation, which would have been unnecessary but for his default.¹

§ 568. **The legal remedy.** The theory of the legal remedy on the contract is not that of specific performance, but the recovery of damages commensurate with the injury resulting from non-performance. There are a few cases in England and this country in which, on the mere tender of a conveyance not accepted, recovery at law has been permitted or countenanced of the entire purchase-money.²

¹ *Gates v. Parmly*, 93 Wis. 294, 66 N. W. Rep. 253, 67 id. 739.

² *Murray v. Ellis*, 112 Pa. 485, 3 Atl. Rep. 845; *Fore v. Gipe*, 2 Pa. Dist. Rep. 822; *Hawkins v. Kemp*, 3 East, 410.

There is an implication in favor of such recovery in *Goodisson v. Nunn*, 4 T. R. 761. In *Glazebrook v. Woodrow*, 8 id. 366, it was decided that no action for the purchase-money could be maintained by the vendor without averring that he had conveyed or *tendered a conveyance*. *Alna v. Plummer*, 4 Me. 258; *Garrard v. Dollar*, 4 Jones, 175; *Sanborn v. Chamberlin*, 101 Mass. 409; *Worthy v. Jones*, 11 Gray, 168, 71 Am. Dec. 696; *Franchot v. Leach*, 5 Cow. 506; *Tripp v. Bishop*, 56 Pa. 424. See *Hansbrough v. Peck*, 5 Wall. 497.

In *Richards v. Edick*, 17 Barb. 260, Gridley, J., expressed disapproval of this rule, but, regarding it as settled in New York, allowed recovery accordingly. He says: "It is insisted by counsel for the defendant that the measure of damages assumed in the first count, viz., the purchase price of the land, is not the true one. He argues that the title to the land does not pass by the tender of a deed to the defendant, and the plaintiff's continued readiness to deliver it, and that the true measure of damages is the excess of the contract price over the actual value of the

land; and that inasmuch as there is no averment of such excess of the purchase price and no other damage claimed, the \$100 which the plaintiff admits to have been paid more than balances the nominal damages arising on a breach of the contract by the defendant. The counsel is certainly sustained in his position as to the true measure of damages by the decision of the court in *Laird v. Pim*, 7 M. & W. 474. It also seems to me, that were it a new question in this state, there would be reason for adopting the principle which is now held to be law in the English courts. Because what is sought to be recovered is damages for the violation of the defendant's contract, by which the plaintiff has suffered loss. But in the case of an agreement for land the title does not pass by tender of the deed; nor does it pass by operation of law on the recovery of a judgment for the purchase price, as is sometimes true of personal property. It is a case, therefore, where the plaintiff holds the title to the land, and recovers its full value expressed in the contract; and after judgment, when the defendant seeks to obtain the land, a court of law is without the power of affording him any relief. . . . The English rule would therefore seem to be more in accordance with general principles, and more in

[193] § 569. **Measure of damages.** In a contract providing for concurrent execution by the parties, it and its consideration are mutually executory, and neither party is bound absolutely to fulfill without performance on the other side; and each, on general principles, has the legal right to violate his contract on the usual terms of compensating the other for the damages which the law allows, and subject to the jurisdiction of equity to decree specific performance.¹ If either can obtain, in a court of law, a judgment which enforces literal performance by the other on a mere proffer of the act which is the consideration, he obtains for himself specific performance without subjecting himself to a jurisdiction which courts of equity exercise in such cases to render the relief reciprocally just and equal. A judgment for the purchase-[194] money on a mere tender of a conveyance, in a legal sense, is founded on the erroneous assumption that the tender of a deed is equivalent to a transfer of the property, and that the purchaser from the time it is made owes the agreed price. Such tender does not pass the title, though followed by recovery and collection of the stipulated consideration; and hence, the vendor would have both the purchase-money and the legal seizin of the land sold. If he has not received a deed, taken or surrendered the possession, he should not be subjected to the payment of the purchase price.² In an English case³ the court say the plaintiff cannot have the land and the value too. A tender of performance will perfect a right of action; but it is not equivalent to performance for the recovery of damages.⁴ In some cases the courts have permitted

analogy to the action for not accepting personal property, as wheat, or other commodity, which the defendant has purchased and contracted to receive and pay for. There is no necessity for the exercise of this jurisdiction, for the court of chancery is competent to order a specific performance of the agreement, and, at the same time, to see that a valid deed conveying the title is delivered on the payment of the contract price." See *Bement v. Smith*, 15 Wend. 493; *Shannon v. Comstock*, 21 id. 457.

In *Bensinger v. Erhardt*, 74 App. Div. 139, 77 N. Y. Supp. 1122, and in *Schmaltz v. Weed*, 27 App. Div. 309, 50 N. Y. Supp. 168, a rule opposed to that declared in *Richards v. Edick*, *supra*, is applied.

¹ *Clark v. Marsiglia*, 1 Denio, 317, 43 Am. Dec. 670.

² *Scudder v. Waddingham*, 8 Mo. App. 26; *Carner v. Peters*, 9 Pa. Super. Ct. 29; *Hellings v. Heydenfeldt*, 107 Cal. 577, 40 Pac. Rep. 1026.

³ *Laird v. Pim*, 7 M. & W. 474.

⁴ *Eastern Counties R. Co. v. Hawkes*, 5 H. of L. Cas. 331, 336; *Wil-*

the whole purchase-money to be recovered where the deed, after tender, has been recorded¹ or has been brought into court to be delivered to the defendant.

In a case in Maine² the defendant gave his bond in a penalty of \$15,000, conditioned to pay for land according to the recited terms, which were one-third part of the purchase-money for one thousand two hundred and eighty acres at \$6 per acre in thirty days, and two notes payable in one and two years, with good security, for the other two-thirds, the obligee being ready and willing to make the conveyance. An action of debt was brought on the bond without being preceded by even the tender of a deed. Emery, J., said: "This contract decidedly throws on the defendant the obligation of *first tendering the money* and the two notes with good security; for without this he could not expect to find the plaintiff ready and willing to make the deed of conveyance free from all incumbrances. [195] But this does not impose on the defendant the duty of parting with his money without receiving the deed of conveyance, provided he takes the precaution of demanding it, and the jury ought not to have withdrawn from them the question whether the plaintiff on his part was ready to perform. . . . When a contract is made to sell and convey on one side, and on the other to purchase and pay for land, on a breach of the agreement each party has an election to seek for damages in a suit at law, or proceed in equity for a specific performance. It is rather unusual for the same party to pursue both remedies. If the seller commence his suit at law, it is supposed that he is contented to keep the property, and pocket the damages which a jury may give him in satisfaction for the injury. Should he wish to get rid of the land, he will proceed in equity to compel specific performance, and in that case nothing would be recovered but the money and interest which were to be given. . . . The appeal to the jury in this case is to be

son v. Martin, 1 Denio, 602; Spencer v. Hulstead, id. 606; Shannon v. Comstock, 21 Wend. 457; Hecksher v. McCrea, 24 id. 304; Boardman v. Keeler, 21 Vt. 77; Clark v. Mayor, 4 N. Y. 338, 53 Am. Dec. 379; Derby v. Johnson, 21 Vt. 17; Philadelphia R. Co. v. Howard, 13 How. 397; Pitkin

v. Frink, 8 Met. 12; Donaldson v. Fuller, 8 S. & R. 505; Jewell v. Handford, 7 Dana, 473; Davis v. Ayers, 9 Ala. 292; Rankin v. Darnell, 11 R. Mon. 30, 52 Am. Dec. 557.

¹ Sanborn v. Chamberlin, 101 Mass. 409, 1 Am. Rep. 125.

² Robinson v. Heard, 15 Me. 296.

relieved from the penalty of \$15,000. If that sum had truly and intentionally been adopted and described in the contract as liquidated damages, and not as a penalty on failure of performance, it may be doubted whether a court or a jury could rightfully have changed it. And had the deed been tendered in season and brought into court by the plaintiff and filed to be delivered to the defendant, perhaps the rule of damages prescribed by the judge (the purchase-money) would be correct. It would hold the defendant to pay what he agreed. The plaintiff did not stipulate to receive any part of that sum in land. And the argument, then, that because he holds the land he ought not to recover the price stipulated to be paid by the defendant in money, ought not to avail, as it would tend to encourage people to break their contracts, in the hope of escaping with trifling damages by casting the commodity back upon the seller's hands. But under these exceptions no tender of the deed appears to have been made, nor does it appear to have been brought into court. Under such circumstances, to give the plaintiff a perfect indemnity, the rule the court understands to be the difference between the sum which the defendant agreed to give for the land and the sum for [196] which the plaintiff could have sold it on the day when the contract should have been performed. Had the plaintiff put it up and sold it at auction on that or the next day after the refusal to take upon fair notice, and obtained a sum of money for it, it would be the duty of the defendant to make up the deficiency, and those two sums would have been the same as the plaintiff would have received if the defendant had performed. If the plaintiff has not done that, nor offered the title to the defendant, then he elects to keep the land at what price it might have sold for at that time."

§ 570. *Same subject.* It is evident, however, that these are irregular expedients to give the judgment at law the effect of specific performance. The importance given to the deposit of a deed in court implies that the sum recovered is not adjudged as damages for failure to perform the contract; but a decree is made for the specific moneys agreed to be paid and decreed in view of such deposit, by which the plaintiff ostensibly keeps good a tender of equitable terms not expressly required or defined by the court. The measure of damages

which is more in accord with legal principles and analogies is that laid down in the English case referred to,¹ and which has been followed in several late decisions in this country — the difference between the price fixed in the contract and the real value at the time the contract was to be executed. In a Massachusetts case² the court, alluding to the argument for the rule that the purchase-money should be the measure of damages, said: "We apprehend that that rule of damages, however applicable it may be to cases of contracts for the sale of personal property, where, by force and effect of mere delivery, or by judgment at law for the value of an article, the property may become vested in the party paying damages therefor, does not apply to real estate, which can only be transferred by deed. In actions against a vendee, on a contract for the purchase of real estate, we had supposed it to be a well settled rule that when a party agrees to purchase real estate at a certain stipulated price, and subsequently refuses to perform his contract, the loss in the bargain constitutes the measure of damages, and that is the difference between the price fixed in the contract and the salable value of the land at the time [197] the contract was to be executed." Finding some diversity of opinion on the subject, and even some Massachusetts cases not in accord with that rule, the conclusion was reached that "upon more full consideration of the question of the measure of damages in an action at law, where the defendant has refused to receive the deed tendered him, the court are of opinion that the proper rule of damages in such a case is the difference between the price agreed to be paid for the land and the salable value of the land at the time the contract was broken."³

¹ *Laird v. Pim*, 7 M. & W. 474.

² *Old Colony R. Co. v. Evans*, 6 Gray, 25, 66 Am. Dec. 394, recognized in *Hallett v. Taylor*, 177 Mass. 6, 58 N. E. Rep. 151.

³ *Guli v. West*, 65 Hun, 1, 19 N. Y. Supp. 757; *Schmaltz v. Weed*, 27 App. Div. 309, 50 N. Y. Supp. 168; *Bensinger v. Erhardt*, 74 App. Div. 169, 77 N. Y. Supp. 1122; *Smith v. Newell*, 37 Fla. 147, 30 So. Rep. 249; *Farmers & Citizens' Building, etc.*

Ass'n v. Rector, 22 Ind. App. 101, 53 N. E. Rep. 297; *Warren v. Chandler*, 98 Iowa, 237, 67 N. W. Rep. 242, quoting the text; *Williams v. Whitmore*, 1 Tenn. Cas. 239 (1872); *Hawison v. Oakley*, 118 Ala. 215, 228, 21 So. Rep. 810; *Sloan v. Baird*, 162 N. Y. 327, 329, 56 N. E. Rep. 752; *Gruswald v. Sabin*, 51 N. H. 167, 12 Am. Rep. 76; *Stewart v. McLaughlin's Estate*, 126 Mich. 1, 7, 85 N. W. Rep. 206, 87 id. 218, citing the text; *Porter v.*

In Pennsylvania the purchase-money may be and is habitually recovered or its payment enforced at law. There being no court of chancery in that state, specific performance, in name, is worked out in various legal actions. It may be done in covenant, debt, *assumpsit* or ejectment.¹ When the purchase-money is so recovered by the vendor it is permitted as specific performance. That relief is so commonly granted at law that it is held under the act of 1836, giving jurisdiction in equity for specific relief where damages recoverable at law would be an inadequate remedy, that a suit for specific performance at the instance of a vendor cannot be maintained where he asks merely for the recovery of purchase-money.² The cases are numerous in that state; they illustrate the flexible character of the practice at law, and the facility with which legal actions are used to afford equitable redress. The legal rule of damages there, based on the vendor's repudiation of the contract, if it cannot be specifically enforced, is the difference between the contract price and the real value at the time of the breach.³

[198] Where the purchase-money is recoverable at law, it must of course be declared for, and its recovery is an enforcement of the contract.⁴ Such a recovery in effect compels the vendee to take the property by obliging him to pay for it.⁵ But it is only in clear cases, where the vendor is ready and willing to perform and has offered to do so, that such a re-

Travis, 40 Ind. 556; *Lewis v. Lee*, 15 id. 499; *Wilson v. Holden*, 16 Abb. Pr. 133; *Marcus v. Smith*, 17 Up. Can. C. P. 416; *Adams v. McMillan*, 7 Port. 73; *Wasson v. Palmer*, 17 Neb. 330, 22 N. W. Rep. 773; *Scudder v. Waddingham*, 7 Mo. App. 26. See *Dayton, etc. Turnpike Co. v. Coy*, 13 Ohio St. 84; *In re Charles Lafitte & Co.*, 23 Week. Rep. 379; *Miller v. Collyer*, 36 Barb. 250; *Gray v. Case*, 51 Mo. 463; also *Webster v. Hoban*, 7 Cranch, 399.

In Illinois where a broker employed to sell lots on commission broke his contract to buy those unsold at a given time, at an agreed price, his liability did not exceed

such price. *Gray v. Meek*, 199 Ill. 136, 64 N. E. Rep. 120.

¹ *Pennock v. Freeman*, 1 Watts, 401; *Stokely v. Trout*, 3 id. 163; *Dixon v. Oliver*, 5 id. 509; *Findlay v. Keim*, 62 Pa. 112.

² *Kauffman's Appeal*, 55 Pa. 383.

³ *Meason v. Kaine*, 67 Pa. 126; *Huber v. Burke*, 11 S. & R. 238; *Bowser v. Cessna*, 62 Pa. 148; *Ellet v. Paxson*, 2 W. & S. 418. See *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297; *Kelly v. Cunningham*, 36 Ala. 78.

⁴ *Porter v. Travis*, 40 Ind. 556; *Bowser v. Cessna*, 62 Pa. 148.

⁵ *Id.*

covery can be had. If he is in default in point of time, or has not title, or his title is not good, he cannot recover.¹ There can be only technical objections to such recovery at law. The practical result is the same whether the contract is enforced in one court or another. So long as the right of property in the thing agreed to be sold has not passed to the purchaser the vendor is entitled, in case of the non-completion of the contract, to resell it; and if the resale has taken place within a reasonable period after the breach, the difference between the price realized thereon and that agreed to be paid by the purchaser will be the measure of damages which the vendor will be entitled to recover, in addition to the costs, charges and expenses of the resale.² What is a reasonable time in which to

¹ *Felter v. Weybright*, 8 Ohio, 168; *Kauffman's Appeal*, 55 Pa. 383; *Meason v. Kaine*, 67 id. 126; *Negley v. Lindsay*, id. 217, 5 Am. Rep. 427; *Huber v. Burke*, 11 S. & R. 238; *Smith v. McClosky*, 45 Barb. 610; *Walker v. France*, 112 Pa. 203, 5 Atl. Rep. 208.

² *Ewing v. Tees*, 1 Bin. 450, 2 Am. Dec. 455; *Irvine v. Bull*, 4 Watts. 287, 28 Am. Dec. 708; *Hughes v. Miller*, 186 Pa. 375, 40 Atl. Rep. 492; *Howison v. Oakley*, 118 Ala. 215, 23 So. Rep. 810; *McBrayer v. Cohen*, 92 Ky. 479, 18 S. W. Rep. 123; *Kempner v. Heidenheimer*, 65 Tex. 587; *Bowser v. Cessna*, 62 Pa. 148; *Webster v. Hoban*, 7 Cranch, 399.

In the last case, upon a sale of land at auction, the terms were that the purchaser should within thirty days give his notes, with two good indorsers, and, if he should fail to comply within thirty days, then the lands were to be resold on account of the first purchaser. Held, that the vendor could not maintain an action against the vendee for a breach of the contract until such resale should take place, and have ascertained the deficit, although the vendee should instruct an attorney to draw a deed and insert his name as purchaser.

Livingston, J.: "It might have produced more than on the first sale, in which case the surplus would have belonged to him; or the same price might have been obtained, and then he would have lost nothing; or it might have been sold for less, and then, by paying the difference which would have formed his whole loss, he would not have been exposed, as he must be if this action proceeds, to have damages assessed against him by some uncertain and arbitrary or unsatisfactory rule which might be adopted by a jury. Of these advantages, which were reserved to him by the terms of the auction, the plaintiff had no right to deprive him."

The damages for the breach of a contract for the right to purchase public land are measured by the difference between the stipulated price and the salable value of the right. The vendor must resell his right or show its market value as a basis for recovery. *Telfener v. Russ*, 145 U. S. 522, 12 Sup. Ct. Rep. 490; *Russ v. Telfener*, 57 Fed. Rep. 973.

It is said in a late case that while the right of the vendor to resell and recover the difference is supported by the Pennsylvania cases cited in

make a resale is a question of fact. The lapse of such a period as would give opportunity for fluctuations in the market, in the usual order of things, or of such as would authorize the inference that the vendor had elected not to adopt this means of fixing the measure of the vendee's liability, would be unreasonable.¹ The sale is in some sense a sale of the defendant's property to pay his debt, and he is entitled to notice of it.² The vendee's liability will not be affected by the resale if it was made under terms more onerous than those of the original sale.³ This rule applies though the conditions of the second sale were prescribed by a court.⁴ The resale must be made after notice, or the defaulting purchaser will not be affected by the price bid thereat.⁵

If the second sale is not properly made, or if it is delayed

this note, it should be noticed that later cases emphasize the doctrine that parol contracts relating to the sale or demise of real estate, when within the statute of frauds, cannot be made a basis upon which to recover damages for the loss of the bargain, or for what may amount, equivalently, to specific enforcement, in the absence of fraud in the contract or proof of special injury caused by the refusal to perform. It may well be doubted whether, under the trend of the later decisions, a vendor can recover the difference in price on a resale where this amounts, substantially, to all the pecuniary advantage to be derived from specific performance of the contract, in the absence of fraud or of direct loss growing out of the breach. This question was not decided. *Carner v. Peters*, 9 Pa. Super. Ct. 29.

In a Tennessee case, decided in 1872, the rule laid down in the text is disapproved as to private sales on the grounds that it is arbitrary, might work the gravest injustice, and leaves it in the power of the vendor to make a sale at any time, for there could be no fixed time in which the resale should be made;

it might be under the most unfavorable circumstances, and the vendor by his own act thus fix the measure of damages for breach of the contract. It would, furthermore, present great temptation in many cases, where the first purchaser was good, to reckless sales, regardless of procuring the best price in which the interest of the party failing to comply with his original contract would have no protection whatever, and would be most likely sacrificed. *Williams v. Whitmore*, 1 Tenn. Cas. 239, 257.

¹ *Kempner v. Heidenheimer*, 65 Tex. 587.

² *Id.*; *Green v. Ansley*, 92 Ga. 647, 19 S. E. Rep. 53, citing the text (but not of the time and place of the intended resale; in accord as to notice of the time and place are *Pollen v. Le Roy*, 30 N. Y. 549; see § 647); *Davis Sulphur Ore Co. v. Atlanta Guano Co.*, 109 Ga. 607, 34 S. E. Rep. 1011; *Bowser v. Cessna*, 62 Pa. 148.

³ *Guli v. West*, 65 Hun. 1, 19 N. Y. Supp. 757.

⁴ *Weast v. Derrick*, 100 Pa. 509; *Banes v. Gordon*, 9 id. 426.

⁵ *Anderson v. Truitt*, 53 Mo. App. 590.

for an unreasonable time, whereby the original purchaser is injured, he is released from all liability for the deficiency arising from the second sale; for there are no means of ascertaining what the land would have brought at the second sale if it had been sold on the same or equally beneficial terms as the first, and within a reasonable time thereafter, and therefore no means of determining the amount to be paid under the implied stipulation.¹ Under these circumstances the liability of the first purchaser should be confined to the expenses of the second sale, which his own default made necessary. The fact that the defaulting purchaser at the first sale was also the purchaser at the second sale, held under different terms and after unreasonable delay, should not make the above rule inapplicable. It cannot be said that his injury as the first purchaser, occasioned by the delay and the change in the terms, whereby a reduced price was brought at the second sale, is offset by his gain as the second purchaser in procuring the land at a reduced price, and that he was not, therefore, injured; for the second sale, if confirmed, must be presumed to have brought a sum not greatly disproportionate to the real value of the land, considering the terms and time of the sale.² In order that a vendee may be made liable for the difference between the price he agreed to pay and that realized on a resale his agreement to purchase must have been made on that condition,³ unless the purchase was made at an official sale.⁴ In Rhode Island an administrator's sale is not an official sale so as to subject the purchaser thereat to this measure of liability.⁵ In Alabama the sale of a decedent's land under the decree of the probate court is a judicial sale. The right to resell and hold the bidder at the first sale liable for the difference in the price realized at the sales is an implied term in every order of sale and a part of every bid. The result of this is that the bidder is bound for such measure of liability as if he had

¹ *Hare v. Bedell*, 98 Pa. 485; *Shinn v. Roberts*, 20 N. J. L. 435, 43 Am. Dec. 636; *Riggs v. Pursell*, 74 N. Y. 370.

² *Howison v. Oakley*, 118 Ala. 215, 239, 23 So. Rep. 810.

³ *McGuinness v. Whalen*, 16 R. I. 558, 18 Atl. Rep. 158; *Adams v. Mo-*

Millan, 7 Port. 73; *Robinson v. Garth*, 6 Ala. 204, 41 Am. Dec. 47.

⁴ *Larkin v. Crawford*, 8 Ala. 153; *Hutton v. Williams*, 35 id. 503, 76 Am. Dec. 297.

⁵ *McGuinness v. Whalen*, 16 R. I. 558, 18 Atl. Rep. 158.

entered into a formal agreement stipulating that such should be the measure of damages. "If, therefore," it is said in a late case, "the loss occasioned by the resale is in the nature of stipulated damages, this loss, and this alone, constitutes the measure of recovery, and if for any reason it be not recoverable in a particular case, the plaintiff, when there has been in fact a resale, cannot waive the stipulation, and, falling back on the ordinary measure of damages for the breach of a contract for the purchase of real estate, recover the actual damages sustained, that is, the difference between the amount agreed to be paid and the market value of the land at the time of the breach. By the stipulation for the liquidated damages he has waived all right to claim actual damages measured by the ordinary legal standard." But if there has been no resale the implied agreement to measure the damages caused by the purchaser's default by the loss occasioned by the resale is no longer binding, and there may be a recovery of the damages according to the rule stated.¹ In Kentucky one who purchases land at a public auction and repudiates his contract is liable for the difference between his bid and the price realized at a subsequent resale made in the same way, and the costs of such resale. The court do not make the distinction that the original purchase must be made subject to the risk of a resale, nor that either sale must be official.² And this is true of cases in other courts. In such cases the difference in the price between the two sales is generally not conclusive, but may be taken as a criterion of the damages actually sustained.³ In the absence of any other evidence of value than the resale that will be conclusive.⁴

If the vendor does not resell the estate or, in case of sale, does not sell it conformably to the rules stated, he will then be entitled to recover the difference between the agreed price and the presumed marketable value of the property,⁵ together

¹ Howison v. Oakley, 118 Ala. 215, 238, 23 So. Rep. 810.

² McBrayer v. Cohen, 92 Ky. 479, 18 S. W. Rep. 123.

³ Bernard v. Duncan, 38 Mo. 184; Gardner v. Armstrong, 31 Mo. 536; Adams v. McMillan, 7 Port. 88; Girard v. Taggard, 5 S. & R. 19, 9 Am.

Dec. 327; Anderson v. Truitt, 53 Mo. App. 590.

⁴ Engel v. Fitch, 10 B. & S. 753.

⁵ Anderson v. Truitt, 52 Mo. App. 590 (not the actual cash value); Gilbert v. Cherry, 57 Ga. 128; Griswold v. Sabin, 51 N. H. 167; Porter v. Travis, 40 Ind. 556; Whiteside v. Jen-

with his costs, charges and expenses. Amongst these [199] costs and charges may be included the expense of making out the title; for although that is, by custom and usage, defrayed by the vendor, yet it is done upon the understanding that the contract will be duly fulfilled by the purchaser.¹ If the land has enhanced in value and its value at the time of the breach exceeds the purchase price, the recovery cannot exceed nominal damages.² If after a partial performance the vendee repudiates the agreement, the rule of liability for lessened value is applicable, or, in a proper case, the vendor might recover the full value of the land, but in either case the value of the partial performance must be deducted therefrom.³ Where the conditions of sale provide for the payment of a deposit by the purchaser, and for its forfeiture in case of his failure to comply with the conditions, the deposit must, nevertheless, be brought into account by the vendor if he seeks to recover the deficiency on a resale of the property.⁴

A grantee who accepts a deed in pursuance of an oral contract for the purchase of land and refuses to execute the note and mortgage which he agreed to give for the deferred payments is liable for the consideration agreed upon and interest thereon; the whole amount may be recovered if it was due before the trial.⁵ And for the sum expended in purchasing an unmatured mortgage upon the premises,⁶ and the difference between the value of the land and the agreed price for it, and such other loss sustained by the vendor as could have been reasonably anticipated.⁷ It is said in a recent case that it may not be easy to determine what damages can be recovered on a contract to purchase real estate when it has been terminated by a forfeiture. It is certain, however, that the purchaser is

nings, 19 Ala. 791; Wells v. Abernethy, 5 Conn. 227; Findlay v. Keim, 62 Pa. 112; Drew v. Pedlar, 87 Cal. 443, 22 Am. St. 257, 25 Pac. Rep. 749; Fears v. Merrill, 9 Ark. 559, 50 Am. Dec. 226; Muenchow v. Roberts, 77 Wis. 520, 46 N. W. Rep. 802; Wasson v. Palmer, 17 Neb. 330, 22 N. W. Rep. 773; Kempner v. Heidenheimer, 65 Tex. 587.

¹ 1 Addison on Cont., § 528.

² Evrit v. Bancroft, 22 Ohio St. 172.

³ Day v. New York Central R. Co., 51 N. Y. 583; Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; Drew v. Pedlar, 87 Cal. 443, 25 Pac. Rep. 749, 25 Am. St. 257.

⁴ Okenden v. Henly, El., Bl. & El. 455.

⁵ Niland v. Murphy, 73 Wis. 326, 41 N. W. Rep. 335.

⁶ Kelley v. West, 86 Minn. 570, 82 N. W. Rep. 620.

⁷ Hurd v. Dunsmore, 63 N. H. 171.

not liable for the amount paid by the vendor to his own agent for negotiating the sale; and if the vendor can sell the property so as to entirely recoup the loss, the damage would not be substantial. But the loss, whatever it is, if not confined to rent, must depend upon what the defendant should have paid.¹

§ 571. Same subject; where notes are given for the price. Where, however, promissory notes are made for the purchase-money, the rule applicable where the contract is disaffirmed can have no application. It would be no defense to an action on such a note that its consideration was an agreement to convey lands; that the consideration had failed wholly or in part because, though the vendor had tendered the deed, the maker of the note had refused it and declined to consummate the purchase.² Giving notes for the purchase-

¹ Hubbard v. Epworth, 69 Mich. 92, 36 N. W. Rep. 801.

² In White v. Beard, 5 Port. 94, 30 Am. Dec. 552, A. sold lands by parol agreement and put his vendee in possession. After the vendor's death the vendee executed his note to the vendor's administrator, and took his bond for conveyance on payment of the purchase-money. It was held that the administrator could recover, and the defense of a failure of consideration could not be made, though he was not able to convey the land. As the intestate made the verbal sale and put the purchaser in possession, the contract was partly performed, so as to be capable of specific execution in equity, and, as the intestate had thus manifested an intention to convert the land into money, it belonged to the administrator, and the right of the heirs was subject to their disposition. Lynch v. Baxter, 4 Tex. 431, 51 Am. Dec. 735; Carter v. Carter, 1 Bailey, 217; Patton v. England, 15 Ala. 69.

In Lewis v. McMillen, 41 Barb. 420, an action was brought on a note given for \$1,000 by McMillen as principal and two others as sureties.

These are the facts: On the 21st of April, 1857, the plaintiff entered into a contract with McMillen to sell him a farm of about ninety-six acres at \$34.50 per acre. McMillen agreed to pay \$300 May 15, 1857, \$200 on the 1st of November, 1857, and \$1,000 May 1, 1858, upon which payment and his giving a bond and mortgage for the residue of the purchase-money the plaintiffs were to convey in fee by a good and sufficient deed. The payment of the money was declared by the contract to be a condition precedent to the execution of a deed. The note in question was given at the execution of the contract for the \$1,000 instalment. The defendant offered to prove, and the rejection of the evidence was the question to be decided, on motion for a new trial, among other things, that the defendant paid the \$300 and the \$200, and tendered amount of the note and interest when due and demanded conveyance, but the plaintiff not having title except to four-fifths could not, and refused to, convey; that the defendant required a rescission of the contract and repayment of what had been paid and

money so far executes the contract to buy that the seller may sue on them without alleging the sale, and recover, unless the maker is able to show some defect of consideration by [201] the fault of the vendor. The contract to convey, and the notes

offered to relinquish possession, but the plaintiff refused to accede to the offer. Johnson, J., delivered the opinion and said: "This action is not upon the contract, nor between the parties to it. The action is upon a separate and independent promise by the purchaser and other parties to pay the plaintiffs the sum specified at a particular day. The consideration of this promise, it is true, is the agreement of the plaintiffs with McMillen. But before the defendants can defeat the action *entirely* they must show either fraud in the transaction in which the note has its inception, or an entire want or failure of consideration. A partial want or failure of consideration cannot be alleged in bar; and no fraud is shown. It is quite manifest that here is not an *entire* failure of consideration. The plaintiffs have not refused to convey the entire premises, and they insist upon their right to the whole, and this right to the largest portion by far is conceded. But even if the plaintiffs had refused to convey, the contract being still executory on their part, the cases are abundant to show that such refusal is no bar to an action upon a separate note given to secure one or more of the payments. The party must pay the note and take his remedy upon the contract to recover damages for the breach. In such case the payment of the note and the conveyance are not concurrent, but independent, acts. The note is in the nature of a condition precedent, and must be paid. This was expressly ruled in *Spiller v. Westlake*, 2 B. & Ad. 155, 22 Eng. C. L. 49. Lord Tenterden, C. J., said:

'I can see no reason why he should have executed a distinct instrument, whereby he promised to pay a part of the purchase-money on a particular day, unless it was intended that he should pay the money on that day at all events.' Parke, J., was inclined to the opinion that the defense might have been maintainable if the circumstances had been such that had the defendant paid the money he would have been entitled to recover it back in an action brought by him, which he held could not be done so long as the contract remained open. Here the contract still remains open, neither party having rescinded or attempted to rescind. To the same effect are *Freligh v. Platt*, 5 Cow. 494; *Moggridge v. Jones*, 14 East, 486, 3 Camp. 38, and *Chapman v. Eddy*, 13 Vt. 205; 1 Pars. on Bills, 203, note z . . .

"The contract being, as we have seen, still open and unrescinded, and the defendant, McMillen, being in the full enjoyment of the benefit of the consideration of the note, is in no situation to resist payment. Parsons, in his book on Bills and Notes, at page 203, notices a distinction between the failure of the consideration of the note and the failure of a benefit resulting from it. As where one party promises another to do a certain thing, and the other gives his note to the promisor in consideration of such promise, the latter cannot defend against the note on the ground of a failure of the consideration so long as he retains the promise made to him, or if it be of such a nature that the other party is permanently held upon it. Before he can defeat the note he must cancel the

for the consideration, though separate instruments, are to be [202] construed together, and are parts of one contract;¹ and if they provide for payment on one side and conveyance on the other, to take place at the same time, they are concurrent acts and in their nature reciprocally dependent in the matter of performance. The vendor is not obliged to convey unless the purchase-money is paid; nor can he be put in default, if he is able

promise. And in *Wright v. Delafield*, 23 Barb. 498, it was held that a purchaser of land could not keep the land and refuse to pay for it, whether the title was good or bad. That if it was bad he must elect to take it as it was, or as the vendor could make it, and pay for it, or else give it up. And that as the purchaser did not elect to give up the land he must pay for it according to his agreement. This is only stating, in another form, a very familiar and elementary rule of law, that where one obtains a right to the possession of land, and to the use and profits thereof by virtue of an agreement, he cannot, while thus holding the land, dispute the title of him from whom he obtained it, and refuse to perform his agreement under which he entered and continued to hold. Before he can do this he must surrender the possession and place the party *in statu quo*. In other words, he must rescind *in toto* by restoring what he received. The action here is upon a separate promise, executed in part by persons who are not parties to the contract, and which contract is still open, neither party having put an end to it on account of the default of the other, but each retaining everything acquired under it. How can the court say that the plaintiffs shall not have the benefit of the contract on their side, to recover according to its terms the value of the property which the defendant McMillen ob-

tained from them by means of it, and which he still keeps and enjoys, and holds from them only. It was in consideration of his promise that he obtained possession of these premises, and has so long enjoyed their use, and so long as he elects to keep the consideration and the benefits resulting from it the law must hold him to his promise, and allow the other party to enforce it. Before the court can have any right to absolve him from his promise, he must do works meet for such absolution, which he has not yet done. It would be monstrous injustice, as it seems to me, in the court to drive the plaintiffs to rescind the contract, and seek some other remedy outside of it, in order to wrest the property from the tenacious grasp of the purchaser." See *Hulshizer v. Lamoreux*, 58 Ill. 72, and *Mallard v. Allred*, 106 Ga. 503, 32 S. E. Rep. 588, holding that a purchaser in possession under a bond for titles cannot have relief in equity against his contract to pay on the mere ground of a defect in title, unless he shows the insolvency of his vendor, or that he is a non resident, or some other fact which would make it inequitable for the vendor to enforce payment of the purchase-money.

¹ *Bailey v. Cromwell*, 4 Ill. 71; *Duncan v. Charles*, 5 id. 561; *Davis v. McVickers*, 11 id. 322, 50 Am. Dec. 460; *Berryhill v. Byington*, 10 Iowa, 223; *School District v. Rogers*, 8 Iowa, 316.

to fulfill, except by its payment or tender.¹ But if he is unable to make title, or on demand and offer of the purchase-money refuses to convey, that fact will entitle the purchaser to rescind; and it will avail to support an action on the contract to sell, or as a defense to the vendor's action, either on the contract of purchase or on notes given for the purchase-money.²

§ 572. **Seller must convey perfect title; effect of condemnation proceedings.** Unless the contract specifies some exception, or can be construed to intend the contrary,³ it binds the vendor to convey a perfect unincumbered title.⁴ And in actions at law time is generally held to be of the essence of the contract, and it is strictly so if the parties have so stipu-

¹ *Id.*; *Carman v. Pultz*, 21 N. Y. 547; *Leaird v. Smith*, 44 N. Y. 618; *Darrow v. Cornell*, 30 App. Div. 115, 51 N. Y. Supp. 828; *Gray v. Meek*, 199 Ill. 136, 64 N. E. Rep. 1020.

² *Lewis v. McMillen*, 31 Barb. 395. But see S. C., 41 Barb. 420; *Cooper v. Singleton*, 19 Tex. 260, 70 Am. Dec. 333; *Baldrige v. Cook*, 27 Tex. 565; *Taylor v. Fulmore*, 1 Rich. 52; *Taylor v. Johnston*, 19 Tex. 351; *Lawrence v. Simonton*, 13 id. 220; *Clute v. Robison*, 2 Johns. 595; *Lewis v. Bibb*, 4 Port. 84; *Hunter v. Bradford*, 3 Fla. 269. Compare *Spiller v. Westlake*, 2 B. & Ad. 155; *Howard v. Witham*, 2 Me. 390.

³ See *Corbitt v. Berryhill*, 29 Iowa, 157.

⁴ *Vought v. Williams*, 120 N. Y. 253, 24 N. W. Rep. 195, 17 Am. St. 634, 8 L. R. A. 591; *Heller v. Cohen*, 151 N. Y. 299, 48 N. E. Rep. 527; *Brokaw v. Duffy*, 165 N. Y. 391, 59 N. E. Rep. 196; *Griffith v. Maxfield*, 63 Ark. 548, 39 S. W. Rep. 852; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Swayne v. Lyon*, 67 Pa. 433; *Gill v. Wells*, 59 Md. 492; *Close v. Stuyvesant*, 132 Ill. 607, 24 N. E. Rep. 868, 3 L. R. A. 161; *Butts v. Andrews*, 136 Mass. 221; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N. E. Rep. 898, citing

the text; *Durham v. Hadley*, 47 Kan. 73, 27 Pac. Rep. 105; *Frazier v. Boggs*, 37 Fla. 307, 20 So. Rep. 245; *Gates v. Parmly*, 93 Wis. 294, 66 N. W. Rep. 253, 67 id. 739; *Roberts v. McFaddin*, 74 S. W. Rep. 105 (Tex. Ct. of Civ. App.); *Cullum v. Branch Bank*, 4 Ala. 21, 37 Am. Dec. 725; *Goddin v. Vaughn's Ex'r*, 14 Gratt. 102; *Souter v. Drake*, 5 B. & Ad. 992; *Doe v. Stanion*, 1 M. & W. 695; *Burwell v. Jackson*, 9 N. Y. 535; *Shreck v. Pierce*, 3 Iowa, 360; *Creigh v. Shatto*, 9 W. & S. 82; *In re Hunter*, 1 Edw. Ch. 1; *Hall v. Betty*, 4 M. & G. 410; *Purvis v. Rayer*, 9 Price, 488; *Boyer v. Marks*, 2 Sweeny, 715; *Pomeroy v. Drury*, 14 Barb. 418; *Hunter v. O'Neil*, 12 Ala. 37; *Greenwood v. Ligon*, 10 Sm. & M. 615, 48 Am. Dec. 775; *Traver v. Halsted*, 23 Wend. 66; *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105; *Andrews v. Word*, 17 B. Mon. 518; *Fleming v. Harrison*, 2 Bibb, 171, 4 Am. Dec. 691; *Vanada v. Hopkins*, 1 J. J. Marsh. 293; *Hedges v. Kerr*, 4 B. Mon. 546; *Davis v. Dyceus*, 7 Bush, 4; *Hatcher v. Andrews*, 5 id. 561; *Guynet v. Mantel*, 4 Duer, 91; *Grimes v. Ballant's Adm'r*, 8 B. Mon. 625; *Atkins v. Bahratt*, 19 Barb. 639; *Witter v. Bisbee*, 13 Ark. 422.

lated.¹ In equity, if time is not made of the essence of the contract, a vendor may be allowed to tender an abstract showing good title at the trial of an action subsequently brought by him for specific performance.² If the purchaser has been let into possession, he cannot rescind for the default [203] of the vendor unless he surrenders such possession;³ but where the obligation is concurrent to convey a good title at the time of receiving payment, the purchaser is not precluded by his possession from setting up a defect of the vendor's title, or his refusal to convey, as a defense to an action on purchase-money notes, or a contract of purchase.⁴ Mere technical objections to the title will not be sufficient to relieve the purchaser from the performance of his contract.⁵

The authorities as to the rights of vendor and purchaser under an executory contract where, before the time for conveying the land, a part or all of it is taken by right of eminent domain are not numerous, and are not in harmony. In Illinois and Kansas the purchaser is not thereby relieved. It is said that the condemnation of the land is a forced sale of it by the purchaser, for which the law secures to him, and he is supposed to receive, full compensation. It is in the nature of a forced sale, it is true, but the responsibility is not upon the vendor. All persons hold their lands subject to the exercise of this right of eminent domain, and it is difficult to see why one holding land under a contract of purchase, and obliged to yield part of it by this forced sale to the state, or to persons clothed with

¹ *Frazier v. Boggs*, 37 Fla. 307, 20 So. Rep. 245.

² *Gates v. Parmly*, 93 Wis. 294, 66 N. W. Rep. 253, 67 id. 739.

³ *Reed v. Davis*, 4 Ala. 83; *Jackson v. McGinnis*, 14 Pa. 331; *Gans v. Renshaw*, 2 id. 31, 44 Am. Dec. 152. See *Giles v. Williams*, 3 Ala. 316, 37 Am. Dec. 692.

⁴ *Lewis v. White*, 16 Ohio St. 444; *Lewis v. McMillen*, 31 Barb. 395; *Baldrige v. Cook*, 27 Tex. 565; *Davis v. McVicker*, 11 Ill. 327. But see *Lewis v. McMillen*, 41 Barb. 420.

In *McIndoe v. Morman*, 26 Wis. 588, 7 Am. Rep. 91, a bond was given by the vendor for a deed, to be made

at a specified time, provided the obligee should pay \$400 on or before that date. An action was brought by the vendor to foreclose the contract, the complaint containing the allegation that the plaintiff had tendered a deed. The answer set up, and on the trial it was proved, that the plaintiff's title was defective. It was held that the vendee, being in possession, could not resist the payment of purchase-money on that ground.

⁵ *Moot v. Business Men's Investment Ass'n*, 157 N. Y. 201, 52 N. E. Rep. 1, 45 L. R. A. 666.

the authority of the state, for full compensation, should have any more claim against his vendor on the covenants in a deed subsequently made than he would have if he had made a private voluntary sale. If he has himself received the damages from the railway company, without objection on the part of the vendor, it would seem simply preposterous in him to claim, after he receives his deed, that his vendor should also respond to him upon the covenants for the purchase-money of the same land. If, on the other hand, his vendor has received the damages and refuses to account for them, the purchaser could certainly hold him responsible for them, or probably might, in the event of such refusal, have his option between an action for the damages, as money had and received for his use, or an action on the covenants in his deed. If, at the condemnation of the land, the damages are not paid in money, but in special benefits to the land, there would be the same reason why the vendor should not be subjected to a suit, after he has made his deed, that there would have been if the purchaser had received for his own use the damages in money. In both cases he has received the consideration for the forced sale, and should not be permitted to demand it twice.¹ In Massachusetts, where the contract was entire, and a part of the land covered by it was taken under the power of eminent domain, the court said that there had been at least a partial failure of consideration, and that the purchaser might elect to take what the vendor could convey, and hold him answerable in damages as to the rest, or, when the parties may be put in *statu quo*, he may rescind the contract and recover the money paid.²

Unless time be made of the essence of the contract, either by stipulation, the nature or value of the property, or the situation of the parties, notice should be given the vendor to perform the contract within a reasonable time, and if he does not do so it may be rescinded. A vendee who has acquiesced in or consented to delay cannot deprive the vendor of opportunity to perform without notice. If the purchase-money has been paid and no time specified in which to make the conveyance,

¹ *Stevenson v. Lochr*, 57 Ill. 509, 11 Am. Rep. 36; *Kuhn v. Freeman*, 15 Kan. 423; *Gannon v. Blissell*, 45 Kan. 221, 25 Pac. Rep. 580. ² *Krus v. Covell*, 180 Mass. 206, 63 N. E. Rep. 244.

the vendor is entitled to a reasonable time, and the vendee should demand a deed and there should be a refusal to deliver it before suit can properly be brought to recover the money.¹

§ 573. **Recoupment for defect of title.** Where the obligation to pay is precedent to that of the other party to convey, if the time fixed for conveyance has arrived, the inability of the vendor to make title is available as a defense to an action on notes for the purchase-money, on the principle of recoupment. If the defense goes to the whole purchase-money it may accomplish a nullification of the sale, and in the absence of any possession by the vendor, there is no obstacle to the defense generally at law.² But if the defendant has taken possession and retains it at the time of the action, he affirms the contract, and can set up no counter-claim unless he has been damnified; though he may, of course, insist on a precedent condition, he cannot insist on a defect of the plaintiff's title unless he has been disturbed in his possession by it, or has extinguished it; nor any incumbrance, unless he has paid it,³ in which case he can only recoup for the sum actually paid.⁴ Where the purchaser assumes the payment of an indebtedness against the property purchased as a part of the price thereof he cannot purchase an outstanding title and set it up to defeat the incumbrance which he has obligated himself to pay.⁵

¹ *McNamara v. Pengilly*, 58 Minn. 353, 59 N. W. Rep. 1055. See this case in 64 Minn. 543, 67 N. W. Rep. 661.

² *American Ass'n v. Short*, 97 Ky. 502, 30 S. W. Rep. 978; *Comegys v. Davidson*, 154 Pa. 534, 26 Atl. Rep. 618; *Fisher v. Salmon*, 1 Cal. 413, 54 Am. Dec. 297; *Tillotson v. Grapes*, 4 N. H. 444; *Dickinson v. Hall*, 14 Pick. 217; *Trask v. Vinson*, 20 id. 110; *Moore v. Ellsworth*, 3 Conn. 483. See § 183.

³ *Marsh v. Thompson*, 102 Ind. 272, 1 N. E. Rep. 630; *Small v. Reeves*, 14 Ind. 163; *Gaar v. Lockridge*, 9 id. 92; *Buell v. Tate*, 7 Blackf. 55; *Wiley v. Howard*, 15 Ind. 169; *Barber v. Kilbourn*, 16 Wis. 486; *Bordeaux v. Cave*, 1 Bailey, 250; *Carter*

v. Carter, id. 217; *Stone v. Gover*, 1 Ala. 287; *Bates v. Terrell*, 7 id. 129; *Lamkin v. Reese*, id. 170; *Worthington v. McRoberts*, id. 814, 9 Ala. 297; *Wilson v. Jordan*, 3 Stew. & P. 92; *Lee v. White*, 4 id. 178; *George v. Stockton*, 1 Ala. 136; *Christian v. Scott*, 1 Stew. 490, 18 Am. Dec. 68; *Peden v. Moore*, 1 Stew. & P. 71, 21 Am. Dec. 649; *Lynch v. Baxter*, 4 Tex. 431; *Wood v. Perry*, 1 Barb. 114; *Galloway v. Finley*, 12 Pet. 264; *Curran v. Rogers*, 35 Mich. 221. See *Tompkins v. Hyatt*, 28 N. Y. 347.

⁴ *Kerley v. Richardson*, 17 Ga. 602; *Hull v. Harris*, 64 id. 309.

⁵ *Landau v. Cottrill*, 159 Mo. 308, 60 S. W. Rep. 64; *Drury v. Holden*, 121 Ill. 130, 137, 13 N. E. Rep. 547, and cases cited.

§ 574. **Purchaser cannot assail validity of contract.** [204] While in possession under a parol contract of sale, the vendee cannot defend against notes for the purchase-money on the ground that the contract is void under the statute of frauds. The contract is not unlawful, and while he is in possession, and the vendor neither repudiates the contract nor is in default, there is no defect of consideration.¹ This principle, in the absence of fraud in the sale, applies where a vendee takes possession under a deed containing a general covenant of warranty.²

§ 575. **Recovery when contract does not fix price.** The amount a vendor is entitled to recover for land contracted or conveyed may not be fixed by the contract; then it must be ascertained by proof or by such other means as the contract points out. The time of the valuation may be material where the value fluctuates. Doubtless the value should be ascertained as of the date of the sale, when the vendor agrees to part with the land and the purchaser to take it, unless they indicate a different time. Where there was a covenant to pay for a surplus, if any, in a tract of land, without designating a time, it was held to refer to the time fixed for paying for the rest, and that the value at that time was the criterion of damages, because the agreement provided that the vendor might have more than the price agreed for the rest, if "at the time of payment" he was dissatisfied with that price, and disinterested men should value the land higher.³ On the question of

¹ Gillespie v. Battle, 15 Ala. 276; Cope v. Williams, 4 id. 362; Johnson v. Hanson, 6 id. 351, 41 Am. Dec. 54; Rhodes v. Storr, 7 Ala. 346. Compare Bates v. Terrell, id. 129.

² Turrell v. Archer, 1 Mart. Ch. 103; Morris v. Ham, 47 Ark. 293, 296, 1 S. W. Rep. 519; Noonan v. Lee, 2 Black, 499; Peters v. Bowman, 93 U. S. 56; Abner v. York, 19 Ky. L. Rep. 643, 41 S. W. Rep. 309; Holman v. Maupin, 3 T. B. Mon. 380.

³ Keas v. McMillan, 2 J. J. Marsh. 12; Means v. Milliken, 33 Pa. 517.

In the last case a debtor conveyed land to his creditor in satisfaction

of his indebtedness, under a verbal agreement that the debtor should have all the profit on a resale within five years, over and above the amount of his debt with interest, etc.; before the expiration of the five years the grantor gave notice to the other party to sell, but the grantee had previously disposed of the property. Held, in an action to recover the difference between the amount of the debt and interest and what the property might have been sold for, that the damages were to be estimated by what it would have produced at the time notice was given to sell,

[205] value the admission of the purchaser may be considered. Where a party has conveyed land on the parol promise of the grantee to convey to him certain other lands, which such grantee refused to do, the grantor has recovered the value of his conveyance upon an implied promise; and the plaintiff has proven, on the question of value, the worth of the land that the defendant agreed to convey, not as a basis of recovery, but as a declaration on the subject of value.¹ If the title to land conveyed in part payment of other land fails, the damage is the value of such land at the time it was conveyed, with interest. Statements of value made by the defendant during the negotiations and the consideration expressed in the deed are competent evidence of its value.² Where a party refuses to convey land contracted in exchange, he is liable on the contract for the value at the time of the breach.³ If one of the parties has executed and recorded his

and not by the highest price that could have been procured at any time during the five years.

¹ *Bassett v. Bassett*, 55 Me. 127; *Greenwood v. Hoyt*, 41 Minn. 381, 43 N. W. Rep. 8; *Nugent v. Teachout*, 67 Mich. 571, 35 N. W. Rep. 254; *Dikeman v. Arnold*, 78 Mich. 455, 468, 44 N. W. Rep. 407. See *King v. Brown*, 2 Hill, 485; *Kneeland v. Fuller*, 51 Me. 518; also, *Basford v. Pearson*, 9 Allen, 387, 85 Am. Dec. 764.

² *Donlan v. Evans*, 40 Minn. 501, 42 N. W. Rep. 472.

If the title is decreed to be in a third person its market value at the time the decree is made governs. *Stewart v. Jack*, 78 Iowa, 154, 42 N. W. Rep. 633.

³ *Devin v. Himer*, 29 Iowa, 297; *Burr v. Todd*, 41 Pa. 206; *Combs v. Scott*, 76 Wis. 662, 45 N. W. Rep. 532; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Warren v. Chandler*, 98 Iowa, 237, 67 N. W. Rep. 242.

It is said in the case last cited: Had the contract been performed, the plaintiff would have received the property which the defendant was to convey to him; and it must

have been contemplated by the parties that if the defendant should, without lawful excuse, fail to convey it to the plaintiff, the latter would be entitled to its value if he had conveyed to the defendant, but, if not, that he would be entitled to the difference in the values. The plaintiff is not restricted to the increase in the value of the property he was to receive, but is entitled to the full benefit of his contract.

In *Brigham v. Evans*, 113 Mass. 538, the defendant agreed to exchange land for land and horses owned by the plaintiff. An appraisal was to be made, and either party was to pay the balance found in the other's favor. The horses were appraised in excess of their value, judged by a sale of them subsequently made. On the defendant's refusal to convey the damage was held to be the difference between the value of the property and the sum the plaintiff would have received for it if there had been no breach; the price secured at the sale was not to govern the jury in determining that value, but was to be considered.

deed, and made a tender of it to the other, who makes no offer to reconvey, but repudiates his contract, the one who has performed may recover the expense to which he was put before such repudiation, and the value of the property conveyed. The defendant cannot mitigate the damages by showing that the property was sold on judicial process subsequent to the making of the contract, it having been conveyed subject to the lien pursuant to which the sale was made.¹ There may be a recovery of expense incurred after a breach of the contract in an endeavor to perform it where the party in default had disabled himself from performing prior to entering into the contract to exchange property, the other party not knowing the fact until after the expenses were incurred.² Where the agreement was to exchange unincumbered land for land which was incumbered, and the owner of the latter guaranteed, for the benefit of the other party, to sell the land for a specified sum, he was bound to sell for such sum over and above the amount of the incumbrance existing when the exchange was made. Failing to do so, he was liable for the difference between value of the land conveyed to him and the value of that he conveyed to the plaintiff, over and above the incumbrance on the latter, if such difference did not exceed the sum for which the defendant agreed to sell. It was discretionary with the jury to allow interest on such difference from the commencement of the suit.³ If the contract for the exchange fixes the relative value of the lands from which one of the parties has the right to select, the value so fixed forms a basis for the recovery of damages in an action for the breach of the contract.⁴

Where the purchaser fails to erect a house, which was to be the consideration for the conveyance of land, the damage is the difference in the value of the house as it was to be built and of the property to be conveyed.⁵ A purchase by the acre of a tract lying on both sides of a river does not bind the purchaser to pay for the land in the river, though it passes by the

¹ Zimmerman v. Galbraith, 4 Penny, 297.

² Warren v. Chandler, *supra*.

³ Hartman v. Ruby, 16 D. C. App. Cas. 45.

⁴ Shirk v. Lingoman, 26 Ind. App. 630, 59 N. E. Rep. 941. Compare Gates v. Parmly, 93 Wis. 394, 66 N. W. Rep. 253, 67 id. 739.

⁵ Laraway v. Perkins, 10 N. Y. 371.

deed.¹ A grantor who reserves "one-eighth part of all the minerals or oil product produced on or from" the land conveyed is entitled to that proportion of the oil raised to the surface by his grantee, without deduction for the cost of getting it there. The measure of damages for its non-delivery is the market value at the time demand was made, with interest from that date. The rule which governs when there is a failure to deliver stocks does not apply.² A purchaser who agrees to assign a mortgage which he covenants shall be a valid and subsisting first lien on property worth a stated sum does not discharge his obligation by assigning the mortgage without the stipulation as to the value of the property covered by it, or as to its priority as a lien. In an action upon his covenant, the assignment being made to secure the mortgagor's notes, which were also assigned, he is entitled to have the value of the notes allowed in diminution of the damages, such value to be determined by the financial condition of their makers at the time of the trial, not when the assignment was made.³

§ 576. **Conveyance in consideration of non-pecuniary covenants.** A covenant by a railroad company, in consideration of the grant of a right of way through land, to erect a flag-station convenient to the grantor's house, and to permit him to cultivate all the land granted which was not needed by the grantee, runs with the land, and binds the grantee's assignee, who has notice.⁴ The measure of damages for its breach is the difference between the value of the lands when suit is brought and what their value would have been had all the stipulations in the contract been substantially performed; or, in other words, the additional value which would have accrued to the lands but for the breach. The covenant inured to the benefit of the grantor's adjoining land, and if performed would have increased its market value. This appreciation was within the legal, if not the actual, contemplation of the parties. Its loss was the natural and proximate result of the breach of the contract.⁵

¹ *Daniels v. Cheshire R. Co.*, 20 N. H. 85. Ala. 569, 58 Am. Rep. 623; *Mobile & M. R. Co. v. Gilmer*, 85 Ala. 422, 5

² *Union Oil Co.'s Appeal*, 3 Penny. So. Rep. 138.

504.

³ *Smith v. Holbrook*, 82 N. Y. 562. ⁵ *Mobile & M. R. Co. v. Gilmer*, *supra*; *Watterson v. Alleghany Valley R. Co.*, 74 Pa. 208; *Louisville, etc.*

⁴ *Gilmer v. Mobile & M. R. Co.*, 79

In a Pennsylvania case there was a breach of the contract to erect a depot, the erection of which was the principal consideration for the release of the right of way through the plaintiff's land. The trial court announced the damages to be the same as would have been awarded the owner if the land had been condemned. The supreme court, by Agnew, J., said: "Instead, then, of the question being the difference in value of the land before and after the building of the road, considering all advantages and disadvantages to the owner, the question would be upon the additional value which would accrue to the plaintiff's land in the event of erecting such a depot as the contract called for. Under the contract, whatever specific advantages would accrue to the land from the adjacent depot and station would have to be added to the plaintiff's claim, for this would be his loss in case of a breach of the contract. While the profits of his business cannot be added to his damages, for these are speculative and uncertain, the business advantages which constitute the characteristics of the land and give it value are not to be thrown out of consideration in determining the value of the land. Clearly, if the depot and station would make the plaintiff's land more valuable as a place of business, by bringing to it business it would not possess without them, they give greater value to the land to the extent of the increase by reason of their being placed there, and therefore fall within the scope of the contract."¹ In an Iowa case the parties exchanged lands, the defendant agreeing, as a part of the consideration, to make improvements on other lands of his adjoining those conveyed to the plaintiff. In an action to recover on account of the partial failure of the consideration in not making the stipulated improvements, it was alleged that by reason thereof there was a difference of \$5,000 in the value of the land conveyed. These damages were held to be actual, not speculative.²

A covenant by the grantee in a deed of the right of way through an eighty-acre tract of land that the water on one side of the road should be made to run on the same side in-

R. Co. v. Neafus, 93 Ky. 53, 18 S. W. Rep. 1030.

¹ Watterson v. R. Co., *supra*; West-

chester & P. R. v. Broomall, 3 Atl. Rep. 444 (Pa.).

² Wilson v. Yocum, 77 Iowa, 569, 42 N. W. Rep. 440.

stead of through cattle-guards, runs with the land; and in an action for its breach the damages are not restricted to those inflicted on the tract of land described in the deed, but extend to other land then owned as part of the same tract by the grantor.¹ If a vendee violates his covenant not to erect a tenement house on the granted premises the vendor may recover such damage as he has sustained thereby. The measure is not the difference between the value of the complainant's house as it was affected by the tenement and the value it would have possessed if the lot on which the latter was built had remained vacant, if there is no evidence that he desired to sell. The diminution of the value of the complainant's house for occupation is the standard by which to measure his compensation. In such a case future damages will not be assessed in a suit for an injunction.² On the breach of a condition subsequent the grantor may recover the value of the land and the rents from the time of instituting suit, but not anterior thereto unless he has previously re-entered.³ If the grantor has judgment of title in him, the damages incidental to his demand for the grantee's continued holding of the possession after breach of the condition subsequent include the rents or profits, or the value of the use and occupation of the land.⁴ Such value is a fair measure of the damages, and it may be recovered regardless of the actual use the defendant made of the property.⁵ If the grantee has met the public charges on the land or it was not subject thereto in its possession, the recovery will be lessened to the extent thereof.⁶ If there is a failure to deliver property which was to be accepted as part of the consideration for land, the damages are measured by its value at the time

The damages for the breach of a contract to buy land, the consideration being the construction and operation of a street-car line, cannot be estimated from proof of the difference between the contract price and the market value of the land when the breach occurred. *Coddington v. Hoblit*, 49 Ill. App. 66.

¹ *Peden v. Chicago, etc. R. Co.*, 78 Iowa, 131, 42 N. W. Rep. 625, 4 L. R. A. 401, 73 Iowa, 328, 5 Am. St. 680, 35 N. W. Rep. 424.

² *Amerman v. Deane*, 57 N. Y. Super. Ct. 175, 6 N. Y. Supp. 542.

³ *Gulf, etc. R. Co. v. Dunman*, 74 Tex. 265, 11 S. W. Rep. 1094.

⁴ *Clason v. Baldwin*, 129 N. Y. 183, 29 N. E. Rep. 226; *Danziger v. Boyd*, 120 N. Y. 628, 24 N. E. Rep. 482.

⁵ *Wallace v. Berdell*, 101 N. Y. 13, 16, 3 N. E. Rep. 769; *Trustees of Union College v. City of New York*, 65 App. Div. 553, 73 N. Y. Supp. 51.

⁶ *Trustees of Union College v. City of New York*, *supra*.

specified for its delivery, with interest from that date less the amount due on the purchase price.¹

Contracts for support during life are generally regarded as entire, and the party injured by the breach of such a contract may sue for the recovery of all the damages he will sustain thereby, although he is not bound to do so, but may bring successive actions.² This rule is not, apparently, recognized in Arkansas where the grantor in a deed executed to secure support sues for the failure to obtain it. He can only recover the amount required to support him during the time he had supported himself prior to the bringing of suit. The grantor's remedy was either to sue at law for the amount of the consideration as it should become due, or to treat the contract as void and sue in equity to cancel it.³

§ 577. **Interest on purchase-money.** If the vendee is in possession under his purchase he will generally be charged with interest on the purchase-money after it has become due, even where the completion of the sale is delayed in pursuance of the contract on account of the title, or by the acquiescence of the vendee;⁴ unless he keeps the money in hand idle, to be paid when the vendor becomes entitled to it.⁵ In Canada the purchaser in possession cannot be exonerated from his contract to pay interest by a court of equity unless the vendor is in wilful default, and he deposits the purchase-money, not to his general current account, but to a separate account, so that he can

¹ *Rayner v. Jones*, 90 Cal. 78, 27 Pac. Rep. 24.

The vendor of land was to place upon it, by a date named, a saw mill owned by him, and was to saw logs and receive one-half the lumber for doing so, and was to receive enough of the other half of the lumber to pay for the land. Before such date he sold the mill to the purchaser, who agreed to move it to the land, saw the logs for one-half the lumber, leaving the remainder for the vendor to the extent that it might be necessary to pay him the purchase price of the land. The mill was not moved as agreed, and the vendor sued for the purchase-money. The right to recover was denied because time

was not of the essence of the contract; the vendor might procure another mill to do the sawing, and thus get his pay, and the expense of doing so was the measure of his recovery. *King v. Mercer*, 7 Ky. 1. Rep. 590 (Ky. Super. Ct.).

² § 127.

³ *Salyers v. Smith*, 67 Ark. 526, 55 S. W. Rep. 936.

⁴ *Brockenbrough v. Blythe's Ex'r*, 3 Leigh, 619; 2 Addison on Cont., § 527; *Jourolomon v. Ewing*, 26 C. C. A. 23, 80 Fed. Rep. 604; *Krepp v. St. Louis, etc. R. Co.*, 72 S. W. Rep. 479 (St. Louis Ct. of App.).

⁵ *Id.*; *Hampton v. Egleberger*, 2 Bailey, 520.

show that he was losing the use of it.¹ Circumstances sometimes impose liability for interest although the purchase-money is not demandable, as where the vendee is in possession of the property and receipt of the rents and profits, the contract being silent as to possession or interest.² But this is not everywhere recognized. In a Delaware case³ the purchaser took possession before paying the purchase-money, and it was sought to hold him liable for interest on the ground that it was equitable for him to pay it. The answer was: Consider the nature and effect of the contract. The defendant became the owner. He had the equitable title. The complainant, if he retained the title, would have been a trustee for the defendant and accountable to him for the profits. It is too absurd a principle to be admitted, and is contrary to equity, that, if the defendant took possession of his own property, which it was lawful for him to do, such an act should make him liable to pay a larger sum for the land than he had agreed to pay.

The right of a vendor to interest from the vendee in possession, the contract being silent respecting it, does not pass with a judgment sale of the land; hence the purchaser at such sale can enforce an equitable claim for interest only from the date of his purchase; the vendor may recover interest for the time anterior thereto.⁴ The liability for interest does not exist if the contract is silent respecting it, although possession is taken under it, if the vendor unexcusedly refuses to perform the conditions precedent which entitle him to the purchase money.⁵ One who agrees to assume the vendor's debt as a part of the consideration for the land conveyed is liable for the amount of the debt then due. If that bore the conventional rate of interest the vendee is liable for only the legal rate, his obligation to pay not being expressed in an instrument signed by him, but embraced in the deed.⁶

¹ *Stevenson v. Davis*, 23 Can. Sup. Ct. 629.

² *Atchison, etc. R. Co. v. Chicago, etc. R. Co.*, 162 Ill. 632, 44 N. E. Rep. 823, 35 L. R. A. 167; *Powell v. Martyn*, 8 Ves. 146; *Simonds v. Essex Passenger R. Co.*, 57 N. J. Eq. 349, 41 Atl. Rep. 682. See § 328.

³ *Lofland v. Maull*, 1 Del. Ch. 359,

12 Am. Dec. 106; *Minard v. Beans*, 64 Pa. 411; *Nettleton v. Caryl*, 14 Pa. Super. Ct. 443.

⁴ *Simonds v. Essex Passenger R. Co.*, 57 N. J. Eq. 348, 41 Atl. Rep. 682.

⁵ *Atchison, etc. R. Co. v. Chicago, etc. R. Co.*, *supra*.

⁶ *Colvin v. Newell*, 8 Ky. L. Rep. 959 (Ky. Super. Ct.).

A purchaser who contracted to pay the purchase-money at a future named day, or as soon thereafter as incumbrances are removed, is not bound, without an express stipulation, to see to their removal; but if he takes possession and remains in the uninterrupted enjoyment of the land, he is liable for interest after the day appointed for payment although the incumbrances have not been removed, unless it appears that he had laid by the money which remained unemployed and unprofitable in order to meet the payment when they should be removed.¹ If

¹ *Brockenbrough v. Blythe's Ex'r*, 3 Leigh, 619; 2 *Addison on Cont.*, § 527. The court say: "The case of *Rutledge v. Smith*, 1 McCord Ch. 403, will serve as an illustration of the principle, whilst its application points out an exception founded on the principle itself. There the defendant purchased a house and lot at auction for cash, and placed the money in [206] the hands of an agent to pay the whole amount; but the agent, finding that there were, as in this case, legal incumbrances upon it, retained a part of the same until they should be removed; and that not having been done a considerable time after, he returned this balance to the defendant, who had taken possession of the house immediately after the purchase. And it was held that she was liable for interest on this balance from the time she received it from the agent, but not whilst it remained in his hands, because she was ignorant that it so remained there, and could have derived no profit from it. And if it had been shown in this case that *Eigleberger* laid by the amount due to the plaintiff to meet the demand when the incumbrances should have been removed, he would doubtless have been exempted from the payment of interest. But that is not pretended. It was insisted by counsel for the motion that until the plaintiff had discharged the incum-

brances, which he considered as a condition precedent, she was not entitled to receive the principal, and hence it was concluded that she was not entitled to interest on what the defendant had a right to retain. This argument has been already sufficiently answered. His liability arises out of the profit which he derived from the use and occupation of the lands and the consequent loss to the plaintiff."

The grantees of certain lands had covenanted with the grantor, since deceased, that the land, except as to the entrance to be made by them towards an intended new road, should be kept inclosed on all the sides abutting on the land of the grantor with a brick wall seven feet high. The grantees not having erected the wall in pursuance of the covenant, an action was brought against them by the executors and devisees of the grantor for damages for its breach. It appeared that, in the events that had happened, the value of the adjoining land of the plaintiff was not decreased by the non-erection of the wall to anything like the amount which it would have cost to build the wall; held, that the true measure of damages being the pecuniary amount of the difference between the position of the plaintiffs upon the breach of the contract and what it would have been if the contract had been performed, under

a vendee wrongfully kept out of possession by the vendor recovers damages the latter may recover interest on the unpaid purchase-money for the same period.¹ A vendor in possession is not entitled to interest until he tenders a deed and offers to surrender possession.² Under a condition imposing liability for interest if the purchaser is in default, such liability does not arise where the delay is due to the state of the vendor's title.³

The contract for the sale of land provided for the payment of \$5,000 at the time of its execution; \$45,000 was to be paid at the time of the conveyance, and the balance on or before five years, for which a note drawing interest, and secured by mortgage, was to be given. The vendee was allowed thirty days to examine the title and complete the contract; if the title proved defective he might avoid the contract and receive the money paid. Defects in the title existed, but no action was taken to terminate the contract or to further enforce it. The vendor remained in possession and received the rents and profits, and at the end of six years perfected the title. The vendee brought an action to enforce specific performance. The contract was regarded as providing for a speedy perfecting of the sale and the title. The impossibility of performance for so long a time rendered it impossible for the vendee to observe or the court to enforce the clause providing that the note for the balance of the purchase-money should draw interest from the date designated in it. It is said: Under these circumstances, the vendee was not required to treat the trans-

the circumstances of the case, the amount that it would cost to build the wall was not the correct measure of damages. *Wigsell v. School for Indigent Blind*, 8 Q. B. Div. 357.

In *Fowler v. Harts*, 149 Ill. 592, 36 N. E. Rep. 696, there was a sale of land for \$8,000, subject to an incumbrance, the amount of which was in dispute, and which the purchaser agreed to pay. There was no agreement to pay interest. The amount of the incumbrance as claimed by the creditor of the vendor was materially reduced, and left a considerable

sum due the latter from the purchaser under the terms of the contract. The vendor was not entitled to interest on such sum.

¹ *Abrahamson v. Lamberson*, 68 Minn. 454, 71 N. W. Rep. 676.

² *Meagher v. Puckett*, 19 Ky. L. Rep. 879, 42 S. W. Rep. 737.

³ *Denning v. Henderson*, 1 De G. & Sm. 689; *Jones v. Gardiner*, [1902] 1 Ch. 191.

Cases of honest mistake do not constitute "wilful default." *Bennett v. Stone*, [1902] 1 Ch. 226.

action as though it were already, or certainly would become, a perfected sale. He could not (as the court found) safely take possession, as though he were already the owner, or certain to become such. He could not venture to improve the property so as to realize the benefits which an owner may derive from such uses of his property as it may most advantageously be put to. The vendor, recognizing this, did not assume to treat the other party as an absolute purchaser. He remained in possession, and continued to receive such rents and profits as the property yielded. In such a case a court of equity will not treat the transaction as though it were an absolute contract of sale, certainly susceptible of specific performance; will not force the possible purchaser remaining out of possession, into the position of a trustee for the vendor, as respects the purchase-money, which he never became obligated to pay, and charge him with interest thereon, especially where the interest would so greatly exceed the value of the use of the land.¹

The purchaser may be liable for interest although not in possession if delay in consummating the transfer of the title is chargeable to him. Thus, in late and well-considered case a letter offering to purchase land provided that the conveyances should be executed within six months thereafter and the price paid at the time of delivery and acceptance of the necessary papers. On the acceptance of the offer drafts of such papers, following a form supplied by the purchaser, were sent him. He waived the submission of executed deeds and delayed for nearly two years to express objections to the drafts, promising from time to time to examine them. Liability for interest at the legal rate attached from the expiration of the six months when the vendor offered to execute the deed.² A purchaser may be relieved in equity against his promise to pay interest if there shall be delay from any cause whatever, if it be shown that the delay was caused by the wilful default

¹ *Lake Phalen Land & Imp. Co. v. Stees*, 54 Minn. 471, 56 N. W. Rep. 59, citing *Binks v. Rokeby*, 2 Swanst. 222, 225; *Carrodus v. Sharp*, 20 Beav. 56; ² *Latrobe v. Wimmer*, 80 Md. 636, *Esdale v. Stephenson*, 1 Sim. & S. 43 Atl. Rep. 829.

of the vendor.¹ Such default does not exist where the delay results because some of the vendors are infants, nor by the vendees' exception to the conveyance tendered, the ground thereof being removed while the paper was in the hands of the vendor's agent as an escrow and before it was delivered.² Under an executory contract by which the vendee assumed payment of an incumbrance on the land and which he might have renewed and extended before receiving his deed, the title being vested in him for the purposes indicated, the vendee was bound to provide for the discharge of the incumbrance within a reasonable time (three months under the circumstances), and was liable for interest thereon thereafter.³ The first instalment of the purchase-money was payable upon the "delivery of a deed clear of incumbrances," with interest on deferred instalments from date of such delivery. Incumbrances existing when the deed was delivered were subsequently gotten rid of by agreement of the parties, which resulted in a sheriff's sale of the land. The liability for interest did not antedate the deed of the sheriff.⁴

SECTION 2.

PURCHASER AGAINST VENDOR.

[207] § 578. Measure of damages in England. The rule of damages against a vendor who fails to perform his contract to convey has been subject to some diversity of decision. While the general rule that the law aims to make compensation adequate to the real injury sustained, and to place the injured party, so far as money can do it, in the same position he would have occupied if the contract had been fulfilled, is recognized, it is relaxed in some jurisdictions, and an exception admitted

¹ *Hayes v. Elmsley*, 23 Can. Sup. Ct. 623.

² *Stevenson v. Davis*, 23 Can. Sup. Ct. 629. See *De Visme v. De Visme*, 1 MacN. & G. 336, which, the Canadian case cited says, has not been followed.

As to delay and wilful delay in executing a conveyance, see *In re Hettling & Merton's Contract*, [1893] 3 Ch. 269; *In re Mayor of London &*

Tubbs' Contract, [1894] 2 Ch. 524, and cases referred to; *In re Woods & Lewis' Contract*, [1898] 1 Ch. 433, [1898] 2 Ch. 211.

³ *Watt v. Hunter*, 20 Tex. Civ. App. 76, 48 S. W. Rep. 593.

⁴ *Robbins v. Westmoreland Coal Co.*, 193 Pa. 301, 47 Atl. Rep. 873. It seems that the purchaser was not in possession.

in favor of a vendor who makes a contract to sell and convey in good faith, believing himself to be the owner of the property, when he is afterwards incapable of performing by reason of a defect in his title of which he was not aware. The damages in such a case are merely nominal. The vendee can only recover payments made with interest, and expenses incurred in the investigation of the title. This exception was first admitted in *Flureau v. Thornhill*,¹ in which it was said by Chief Justice De Grey: "If the title proves bad, and the vendor is, without fraud, incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." Blackstone, J., said: "These [contracts of sale] are merely upon condition, frequently expressed but always implied, that the vendor has a good title; if he has not, the return of the deposit with interest and costs is all that can be expected." This case has been followed in many cases in England and this country. These subsequent cases define more precisely, but not always consistently, the scope of the exception. The mild and exceptional rule, as supported by the weight of au- [208] thority, it is believed, is that above stated; it is confined to cases of inability to perform arising from a discovery after the contract of a previously unsuspected defect in the vendor's title.

In England the cases indicate that the doctrine and measure of damages in *Flureau v. Thornhill* is accepted as the rule, and any departure by allowing a recovery under a more liberal standard for the vendee is exceptional, if, indeed, they do not tend to the conclusion that it is the exclusive rule, and put a vendee to his action for deceit, if he seeks enhanced damages on the ground of fraud. It cannot be said that the courts there have reached that point, but the following observations of Lord Chelmsford in *Bain v. Fothergill*² show the tendency in that direction: "I fully agree in the doubt expressed by Mr. Justice Blackburn in *Sikes v. Wild*³ as to the soundness of the exception in *Hopkins v. Grazebrook*⁴ and in the observations which follow the expression of that doubt. The judge said: 'I do not see how the existence of misconduct can alter

¹ 2 W. Bl. 1078.² 1 B. & S. 587.³ L. R. 7 Eng. & Ir. App. 153.⁴ 6 B. & C. 31.

the rule by which damages for the breach of a contract are to be assessed; it may render the contract voidable on the ground of fraud, or give a cause of action for deceit; but surely it cannot alter the effect of the contract itself.' . . . Upon a review of all the decisions on the subject, I think that the case of *Hopkins v. Grazebrook*¹ ought not any longer to be regarded as an authority. Entertaining this opinion, I can have no doubt that the judgment of the court of exchequer in the present case is right, whether it falls within the rule established by *Flureau v. Thornhill*, or is to be considered as involving circumstances which have been regarded as removing cases from the influence of that rule; because I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot [209] recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit." *Bain v. Fothergill* was decided in the house of lords in 1874, and the opinions contain a thorough analysis and comparison of all the English cases on the point under consideration. F. was in possession, under a written agreement, of a mining royalty for a lease of which he had taken an assignment. One of the stipulations was that H. (the person with whom the agreement was originally made) should not assign without the consent of the lessors. They were ready to consent to the assignment to F., provided he would execute a duplicate of the agreement containing this stipulation. Though repeatedly communicated with on the subject, he delayed doing so. F. entered into a contract with B. to sell his interest in the royalty, but it was afterwards found that the lessors absolutely refused their assent to the transfer, and F. was unable to perform his contract with B.; B. brought an action against F. for its non-performance, and it was held that he could recover only the expenses he had incurred.² The general rule there being to give no

¹ 6 B. & C. 31.

the dissent was placed: "It appears

² Mr. Justice Denman dissented, that when the contract of the 17th and thus stated the facts on which of October, 1867, was signed, the de-

more than nominal damages and the expenses of investigating the title, except in a clear case of bad faith on the part of the vendor, there is the anomaly of aggravating the damages in an action upon contract on the ground of fraud. The anomaly, however, goes no farther than to secure to the vendee full compensation for the injury he sustains, according to the standard on other contracts of sale, namely, the value of the bargain. The cases are not numerous in England in which the increased damages have been allowed. The first was decided in 1826, and those which followed were based upon it. The original case has been overruled, and as a consequence the authority of the subsequent cases is shaken.¹

fendant, Fothergill, knew that the consent of Hill's lessors was required before Hill's executors could assign their interest to the defendants, and also that the like consent was necessary before the defendants could effectually assign their interest to the plaintiffs. The plaintiffs were not informed either of the necessity or of the non-existence of such consent. It further appears that before the contract was signed the defendants had had notice, through their solicitor, that the consent of the lessors of Hill to the assignment of his agreement with them was dependent upon the defendants doing an act which they were being pressed to do as far back as October, 1865, and which had not yet been done, and that such notice was not communicated to the plaintiff, nor the difficulty which might obviously arise in consequence pointed out. It appears to me that under the circumstances it was so clearly the duty of Mr. Fothergill to have put the plaintiffs in possession of these facts before he allowed them to sign a contract for the purchase of the royalty, that it is impossible for the defendants to rely upon the rule in *Flureau v. Thornhill*, 2 W. Bl. 1078. I think that the contract

in this case did not go off through the *discovery* by the defendants that they could not make a good title, but by reason of the over-sanguine expectation on the part of Mr. Fothergill that an obstacle which he *knew* to exist, and over which he had no control, would somehow or other cease to exist before the completion of the purchase. In such a case I am of opinion that the case of *Flureau v. Thornhill* does not apply."

¹ *Hopkins v. Grazebrook*, 6 B. & C. 31, is the case which introduced the exception to the rule of damages laid down in *Flureau v. Thornhill*, and *Bain v. Fothergill*. Lord Chelmsford thus criticises it and the cases which followed: "The decision itself in *Hopkins v. Grazebrook* cannot be supported. The seller in that case had undoubtedly an equitable estate in respect of which he had a right to contract. Therefore the language of Chief Justice Abbot, that 'the defendant had entered into a contract to sell without the power to confer even the shadow of a title,' is not warranted by the circumstances of the case, as the defendant could certainly have assigned his equitable estate, and thus the sole ground upon which he held him responsible for damages entirely failed. But al-

There is a seeming inclination on the part of some of the English judges not to extend, but rather to limit, the doctrine of *Bain v. Fothergill*. In a recent case *Lindley*, Master of the Rolls, delivering judgment on behalf of himself and *Rigby*,

though the facts in *Hopkins v. Grazebrook* did not justify the decision, yet the case has always been treated as having introduced an exception to the rule in *Flureau v. Thornhill*, and as having withdrawn from its operation a class of cases where a person knowing that he has no title to real estate enters into a contract for the sale of it. It is not correct to say, with Lord St. Leonard in his *Vendors and Purchasers* (14th ed., p. 359), that *Hopkins v. Grazebrook* has not been followed. It has been recognized in several cases since, and in one, to which I shall presently refer, it has been expressly followed. In *Robinson v. Harman*, 1 Ex. 850, already mentioned as having sanctioned the decision in *Flureau v. Thornhill*, Baron Parke said: 'The present case comes within the rule of the common law, and I cannot distinguish it from *Hopkins v. Grazebrook*.' And Baron Alderson and Baron Platt expressed the same opinion. In *Pounsett v. Fuller*, 17 C. B. 660, *Hopkins v. Grazebrook* was treated as a valid authority by all the judges, the question which they considered being whether the case fell within *Flureau v. Thornhill*, or the exception in *Hopkins v. Grazebrook*, and they decided that it was within the former case. But in the case of *Engel v. Fitch* the court of queen's bench, L. R. 3 Q. B. 314, and afterwards in the exchequer chamber, L. R. 4 Q. B. 659, 664, proceeded expressly on the cases of *Hopkins v. Grazebrook* and *Robinson v. Harman*, the chief baron quoting the very words of the lord chief justice, and relying on those cases. In that case the mortgagees of a

house sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on the completion of the purchase. The purchaser resold the house at an advance in the price to a person who wanted it for immediate occupation. The mortgagor refused to give up the possession. The mortgagee could have ousted him by ejectment, but refused to do so on the ground of expense. The purchaser brought an action upon the contract of sale, and it was held that, as the breach of contract arose not from inability of the defendants to make a good title, but from their refusal to take the necessary steps to give the plaintiff possession pursuant to the contract, he could recover not only the deposit and expenses of investigating the title, but damages for the loss of his bargain; and that the measure of such damages was the profit which it was shown he would have made upon a resale. It was after this decision in *Engel v. Fitch* that the plaintiff in error declined to argue the present case in the exchequer chamber, as the authorities on the subject could only be freely reviewed by a higher tribunal. Notwithstanding the repeated recognition of the authority of *Hopkins v. Grazebrook*, I cannot, after careful consideration, acquiesce in the propriety of that decision. I speak, of course, of the exception which it introduced to the rule established by *Flureau v. Thornhill* with respect to damages upon the breach of a contract for the sale of a real estate; for as to the case itself not falling within the exception to the rule (if any such exists), I suppose no doubt can now be enter-

L. J. (Sir F. H. Jeune, dissenting), said: The question raised by this appeal is whether a purchaser of leasehold property which the vendor cannot assign without a license from his lessor is entitled to damages (beyond the return of the deposit with

tained. The exception which the court in *Hopkins v. Grazebrook* engrafted upon the rule in *Flureau v. Thornhill* has always been taken to be this: that in an action for breach of a contract for the sale of a real estate, if the vendor at the time of entering into the contract knew that he had no title, the purchaser has a right to recover damages for the loss of his bargain."

Mr. Baron Pollock said: "In *Robinson v. Harman*, 1 Ex. 850, the defendant agreed to grant a valid lease when he well knew that he had no power to do so. In *Engel v. Fitch*, in which there was given an elaborate and exhaustive judgment of the court of queen's bench, confirmed by the exchequer chamber, the defendants, who were mortgagees of a lease but not in possession, sold it to the plaintiff, undertaking by the particulars of sale that possession should be given on completion of the purchase, and on the faith of this the plaintiff resold at a profit. The title was good, but on the plaintiff requiring possession it was found that the mortgagor was in possession and refused to give it up; and farther, that the defendants could have ousted him by ejectment, but refused to incur the necessary expenses. Under these circumstances the judges in the queen's bench held that the plaintiff was entitled to recover, not merely the deposit and expense of investigating the title, but also the damages for the loss of his bargain; and in giving the grounds for their judgment on the particular case said that 'the rule in *Flureau v. Thornhill* can have no application where the failure either to make out a title

or to give possession arises not from inability of the vendor, but from his unwillingness either to remedy a defect in the title, or to obtain possession on the score of expense.' It was urged by the learned counsel for the plaintiffs in error that the rule laid down in *Flureau v. Thornhill* was anomalous, and differed from that which is usually applied to the assessment of damages where there has been a breach of a contract for the delivery of goods, and therefore that it ought not to be upheld. It is scarcely correct to say the rule is anomalous; that it differs from that applicable to a contract for the sale of goods is true, but the subject-matter to which it is applied differs also. It is observable, in following the history of the rule in question, that when it was first laid down in *Flureau v. Thornhill* the whole question of the proper measure of damages had not received from our courts the attention which it has done in later years. Moreover, at that time, although it had never been expressly decided, it was commonly supposed that upon the sale of a chattel, in the absence of any warranty of title, the rule of *caveat emptor*, as laid down in *Co. Litt.*, p. 102a, and by *Noy*, in his maxim, c. 42, applied; but assuming that the difference exists, as it now undoubtedly does, there are two marked distinctions affecting the present question between a contract for the sale of personal and real property.

"In the first place, a man whose goods must be taken to know whether they are his or not. Secondly, he must be aware that, in the majority of cases, the goods he is

interest and expenses) by reason of the vendor's omission to do his best to procure such license. . . . Having regard to this circumstance, we do not think that *Bain v. Fothergill* covers this case. There the vendors did all they could to obtain

selling are intended for resale, or to be used by the buyer for the purpose of construction or manufacture, so that both the title of the vendor and the probable result of its deficiency may fairly be presumed to be in the minds of the contracting parties. With real estate the case differs in both these respects. First, no layman can be supposed to know what is the exact nature of his title to real property, or whether it be good against all the world or not; hence, as was said by the court in *Engel v. Fitch* (L. R. 3 Q. B. 314, id. 4 Q. B. 659), the undoubted owner of an estate often finds, unexpectedly, a difficulty in making out a title which he cannot overcome. Assuming that the vendor acts *bona fide*, the difficulty must be equally known to the vendee as to the vendor." [In the particular case the vendor knew the difficulty, and did not communicate it to the vendee; his good faith could therefore only have been inferred from the fact that he forgot to mention it, or omitted to do so by under-estimating its importance.]

"Secondly, to enter into a contract for the purchase of land in order immediately to resell it before the title is examined is unusual." [When a vendor contracts to sell in this unusual way, however, he is exempt from damages, if it happens unexpectedly that his vendor will not confer the power to fulfill. See *Hopkins v. Grazebrook*, which was held to be incorrectly decided. *Sikes v. Wild*, 1 B. & S. 587, 4 id. 421; *Walker v. Moore*, 10 B. & C. 416.] "It seems, therefore, more reasonable to treat the mere contract for the conveyance of land not as based upon an implied

warranty that the vendor has power to convey, but as involving the condition that the vendor has a good title; and that if, on examination of the abstract, this turns out not to be so, the vendee cannot ask to be put in as good a position as if a conveyance with the usual covenants had been executed, but can only recover the expenses to which he has been put. All that has been hitherto said leads to the conclusion that the case of *Flureau v. Thornhill* was rightly decided, at the time it was decided, on sufficient legal principles; but if it was a decision to which at the time I could not have acceded, I should, nevertheless, think that a contract of purchase and sale, made on the footing of that decision, was correct."

Lord Hatherley, also favoring the judgment which was pronounced, said: "The reasons given for the judgment in *Flureau v. Thornhill* were certainly not altogether satisfactory, because the lord chief justice is said, upon that occasion, to have stated *simpliciter*, without alleging any ground whatever for the decision, that upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, the purchaser is not entitled to any damages for the fancied goodness of the bargain; to which Mr. Justice Blackstone added, that 'these contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title.' That is scarcely a correct representation of the case, because if the vendor's contract with his vendee was on the condition that he had a

the lessors' consent to the assignment, and they failed to obtain it. The first question submitted to the judges shows that what was being considered was the rule as to damages on the sale of real estate where a vendor *without his default* is unable to make a good title. Lord Chelmsford's speech is addressed to that question; and his observations on fraud are a part of his comment on *Hopkins v. Grazebrook*,¹ which had decided that the exceptional rule laid down in *Flureau v. Thornhill*² did not apply where the vendor knew that he had not a good title although he believed he could get one, and had in fact an equitable title. Neither Lord Chelmsford's speech nor Lord Hatherley's is an authority for the application of that exceptional rule to the case of a vendor who can make good title

good title, then in the event of the title failing, there would be no action for damages whatever, and there would be no power in the vendee to do that which he is always entitled in equity to do, namely, to insist upon having the title good or bad, if he should be so minded; if the title is defective, and if it is so stated, the vendee is always allowed to have the benefit of the contract" [and, it may be added, compensation for any defect of title. *Mestaer v. Gillespie*, 11 Ves. 621-640; *Mortlock v. Buller*, 10 id. 292; *Wood v. Griffith*, 1 Swanst. 54; *Milligan v. Cooke*, 16 Ves. 1; *Seaman v. Vawdrey*, id. 390; *Painter v. Newby*, 11 Hare, 26; *Woodbury v. Luddy*, 14 Allen, 1]. "Therefore the reason is, not that the contract is made upon that condition, but the foundation of the rule has been already more clearly expressed by my noble and learned friend who has preceded me in saying that, having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estate, it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his

vendor; and taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title. All that he is entitled to is the expense he may have been put to in investigating the matter. He has a right also to take the estate and complete the purchase with that defective title, if he thinks proper so to do; but he is held to have bargained with the vendor upon the footing that he (the vendee) shall not be entitled, under all circumstances, to have that contract completed, and therefore he is not put in a position under such a contract to make a resale before the matter has been fully investigated, and before it is ascertained whether or not the title of his vendor is a good one."

Bain v. Fothergill was followed in *Rowe v. School Board for London*, 36 Ch. Div. 619, where it was ruled that there is no distinction between a contract to grant a right of way and make a road and sewers, and a contract to sell real estate.

¹ 6 B. & C. 31.

² 2 W. Bl. 1078.

but will not, or will not do what he can do and ought to do in order to obtain one. Such a case is, however, covered by *Engel v. Fitch*,¹ which was to a certain extent based on *Hopkins v. Grazebrook*,² and was much commented on in, but not overruled by, *Bain v. Fothergill*. These observations do not, however, dispose of this case. They render it necessary to consider another difficulty, which is this. If the defendant's representatives had tried to obtain the lessors' consent and had failed, the plaintiff could have obtained no more damages than the return of the deposit, with interest and expenses. The damage to him is occasioned by his not obtaining what he was entitled to by his contract; and so far as damages are concerned the reason why he fails to obtain what he bargained for is immaterial. The damage is the same whatever that reason may be. Why, then, should he obtain more damages if no attempt is made to obtain the lessors' consent than he would be entitled to if a proper effort to obtain such consent had been made and had failed? The only reason which can be assigned for deciding that he is entitled to more is that the rule which limits his damages in the first case is itself an anomalous rule based upon and justified by difficulties in showing a good title to real property in this country, but one which ought not to be extended to cases in which the reasons on which it is based do not apply. This answer to the question with which we are dealing appears to us sufficient and satisfactory. The answer may possibly be difficult to reconcile with some of Lord Chelmsford's observations in *Bain v. Fothergill*, but the answer is, in our opinion, quite consistent with the decision in that case, and it has the merit of preventing the rule there upheld from leading to grievous injustice. The plaintiff was entitled to recover for the loss of his bargain.³ Substantially the same view is announced by the supreme court of Victoria: the rule of *Flureau v. Thornhill* and *Bain v. Fothergill* is limited to cases where the breach arises from the inability of the vendor to make a good title, and does not apply where the breach arises from some other source than want of title.⁴

¹ L. R. 3 Q. B. 314, 4 id. 659.

² 6 B. & C. 31.

³ *Day v. Singleton*, [1899] 2 Ch. 320.

See *Jones v. Gardiner*, [1902] 1 Ch. 191.

⁴ *Ross v. Robinson*, 12 Vict. L. R. 764 (1886).

§ 579. Conflict of American decisions on measure of damages. The doctrine of the American courts has been [211] less liberal to the vendor. The general rule is that usually [212] applied, adequate compensation for the actual injury or, [213] as it is briefly expressed, damages for the loss of the bargain. In some jurisdictions there is no deviation from this rule on account of good faith and inability to perform resulting [214] from an unsuspected defect in the vendor's title; there the symmetry of the law relating to sales is preserved.¹ In case of delay in making the conveyance, which is ultimately accepted, the vendee is entitled to recover the difference between the value when the transfer should have been made and when it was made; and if he has been kept out of possession, the rental value of the property should be added.²

The New Jersey court of errors and appeals has recently reconsidered the question under discussion, and overruled *Drake*

¹ *Atwood v. Walker*, 179 Mass. 514, 61 N. E. Rep. 58; *Roche v. Smith*, 176 Mass. 595, 58 N. E. Rep. 152; *Dady v. Condit*, 188 Ill. 234, 58 N. E. Rep. 900; *Fleckten v. Spicer*, 63 Minn. 454, 65 N. W. Rep. 926, quoting the text; *Scheerschmidt v. Smith*, 74 Minn. 224, 77 N. W. Rep. 34; *Turner v. Brooks*, 2 Tex. Civ. App. 451, 21 S. W. Rep. 404; *Johnson v. McMullin*, 3 Wyo. 237, 21 Pac. Rep. 701, 4 L. R. A. 670; *Hamaker v. Coons*, 117 Ala. 603, 23 So. Rep. 655; *Brooks v. Miller*, 103 Ga. 712, 30 S. E. Rep. 630; *Warren v. Chandler*, 98 Iowa, 237, 67 N. W. Rep. 242; *Plum v. Mitchell*, 16 Ky. L. Rep. 162, 26 S. W. Rep. 391; *Matheny v. Stewart*, 108 Mo. 73, 78, 17 S. W. Rep. 1014; *Hartzell v. Crumb*, 90 Mo. 629, 3 S. W. Rep. 59; *Krepp v. St. Louis, etc. R. Co.*, 72 S. W. Rep. 479 (St. Louis Ct. of App.); *Bierer v. Fretz*, 32 Kan. 329, 4 Pac. Rep. 284; *Tracy v. Gunn*, 29 Kan. 508, intimating a disapproval of *Lister v. Batson*, 6 id. 420; *Muenchow v. Roberts*, 77 Wis. 520, 46 N. W. Rep. 802; *Wells v. Abernethy*, 5 Conn. 222; *Hopkins v.*

Lee, 6 Wheat. 109; *McKee v. Brandon*, 3 Ill. 339; *Buckmaster v. Grundy*, 2 Ill. 310; *Gale v. Dean*, 20 Ill. 320; *Cannell v. McClean*, 6 Har. & J. 297; *Bryant v. Hambrick*, 9 Ga. 133; *Hill v. Hobart*, 16 Me. 164; *Warren v. Wheeler*, 21 Me. 484; *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677; *Hopkins v. Yowell*, 5 Yerg. 305; *Shaw v. Wilkins*, 8 Humph. 647; *Barbour v. Nichols*, 3 R. I. 187; *Nichols v. Freeman*, 11 Ired. 99; *Lee v. Russell*, 8 id. 526, 49 Am. Dec. 692; *Spruell v. Davenport*, 5 Humph. 145. See *Fuller v. Reed*, 38 Cal. 99.

In *Hallett v. Taylor*, 177 Mass. 6, 58 N. E. Rep. 154, there was a breach of a contract covering land and personalty. The damages were measured by the difference between the value of the property at the time the plaintiff was entitled to a conveyance and the price he was then to pay; in estimating the damages it was proper for the jury to consider the sum paid and that due.

² *Violet v. Rose*, 39 Neb. 660, 58 N. W. Rep. 216.

v. Baker,¹ which followed the English cases making an exception to the rule of *Flureau v. Thornhill*,² which was decided before *Bain v. Fothergill*.³ The principal consideration given in support of the change of position is that there is no substantial difference in the injury resulting, where there is an ouster after conveyance with warranty, and where there is a refusal of conveyance in pursuance of the contract to convey, when the vendor is unable to make title, which can reasonably support a rule for damages in the former case wholly different from that which prevails in the latter case. The injury in both cases is the same — the loss of the property, the loss of such profit as would have been incident to increased value; the loss in both cases arises from the breach of the vendor's covenant on account of the defect in his title. If fraud or deceit enters into the transaction the vendee should be left to his action for deceit to recover for the loss he may sustain thereby.⁴

In Nebraska there are decisions on both sides of the question. A recent case has departed from all the previous rulings, and announced that there is no ground for distinction because the vendor did not act in good faith. "It may well be doubted whether, in a state where exemplary damages are not permitted, the measure of recovery should depend on the good faith of the vendor. The object of the law is to afford compensation, and not to punish, in civil cases, and the actual damage is the same regardless of the motive of the vendor. We think, however, the cases can be reconciled on a more logical basis. The vendor should not be permitted to speculate on his contract. If either rule of damages should be enforced to the exclusion of the other, he would be permitted to do so. If the rule of nominal damages alone prevails, then if the land rises in value the vendor may obtain the benefit of the increase by breaking his own contract, and by putting it out of his power to fulfill it. If the rule of substantial damages alone applies, the vendor, when the property has fallen in value, may keep the purchase-money and the land by repaying only the value of the land. The law will not permit a party to so speculate and reap a profit by violating his con-

¹ 34 N. J. L. 338.

² 2 W. Bl. 1078.

³ L. R. 7 Eng. & Ir. App. Cas. 158. St. 578.

⁴ *Gerbert v. Trustees*, 59 N. J. L. 160, 180, 35 Atl. Rep. 1121, 59 Am.

tract. We think the true rule to be that the law reposes in the innocent vendee an election either to treat the contract as rescinded and recover what he has paid, or to ask damages for the breach."¹

It has been given as a reason for departing from the English rule of damages that titles to real estate in this country are as a general thing less complicated, more readily investigated, and, by our jurisprudence, depend on rules which are less refined and abstruse than those which surround the questions which arise on an English title. The reasoning upon which the damages have been made merely nominal against a defaulting vendor who has acted in good faith, and been prevented from performing by unforeseen causes, has not been entirely satisfactory even to judges who have applied that rule in consequence of the supposed weight of general or local authority. The difficulty of ascertaining the state of the title, either in England or in this country, may well make both of the parties cautious, but it is a difficulty which they must surmount; and whether the loss is made to fall on one or the other, the state of the title is involved in every sale, and at some stage of the negotiation, or of the steps taken with a view to performance, is examined and ascertained. The vendor has the means of ascertaining his title, and where he undertakes absolutely to convey a particular estate it is more consistent with the responsibility which the law attaches to all other undertakings to impose the obligation which it imports, [215] and the liability to make full compensation on default. The reasons which govern the measure of damages on breach of the covenants for title in deeds have but slight application, considering the brief period during which executory contracts of sale operate.

On the breach of an agreement to convey land situated in another state than that in which a contract is made, and was

¹ *Seaver v. Hall*, 50 Neb. 878, 70 N. W. Rep. 373. See *Eaton v. Redick*, 1 Neb. 305; *Reed v. Beardsley*, 6 Neb. 493; *McPherson v. Wiswell*, 19 Neb. 117, 26 N. W. Rep. 916, holding that the vendee may recover the purchase-money although he was in default; *Wasson v. Palmer*, 13 Neb. 376, 14 N. W. Rep. 171; *Carver v. Taylor*, 35 Neb. 429, 53 N. W. Rep. 386, and *Violet v. Rose*, 39 Neb. 600, 58 N. W. Rep. 216, held in favor of substantial damages.

to be performed by payment of the purchase price and delivery of the deed, the damages are to be measured by the law of the state in which the contract was made.¹ A distinction exists between a conveyance of land and a covenant therefor in this respect.²

§ 580. *Same subject.* In an action in Maine upon such a contract, the law of damages was thus pointedly discussed by Peters, J.:³ "The general rule of damages in this form of action is well settled. If the plaintiff has paid nothing down, and the land was worth, at the date of the breach, more than he was to give for it, the difference would be his profit, and he could recover that amount. If there was no difference between the contract price and the value of the land when it should have been conveyed, and nothing was paid, then his damages could be nominal only; or if, in such case, the land was worth less than the contract price, he would then have nominal damages for the technical breach. So, if the plaintiff had paid the contract price in full, he could recover the value of the land at the time it should have been conveyed to him, whether the value was then more or less than the contract price. And so it logically follows, there being a part payment, and the land worth less than the contract price at the time a conveyance should have been made, that the damages would be what the land was then worth, less the amount of the price for it that remained unpaid. By paying the full price, the vendor is entitled to the land or its value, whatever the value may be. The recovery of damages, according to these rules, puts him in as good condition as if the contract had been performed. He gets exact indemnity."⁴ Referring to the English rule, he says: "Many of the American state courts have adopted it. It prevails in New York, although much doubt of its correctness has been expressed by the individual members of the courts of that state. . . . The supreme court of the United States does not sustain the doctrine."⁵ . . . We do

¹ *Atwood v. Walker*, 179 Mass. 514, 61 N. E. Rep. 58.

² *Id.*; *Polson v. Stewart*, 167 Mass. 211, 45 N. E. Rep. 737.

³ *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677.

⁴ *Warren v. Wheeler*, 21 Me. 484; *Hill v. Hobart*, 16 Me. 164; *Robinson v. Heard*, 15 Me. 296; *Russell v. Copeland*, 30 Me. 332; *Lawrence v. Chase*, 54 Me. 196.

⁵ *Hopkins v. Lee*, 6 Wheat. 109.

not discover that the precise point, namely, whether the measure of damages depends at all upon the cause of the failure to convey, has ever been noticed in any reported case in our own state. Still, it can hardly be regarded here as a new [216] question. We think it is virtually settled by decisions in analogous cases. In the case of personal property, the measure of damages has uniformly been based, in this state, upon the value of the articles when they should have been delivered, and not upon the consideration paid therefor.¹ The reason assigned in the New York cases (and in cases elsewhere) for the adoption of the rule there adopted is the analogy that is claimed to exist between actions for the breach of a covenant to convey land and actions for the breach of a covenant for the quiet enjoyment of land and for warranty of title.² But that can be no argument for the doctrine here, but conclusive argument against it, inasmuch as, while the rule of damages in those courts, under the covenants of quiet enjoyment and warranty of title, is the consideration paid for the land, and interest, the measure in this state is the value of the land at the time of the eviction.³ Still, it is not to be admitted that a complete similitude exists between the two classes of covenants in their legal bearing and effect. There is less harshness in applying our rule to contracts to convey than to the case of covenants in deeds. Improvements are not so likely to be made upon the land in the former as in the latter case by the person in possession. The correctness of the comparison is questioned in the opinion of the majority of the court in *Pumpelly v. Phelps*.⁴ We think that the rule that we are disposed to adhere to, as adapted to all cases, a reasonable one. The pecuniary damages are the same to the vendee, whether the motive of the vendor in refusing to convey is good or bad. It is a difficult thing to ascertain whether or not a vendor is actuated by good faith in his refusal to convey. There can easily be frauds and deceits about it. The vendor is

¹ *Smith v. Berry*, 18 Me. 122; *Furlong v. Polleys*, 30 Me. 491, 50 Am. Dec. 635; *Berry v. Dwinel*, 44 Me. 255; *Bush v. Holmes*, 53 Me. 417; *Stevenson v. Fuller*, 75 Me. 324.

20 Am. Dec. 627; *Peters v. McKean*, 4 Denio, 546.

³ *Hardy v. Nelson*, 27 Me. 525; *Elder v. True*, 82 Me. 101, and cases there cited.

² *Baldwin v. Munn*, 2 Wend. 399,

⁴ 40 N. Y. 59, 100 Am. Dec. 463.

strongly tempted to avoid his agreement where there has been a rise in the value of the property. The vendee, by making this contract, may lose other opportunities of making profitable investments. The vendor knows, when he contracts, his ability to convey a title, and the vendee ordinarily does not. The vendor can provide in his contract against such a contingency as an unexpected inability to convey. He can also liquidate the damages by agreement. The measure of relief afforded by our rule is a fixed and definite thing. The other rule is not easily applied to all cases, and the books are burdened with discussions and refinements in relation to the modifications and restrictions and qualifications which, in different jurisdictions, have been annexed to it." However, the principle on which damages were exceptionally reduced in *Flureau v. Thornhill* has been adopted as settled law in many of the states. Where this is the case the liability is not, perhaps, as much restricted as it is in England.¹ On the failure

¹ *Morgan v. Bell*, 3 Wash. 554, 582, 28 Pac. Rep. 925, 16 L. R. A. 614; *West Coast Mannf. & Inv. Co. v. West Coast Imp. Co.*, — Wash. —, 72 Pac. Rep. 455; *Gerbert v. Trustees*, 59 N. J. L. 160, 35 Atl. Rep. 1121, 59 Am. St. 578; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. Rep. 205; *Brokaw v. Duffy*, 165 N. Y. 391, 59 N. E. Rep. 196; *Koshland v. Spring*, 116 Cal. 689, 48 Pac. Rep. 58; *Place v. Dudley*, 41 App. Div. 540, 58 N. Y. Supp. 691; *Marsh v. Cavanaugh*, 15 Wash. 282, 46 Pac. Rep. 239; *Hartsock v. Mort*, 76 Md. 281, 25 Atl. Rep. 303; *Rineer v. Collins*, 156 Pa. 342, 27 Atl. Rep. 28; *Snodgrass v. Reynolds*, 79 Ala. 452; *Baltimore Building & L. Society v. Smith*, 54 Md. 187, 39 Am. Rep. 374; *Northridge v. Moore*, 118 N. Y. 419, 23 N. E. Rep. 570; *McCafferty v. Griswold*, 99 Pa. 270; *Allison v. Montgomery*, 107 id. 455; *Baldwin v. Munn*, 2 Wend. 399, 20 Am. Dec. 627; *Peters v. McKean*, 4 Denio, 546; *Conger v. Weaver*, 20 N. Y. 140; *Allen v. Anderson*, 2 Bibb, 415; *Goff v. Hawks*, 5 J. J. Marsh. 341; *Combs v. Tarlton's Adm'r*, 2 Dana, 464; *Seamore v. Harlan's Heirs*, 3 id. 410; *Herndon v. Venable*, 7 id. 371; *Foley v. McKee-gan*, 4 Iowa, 1, 66 Am. Dec. 107; *Sweem v. Steele*, 5 Iowa, 352; *Thompson v. Guthrie*, 9 Leigh, 101, 33 Am. Dec. 225; *Bitner v. Brough*, 11 Pa. 127; *McClowry v. Chrogan's Adm'r*, 31 id. 22; *McDowell v. Oyer*, 21 id. 417; *Hertzog v. Hertzog*, 34 id. 418; *McNair v. Compton*, 35 id. 23; *Saulters v. Victory*, 35 Vt. 351; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Hall v. York*, 22 Tex. 641; *Margraf v. Muir*, 57 N. Y. 155; *Drake v. Baker*, 34 N. J. L. 358; *Wheeler v. Styles*, 28 Tex. 240; *Stuart v. Pennis* — Va. —, 42 S. E. Rep. 669; *Conrad v. Effinger*, 87 Va. 59, 12 S. E. Rep. 2, 24 Am. St. 646; *Roberts v. McFaddin*, 74 S. W. Rep. 105 (Tex. Ct. of Civil App.). See *Combs v. Scott*, 76 Wis. 662, 670, 45 N. W. Rep. 532; *Dunnica v. Sharp*, 7 Mo. 71.

Section 3306 of the California Civil Code provides: "The detriment caused by the breach of an agreement to convey an estate in real

of title to part of the land, no other damage being shown, there will be a proportionate abatement of the price.¹

§ 581. *English rule, when not applied.* If the person selling is in default,—if he knew or should have known that he could not comply with his undertaking; if he, being an agent, contracted in his own name, depending on his principal to fulfill his contract merely because he had power to negotiate a sale; if he has only a contract of the owner to convey, or a bond for a deed; if his contract to sell requires the signature of his wife to bar an inchoate right of dower, or the consent of a third person to render his deed effectual; if he makes his contract without title in the expectation of subsequently being able to acquire it, and is unable to fulfill by reason of causes so known, as the want of concurrence of other persons; or if he has title and refuses to convey, or disables himself from doing so by conveyance to another person,—in all such cases he is beyond the reach of the principle of *Flureau v. Thornhill*, and is liable to full compensatory damages, including [218] those for the loss of the bargain.² This rule applies where

property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon, but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." See *Yates v. James*, 89 Cal. 474, 26 Pac. Rep. 1073.

¹ *Drake v. Eubanks*, 61 Ark. 120, 32 S. W. Rep. 492.

² *Thompson v. Shepler*, 72 Pa. 160; *Rineer v. Collins*, 156 Pa. 342, 27 Atl. Rep. 28; *Lyles v. Perrin*, 134 Cal. 417, 66 Pac. Rep. 472; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 296, 33 N. E. Rep. 808, citing the text; *Warren v. Chandler*, 98 Iowa, 247, 67 N. W. Rep. 242; *McMurtry v. Blake*, 45 Neb. 213, 63 N. W. Rep. 467; *Boyd v. DeLancey*, 91 Hun, 542, 36 N. Y. Supp. 245; *Ross*

v. Robinson, 12 Vict. L. R. 761; *Colonial Investment & Agency Co. v. Cobain*, 14 id. 740 (in the last case the vendor knew he had no title); *Mailer v. Clayton*, 1 West Aust. L. R. 3 (in this case the rule applied was the expense of investigating the title, the vendor knowing that he had no title; but for his omission to pay money or remove the obstacle to a title he was liable for the loss of the purchaser's bargain on a resale, which was estimated by the value of the land at the time of a *bona fide* offer to purchase from him); *Tracy v. Gunn*, 29 Kan. 508; *Dikeman v. Arnold*, 71 Mich. 656, 40 N. W. Rep. 42, 78 Mich. 455, 44 N. W. Rep. 407; *Skaarans v. Plunegan*, 31 Minn. 48, 16 N. W. Rep. 456; *Hartzell v. Crumb*, 90 Mo. 629, 3 S. W. Rep. 59; *Brigham v. Evans*, 113 Mass. 538; *Sanford v. Cloud*, 17 Fla. 532, 554; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Dunshee v. Geohagan*, 7 Utah, 113,

the grantor expressly agrees to make a good title;¹ but not in an action at law where the invalidity of the contract sued upon is made a defense.² In a recent case a vendor was subjected to the severer measure of damages for delay in completing the transfer of the property, that being occasioned by his lack of reasonable diligence in performing the contract, and not because of any lack of, or defect in, title.³

In a case in New York⁴ Mason, J., thus discusses this rule of damages: "There has never seemed to me to have been any very good foundation for the rule which excuses a party from the performance of his contract to sell and convey lands because he had not the title which he had agreed to convey. There seems to have been considerable diversity of opinion in the courts as to the grounds upon which the rule is placed. In England the rule seems to have been sustained upon the ground of an implied understanding of the parties, that the parties must have contemplated the difficulties attendant upon

25 Pac. Rep. 731; *Cade v. Brown*, 1 Wash. 401, 25 Pac. Rep. 457; *Chartier v. Marshall*, 56 N. H. 478; *Irwin v. Askew*, 74 Ga. 581; *Snodgrass v. Reynolds*, 79 Ala. 642; *Taylor v. Barnes*, 69 N. Y. 430; *Phillips v. Herndon*, 78 Tex. 378, 22 Am. St. 59, 14 S. W. Rep. 857; *Muenchow v. Roberts*, 77 Wis. 520, 46 N. W. Rep. 802; *Carver v. Taylor*, 35 Neb. 429, 53 N. W. Rep. 386; *Allen v. Atkinson*, 21 Mich. 351; *Dustin v. Newcomer*, 8 Ohio, 49; *Trull v. Granger*, 8 N. Y. 115; *Engel v. Fitch*, L. R. 3 Q. B. 314, 4 id. 659; *Martin v. Wright*, 21 Ga. 504; *Cox v. Henry*, 32 Pa. 18; *Burr v. Todd*, 41 id. 206; *Grisson v. Sorrell*, 8 Humph. 372; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *Sweem v. Steele*, 5 Iowa, 352; *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463; *Brinckerhoff v. Phelps*, 24 Barb. 100; *Hopkins v. Lee*, 6 Wheat. 109; *Drake v. Baker*, 34 N. J. L. 358; *Driggs v. Dwight*, 17 Wend. 71, 31 Am. Dec. 283; *McNair v. Compton*, 35 Pa. 23; *Wilson v. Spencer*, 11 Leigh, 261; *Graham v. Hackwith*, 1 A. K. Marsh. 423; *Bush*

v. Cole, 28 N. Y. 261; *Burwell v. Jackson*, 9 id. 535; *Dean v. Roesler*, 1 Hilt. 420; *Lewis v. Lee*, 15 Ind. 499; *White v. Madison*, 26 N. Y. 124, 84 Am. Dec. 343; *Roberts v. McFaddin*, 74 S. W. Rep. 105, 110 (Tex. Ct. of Civ. App.); *Stephenson v. Harrison*, 3 Litt. 170; *Kirkpatrick v. Downing*, 58 Mo. 32; *Pringle v. Spaulding*, 53 Barb. 17; *Gibbs v. Champion*, 3 Ohio, 335; *Scott v. Reikel*, 15 Up. Can. C. P. 200; *Plummer v. Simonton*, 10 Up. Can. Q. B. 220; *Vallier v. Walsh*, 6 Up. Can. C. P. 459; *McConnell v. Dunlop*, *Hardin*, 41, 3 Am. Dec. 723; *Gerault v. Anderson*, 2 Bibb, 543; *Davis v. Lewis*, 4 id. 456; *Morgan v. Stearns*, 40 Cal. 434; *Bartram v. Hering*, 18 Pa. Super. Ct. 395, applying the same rule to a lessor who acted in bad faith.

¹ *Wall v. City of London Real Property Co.*, L. R. 9 Q. B. 249.

² *Matthews v. Matthews*, 133 N. Y. 679, 31 N. E. Rep. 519.

³ *Jones v. Gardiner*, [1902] 1 Ch. 191.

⁴ *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463.

the conveyance. In the leading case upon this subject¹ Blackstone, J., said: 'These contracts are merely upon condition frequently expressed, but always implied, that the vendor has a good title,' while in this country the rule is based upon the analogy between this class of cases and actions for the breach of covenant of warranty of title.² The rule of damages in an action for a breach of covenant of warranty of title is settled to be the consideration paid, and the interest; and yet this is an arbitrary rule, and works great injustice many times, and the courts meet with great embarrassment in settling it. These difficulties were considered and well expressed in the leading case in this state,³ in which the court said: 'To find a rule of damages in a case like this is a work of difficulty. [219] None will be entirely free from objection, or will not, at times, work injustice. To refund the consideration, even with the interest, may be a very inadequate compensation when the property is greatly enhanced in value, and when the money might have been laid out to equal advantage elsewhere. Yet, to make this increased value the criterion, where there has been no fraud, may be attended with injustice, if not ruin. A piece of land is bought solely for the purpose of agriculture, and, by some unforeseen turn of fortune, it becomes the site of a populous city; after which an eviction takes place. Every one must perceive the injustice of calling on a *bona fide* vendor to refund its value, and that few fortunes could bear the demand. Who, for the sake of one hundred pounds, would assume the hazard of repaying as many thousands, to which the value of the property might rise by causes unforeseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee?' There is still another class of cases where the rule of simply refunding the purchase-money and the interest operates with great hardship and injustice upon the purchaser. A. purchases of B. a city lot for the purpose of building himself a dwelling or buildings upon it, and takes from B. a full covenant deed of the premises, covenanting to assure, or warrant

¹ Flureau v. Thornhill, 2 W. Bl. 20 Am. Dec. 627; Peters v. McKean, 1078. 4 Denio, 549.

² Baldwin v. Munn, 2 Wend. 399, ³Stauts v. Ten Eyck, 3 Cal. 111, 2 Am. Dec. 254.

and defend the title. The buildings are constructed at the cost of thousands of dollars, and then B. is evicted by a paramount title ascertained to be in some one else. The recovery of the money and six years' interest is not a very just or reasonable return in damages for the law to give one who holds a covenant to make good and to defend the title. The reasons assigned for this rule, in actions for breach of covenant of warranty of title, can scarcely apply to these preliminary contracts to sell and convey title at a future time. In the latter case the vendee knows he has not got the title, and that perhaps he may never get it; and, if he will go on and make expenditures under such circumstances, it is his own fault; and, besides, these preliminary contracts to convey generally have but a short time to run, and there is seldom any such opportunity for the growth of towns, or a large increase of value of the property, as there is in these covenants in deeds which run with the land through all time. . . . These views are not presented to induce the court to overrule or repudiate the adjudged cases in our own courts upon this subject. They reach back over a period of more than forty years, and have been too long sanctioned to be now repudiated. I have referred to this matter simply as furnishing an argument against, in any degree, extending the rule, and as a reason for limiting it strictly where the already adjudged cases in our own courts have placed it." In this case the party contracting as vendor was a trustee having power to sell with the consent of a third person. He made an absolute contract in his own name; not being able to obtain the necessary consent, he was unable to perform, and was held liable for the difference between the value of the land and the price to be paid for it.

A similar case was determined in New Jersey,¹ and notwithstanding it has been overruled² there, its doctrine is applicable in jurisdictions in which the English rule is not applied in its strictness. The vendor was not able to perform because the consent and concurrence of his wife was necessary. Beasley, C. J., said: "The defendant in this suit knew when he

¹ Drake v. Baker, 34 N. J. L. 358. 160, 35 Atl. Rep. 1121, 59 Am. St.

² Gerbert v. Trustees, 59 N. J. L. 578.

agreed to make a perfect title to this property that it was altogether uncertain whether he would be able to do so, for his ability to discharge his contract was dependent upon the consent of his wife. With a full knowledge of his power of performance being contingent, he entered into this absolute stipulation, and I think this circumstance should take this case out of the rule adopted in *Flureau v. Thornhill*. It may be quite reasonable that an implicit understanding should grow up between vendors and vendees of real estate that a vendor should not be responsible for secret flaws in the title of the property, and that such understanding should assume the form of a rule of law. But there seems no rational ground for the hypothesis that a similar relaxation of the general law exists in those cases in which a man agrees, in an absolute form, to do some act which he knows he has not the power to do without the assent of a third party. In the former class of cases [221] there is a semblance of good sense and public convenience in favor of the application of the rule excluding the liability in question, but in the latter class there is apparently none whatever."¹

This view is not acquiesced in by the Pennsylvania, California and Iowa courts. In the former state a wife will not be indirectly coerced into a conveyance of her interest in land by awarding exemplary damages — that is, damages in excess of such as are compensatory under the English rule — against her husband for the breach of his contract; and his delay in notifying the intending purchaser of her refusal to join in a conveyance is not evidence of fraud; it was important only in determining the actual damage he sustained.² It is ruled in Washington that a party who contracts with a husband to purchase community property, knowing it to be such, does so with knowledge that the law forbids the latter to enter into a valid contract for its sale, unless his wife join him, and that damages cannot be recovered for its breach.³

¹ *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 296, 33 N. E. Rep. 803; *Plum v. Mitchell*, 16 Ky. L. Rep. 162, 26 S. W. Rep. 391. Iowa, 269, 16 N. W. Rep. 127; *Yates v. James*, 89 Cal. 474, 26 Pac. Rep. 1073.

² *Holyoke v. Jackson*, 3 Wash. Ty. 255, 3 Pac. Rep. 841.
³ *Burk v. Serrill*, 80 Pa. 413, 21 Am. Rep. 105; *Donner v. Redenbaugh*, 61

The exemption of the vendor from the severer rule of damages does not extend beyond his inability to perform his contract by reason of a defect in his title which was unknown to him at the time he made his engagement to sell. This rule will exclude all defaults that are wilful, or which arise from contingencies known to the vendor and of which he consciously assumed the risk.¹ In cases of this latter kind the contract is either made or violated in bad faith, or is speculative.² An agreement for the exchange of lands, performed on one side, is like a purchase after the consideration has been paid; and the value of the land agreed to be conveyed in exchange, at the time when the conveyance should have been made, is the measure of damages.³

§ 582. **Elements of damage under the milder rule.** Where only nominal damages can be recovered for the loss of the bargain the vendee is entitled to recover his deposit, any payments he may have made on the contract of purchase with interest, and expenses incurred in investigating the vendor's title.⁴ But

¹ *Drake v. Baker*, 34 N. J. L. 358.

² *Bryant v. Booth*, 30 Ala. 311, 68 Am. Dec. 117; *Clark v. Yocum*, 116 Cal. 515, 48 Pac. Rep. 498; *Hartsock v. Mort*, 76 Md. 281, 25 Atl. Rep. 303. See *Gale v. Dean*, 20 Ill. 320; *Dyer v. Dorsey*, 1 Gill & J. 440; *Pinkston v. Huie*, 9 Ala. 252; *Gibbs v. Jamison*, 12 id. 820; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Thouvenin v. Lea*, 26 Tex. 612; *Taylor v. Rowland*, id. 293.

In *Stuart v. Pennis*, 42 S. E. Rep. 667, the Virginia court of appeals applied the milder rule of damages notwithstanding the vendor broke his contract in order that a better price might be obtained. This appears to be a departure from earlier cases in that court. See *Wilson v. Spencer*, 11 Leigh, 261; *Newbrough v. Walker*, 8 Gratt. 16, 56 Am. Dec. 127.

³ *Warren v. Chandler*, 98 Iowa, 237, 67 N. W. Rep. 242; *Bierer v. Fretz*, 32 Kan. 329, 4 Pac. Rep. 284; *Dike-*

man v. Arnold, 71 Mich. 656, 40 N. W. Rep. 42; *Burr v. Todd*, 41 Pa. 206; *Faxon v. Davidson*, 2 Duer, 153; *Devin v. Himer*, 29 Iowa, 297; *Bender v. Fromberger*, 4 Dall. 436; *Brown v. Dickerson*, 12 Pa. 372; *King v. Pyle*, 8 S. & R. 166. See *Lacey v. Marnan*, 37 Ind. 168.

⁴ *Clark v. Yocum*, 116 Cal. 515, 48 Pac. Rep. 493; *Wilson v. Hendrix*, 13 Ky. L. Rep. 687 (Ky. Super. Ct.); *Kaplron v. Tucker*, 35 App. Div. 310, 55 N. Y. Supp. 8 (and the sum stipulated as damages); *Eberz v. Heisler*, 12 Pa. Super. Ct. 388; *Rineer v. Collins*, 156 Pa. 342, 27 Atl. Rep. 28; *Perrin v. Reynolds*, 12 Vict. L. R. 440; *Bennett v. Latham*, 18 Tex. Civ. App. 403, 45 S. W. Rep. 934; *Baltimore Permanent Building & L. Society v. Smith*, 54 Md. 187, 39 Am. Rep. 374; *Northridge v. Moore*, 118 N. Y. 419, 23 N. E. Rep. 570 (expenses incurred in examining title recoverable although both parties knew that the vendor

interest will not be allowed where possession under the [222] contract of purchase has been enjoyed, except for such time as there is a liability for the profits to another person.¹ Neither will it be allowed unless there is an established market value of the land or means accessible to the party sought to be charged of ascertaining, by computation or otherwise, the amount to which the plaintiff is entitled.² The vendee may recover costs incurred, although not paid, if he makes allegation of them as *incurred* rather than as expenses *paid*;³ and, among them, costs for searches relating to the title and for incumbrances, comparing the abstract with the deeds, and expense of journeys in the investigation of such title.⁴ He may also recover expenses

was not possessed of the title, it being supposed he would procure it); *Wetmore v. Bruce*, 54 N. Y. Super. Ct. 149; *Morgan v. Bell*, 3 Wash. 554, 28 Pac. Rep. 925, 16 L. R. A. 614; *Walker v. Moore*, 10 B. & C. 416; *Pounsett v. Fuller*, 17 C. B. 660; *Tyrer v. King*, 2 Car. & K. 149.

In *McCounel v. Hall*, 3 P. & W. 53, a vendee paid down \$100 on a purchase of land, knowing at the time that the seller's agent had sold the land to another; on the seller being informed of the prior sale he tendered back the \$100, but the vendee refused to accept it. In a suit by the latter on the contract he was held entitled to recover his payment, but without interest or costs, though the tender was not pleaded.

In *Tyrer v. King*, *supra*, an auctioneer entered into an agreement in behalf of A. to sell certain premises to B., without having communicated to A. that B. was in treaty for the premises: A. had previously sold them to another party, and therefore could not fulfill the contract so made with B. B. sued A. for nonfulfillment of his contract. Held, that under these circumstances B. was not entitled to recover damages for the loss of his bargain, but was entitled to recover £50 deposit and

loss of the use and his expense to his attorney.

¹ *Thompson v. Guthrie*, 9 Leigh, 100.

² *Sloan v. Baird*, 162 N. Y. 327, 56 N. E. Rep. 762.

³ *Richardson v. Chasen*, 10 Q. B. 756. See *Sutton v. Page*, 4 Tex. 142, as to pleading.

⁴ *Baltimore Permanent Building & L. Society v. Smith*, 54 Md. 187, 39 Am. Rep. 374; *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 492.

In the last case, in the vendee's action, he alleged that he had been put to great charges and expenses, amounting in the whole to a large sum of money, to wit, to the sum of 1,000*l.*, in and about the negotiation and agreeing for the purchase of said estate, and having the same conveyed; and about the investigating the title to the said estate and the existence and effect of the said supposed *modus* in the said article mentioned; and in and about his defense of and in a certain suit commenced and prosecuted by the defendant against the plaintiff in the court of chancery for compelling a specific performance by the plaintiff of the said article of agreement, and in which suit the bill filed by the defendant against the plaintiff was

[223] for preparing papers with a view to the conveyance of the title.¹ Where one to whom land was conveyed, upon express condition that he was to convey it to another, refused to convey it, he was liable for the expenses of litigation necessarily resulting and for the loss of an opportunity to sell the land.² Besides being entitled to interest on the payments recovered the vendee may have interest allowed on money kept idle after the day for consummation of the purchase, pending an endeavor by the vendor to clear the title.³ But he cannot recover for the expense he may have incurred in moving to the land, nor for improvements, whether of a permanent or tem-

dismissed by the same court, and in and about the making and performing of divers journeys, and otherwise respecting the said purchase; and also thereby the plaintiff lost and was deprived of a great part of the gains and profits which he might or would otherwise have made and acquired, from using and employing the said sum of 1,000*l.* so paid by him as aforesaid, and other moneys provided and kept by the plaintiff for the completion of the said purchase, etc. The damages in respect to each "head of claim" were ascertained by an arbitrator. It was held that the expenses preliminary to the contract ought not to be allowed. The party enters into them for his own benefit at a time when it is uncertain whether there will be any contract or not. The charge for a survey was also disallowed. It would have been prudent in the purchaser to defer the survey till he knew whether or not a title could be made out. There was a charge of 7*l.* 11*s.* 6*d.* for journeys to investigate title, and 6*l.* 17*s.* 2*d.* for searching for judgments. These were allowed. Tindal, C. J., said: "Unless judgments are searched for at an early stage of the proceedings great expense may afterwards be incurred unnecessarily, and, for the same reason, the comparison of deeds with

the abstract should be made early." Under the third head, 194*l.* 4*s.* 11*d.* was claimed as plaintiff's costs as between attorney and client, *ultra* the costs as between party and party taxed to him in the suit in chancery. See *Sandbank v. Thomas*, 1 Stark. 306; *Jones v. Dyke*, Sugd. Vend. & Pur., App. 9; *Webber v. Nicholas*, Ry. & Moo. 419. In opposition, see *Hathaway v. Barrow*, 1 Camp. 151; *Sinclair v. Eldred*, 4 Taunt. 7; *Jenkins v. Biddulph*, 4 Bing. 160. Upon that claim the chief justice said: "We all think that the extra costs in chancery are not a damage which is a necessary consequence of the breach of this contract; . . . but the filing of a bill for enforcing a specific performance is one degree removed from a consequence of the contract."

If the sale is made subject to the approval of a third party and there is no fraud or warranty of ownership, the expense of journeys cannot be recovered. *Dey v. Nason*, 100 N. Y. 166, 2 N. E. Rep. 382.

¹ *McNair v. Compton*, 35 Pa. 23; *Dumars v. Miller*, 34 id. 319; *Malaun v. Ammon*, 1 Grant's Cas. 123.

² *McMurtry v. Blake*, 45 Neb. 213, 63 N. W. Rep. 467.

³ *Sherry v. Oke*, 3 Dowl. Pr. 349; *Metcalf v. Fowler*, 6 M. & W. 830.

porary nature, nor for repairs. The vendee expends money in his own wrong if he takes possession and makes improvements before he has looked into the title and ascertained that it is likely to prove satisfactory,¹ unless he does so pursuant to the contract between him and his vendor.² He cannot recover, it has been held, even for repairs;³ nor for expenses incurred prior to the contract; or of a survey; or for the preparation of conveyances before known objections to the title have been answered.⁴ Nor can he recover the difference between his costs, taxed as between party and party, and his costs between solicitor and client in an unsuccessful suit by the vendor for specific performance;⁵ nor the costs of a suit by himself as purchaser for specific performance where the bill has been dismissed without costs on the master reporting against the title.⁶

¹ *Gerbert v. Trustees*, 59 N. J. L. 160, 183, 35 Atl. Rep. 1121, 59 Am. St. 578; *Walton v. Meeks*, 120 N. Y. 79, 23 N. E. Rep. 1115; *Chamberlain v. Brady*, 49 N. Y. Super. Ct. 484; *Cartin v. Hammond*, 10 Mont. 1, 24 Pac. Rep. 627; *Burnett v. Caldwell*, 9 Wall. 290; *Peters v. McKean*, 4 Denio, 546; *Walker v. Moore*, 10 B. & C. 416; *Hertzog v. Hertzog*, 34 Pa. 418; *Worthington v. Warrington*, 18 L. J. (C. P.) 350. See *Ryder v. Wall*, 29 N. Y. Misc. 377, 60 N. Y. Supp. 535.

In *Thuemler v. Brown*, 18 Pa. Super. Ct. 117, the owner leased land and gave the lessee the right to purchase it for a fixed amount. Thereafter he conveyed the land subject to the rights of the lessee, and took a bond from the grantee to protect himself from liability to the lessee. The latter subsequently exercised his option to purchase, and recovered from the lessor for the loss of his improvements and the cost of removing machinery.

² *Gilbert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785; *Willis v. Wozencraft*, 22 Cal. 607.

³ *Bratt v. Ellis*, Sugd. App. No. 5.

⁴ *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 492.

⁵ *Id.*

⁶ *Malden v. Fyson*, 11 Q. B. 292. M. agreed with F. to purchase land of him. On production of F.'s title M. objected to it. F. insisted that it was good, and gave M. notice that he should sell at M.'s risk. M. then filed a bill for specific performance, and the question of title was referred by the court of chancery to a master, who reported that F. had not a good title, whereupon the bill was dismissed without costs on either side; that being the practice of the court of chancery in such cases. Held, that M. could not recover from F., as damages for breach of the contract, costs incurred by M. in the chancery suit. Lord Denman, C. J., said: "The dismissal of the bill was a matter of course when the defendant appeared to want the power to perform his contract; and the refusal of costs to the defendant seems to have been required by justice, as the plaintiff's failure in his suit was occasioned by the defendant's incompetency to fulfill his own engagement. But the plaintiff has brought this action to recover, amongst other things, the costs to which he was put in the prosecution of his unsuccessful suit."

And where a purchaser, upon the delivery of an abstract showing [224] an apparently good title, resold at a profit, and it subsequently appeared, on comparing the abstract with the deeds, that the title was defective, he was not allowed the expenses of the resale, there being nothing more on the part of the vendor than negligence in the preparation of the abstract, [225] and the purchaser being equally negligent in reselling before he had tested its accuracy.¹ So where a vendor was

Some of us thought that it might be important, in one view of the case, to inquire into the practice in chancery; and we cannot find or hear of any decision compelling the defendant to pay costs where the bill is dismissed in such a suit. We cannot, however, believe that the court of chancery does not possess the power to award costs to the plaintiff under circumstances involving fraud in any part of the negotiation; but without fraud the rule appears to be inflexible that the unsuccessful plaintiff, though not liable to costs, does not recover them in chancery.

"The plaintiff asserts that these costs are the natural consequence of the defendant's breach of contract, coupled with his threat to resell the estate, and as such are recoverable. He rests his claim on the practice of chancery, which, he contends, systematically lays these costs out of its consideration, and leaves them to be recovered in an action at law for the damages resulting from that breach of contract; and urges that if he cannot so make good his loss at the expense of him who caused it he has no remedy. On the other hand, the general rule is set up that the right to costs must always be considered as finally settled in the court where the question is adjudicated or to which it is accessory. Several cases were quoted to this effect. And this principle was admitted, in general, to apply; so that, if any costs were awarded, nothing

beyond the sum taxed according to the rules of the court could be recovered as damages; or, if costs were expressly withheld by an adjudication in the particular case, none would be recoverable by suit in any other court. We are of opinion that this case falls within the same principle. The general rule of the court of chancery, a court having full discretion, must be intended to apply itself as an adjudication in every particular case which falls within it. In the case of *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 492, in which the plaintiff claimed as damages extra costs of a bill for specific performance, Tindal, C. J., says: "The extra costs in chancery are not a damage which is a necessary consequence of the breach of this contract." "The filing of a bill for enforcing a specific performance is one degree removed from a consequence of the contract, and the plaintiff must take the consequences of the suit, as in other cases."

In *Marvin v. Prentice*, 94 N. Y. 295, land was conveyed absolutely to secure a loan. The grantee refused to reconvey on tender of the amount due. A reconveyance was decreed, and the owner then sought to recover for the depreciation in the value of the property during the litigation and his costs and expenses therein. He was unsuccessful.

¹ *Loney v. Oliver*, 21 Ont. 89; *Walker v. Moore*, 10 B. & C. 416.

prevented from performing by the refusal of a third person to accept substituted security for an incumbrance upon the property, according to a previous parol promise, and negotiations were continued after breach of the contract in the hope that some new arrangement might be come to, the expenses incurred to effectuate that abortive plan were not recoverable, because not sufficiently proximate.¹

In the absence of fraud, if the vendor fails to convey all the land he contracted to sell because of the failure of title to a part, the damages are measured by the difference between the contract price and the value of the land actually sold at the time of the sale.² Where land was conveyed by a trustee and the proceeds applied as directed, after the sale and conveyance were set aside in an action by the purchaser to quiet the title, because the grantor in the deed creating the trust did not join with the trustee in the conveyance, the purchaser was allowed, as against the heirs of the trustee's grantor, to treat the rents as an equivalent to the interest on the purchase-money, on accounting for improvements made in good faith, the trustee's grantor having acquiesced in the sale and the making of the improvements.³ On the breach of an agreement to make a contract for the sale of land the recovery cannot exceed nominal damages. But if the person holding an option for the purchase of it has paid the other money as the consideration for the option and which, if the person paying it, elected to purchase, was to be applied upon the purchase price, otherwise

¹ *Sikes v. Wild*, 4 B. & S. 421, 1 id. 587.

In *Pounsett v. Fuller*, 17 C. B. 660, A. agreed to sell to B. the shooting on the manor of C. It being afterwards discovered that A. had a mere equitable title, and C. refusing to confirm, B. brought an action against A. for breach of the contract. Held, that he was only entitled to recover nominal damages and expenses incurred in the investigation of A.'s title; but not damages for the loss of his bargain, or expenses incurred in obtaining shooting elsewhere, or in fruitless endeavors to substitute a new contract on the failure of the

original bargain. Jervis, C. J., said: "If it could have been established that the contract being about to go off, on the representation or suggestion of Fuller, the plaintiff's attorney had prepared the deed of covenant for the purpose of supplying the defect in the title, and of carrying out the original contract, that would have been an expense incurred in endeavoring to perfect a title which was imperfect, and the defendant would have been liable."

² *Sears v. Stinson*, 3 Wash. 615, 29 Pac. Rep. 205.

³ *Hadley v. Winchester* (Disputed Lodge), 97 Ky. 438, 50 S. W. Rep. 969.

to belong to the person giving the option, the money so paid may be recovered if there is a refusal to execute the contract, although there is no technical breach of the contract to convey, the election to purchase having been made.¹

§ 583. **Recovery on parol contract.** The statute of frauds, although preventing the specific performance of a parol contract to convey land, does not prevent an action for damages for a breach of the contract. In Pennsylvania it is considered that the allowance of a recovery for the value of the land would be equivalent to specific performance, and therefore, the value of the land cannot be shown in order to fix the damages; that is done by proving the value of what has been paid on the contract and the damages sustained in consequence of its breach.² The plaintiff may recover the consideration paid³ and compensation for improvements made in reliance upon the contract, less a reasonable charge for rent, there being no fraud on the part of the vendor. The failure to convey does not establish fraud, although the ability to convey existed.⁴ The vendor must restore the vendee to the condition in which he found him; but he is not bound to compensate him for the loss of a bargain. In order that the latter may recover he must affirmatively show that the former has actually broken his contract.⁵

In New York the defense of the statute of frauds must be pleaded; if the complaint does not show whether the contract for the sale of land was oral or written and the answer does not plead the statute, objection to the proof of an oral contract cannot be made, and if such a contract be shown there may be a recovery of the same damages for its breach as if it had been written. Where the purchaser under such a contract had disposed of his home at a great sacrifice, and removed

¹ *Boyd v. De Lancey*, 17 App. Div. 567, 45 N. Y. Supp. 693.

² *Hertzog v. Hertzog*, 34 Pa. 418; *Swayne v. Swayne*, 19 Pa. Super. Ct. 160.

³ *Herrick v. Newell*, 49 Minn. 198, 51 N. W. Rep. 879; *Payne v. Hackney*, 84 Minn. 195, 87 N. W. Rep. 608, citing the text; *McClowry v. Chrogan's Adm'r*, 31 Pa. 22.

⁴ *Harris v. Harris*, 70 Pa. 170; *Welch v. Lawson*, 32 Miss. 170, 66 Am. Dec. 606.

In the absence of fraud in the origin of the contract, the damages are measured by the money paid and the expenses incurred on the faith of the contract. *Rineer v. Collins*, 156 Pa. 342, 27 Atl. Rep. 28.

⁵ *Allison v. Montgomery*, 107 Pa. 455.

therefrom to the property bought and taken possession of it, on being ejected in consequence of the sale of the property to another, the expense of removing, the value of the repairs made, and of services rendered, and the damages resulting from the sale of the former home, were elements of the loss for which the vendor was liable.¹ The vendor does not absolve himself from liability to his vendee for subsequent taxes and improvements by serving notice that he would not convey and would consider the vendee a trespasser, if the notice is withdrawn or he is led to believe that the original contract would be carried out.² In Texas if a party makes a parol agreement for the sale of lands, puts the purchaser in possession, and afterwards takes advantage of the contract being void by the statute of frauds, he is bound to pay for the improvements. If in such an agreement the vendor stipulates to pay for such improvements, but no stipulation is made [226] as to rents, on his refusal to complete the agreement, and he is sued for the improvements, the rents will not be allowed as a set-off.³ Where a vendee goes into possession and makes valuable improvements under a parol contract, and specific performance is successfully resisted by the vendor because the contract is not in writing, equity will in general decree compensation for improvements.⁴ The measure of damages is not what it cost to put the improvements on the land, but only to the extent that the land is improved by them; the increase in value measures the recovery.⁵ It may be shown by parol that a party entered and placed improvements on land under a parol contract to convey it, the owner denying the existence of

¹ *Matthews v. Matthews*, 151 N. Y. 288, 48 N. E. Rep. 531.

² *Halthouse v. Rynd*, 155 Pa. 43, 25 Atl. Rep. 760.

³ *Thouvenin v. Lea*, 26 Tex. 612; *Taylor v. Rowland*, id. 293; *Goodwin v. Lyon*, 4 Port. 297. See *Lister v. Batson*, 2 Kan. 420, 85 Am. Dec. 595, and an intimation of its disapproval in *Tracy v. Gunn*, 29 Kan. 508.

⁴ *Thomas v. Kyles*, 1 Jones' Eq. 302; *Goodwin v. Lyon*, 4 Port. 297; *Boze v. Davis*, 14 Tex. 331; *Alben v. Griffin*, 2 Dev. & B. Eq. 9; *Herring*

v. Pollard, 4 Humph. 362, 40 Am. Dec. 653; *Mathews v. Davis*, 6 Humph. 324; *Parkhurst v. Van Courtlandt*, 1 Johns. Ch. 273. See *Cook v. Doggett*, 2 Allen, 439. *Contra*, in North Carolina, *McCracken v. McCracken*, 88 N. C. 272. But see *Luton v. Badham*, 127 N. C. 96, 37 S. E. Rep. 143, which is in harmony with the text, and which reviews the local cases.

⁵ *North v. Bunn*, 128 N. C. 196, 28 S. E. Rep. 814.

the contract.¹ In Wisconsin the vendee may recover the money paid and the reasonable value of his services in working the farm, after deducting the income thereof received by him.² The fact that the vendor who orally contracts to convey an interest in land is only a part owner of such interest does not absolve him from liability for damages to the extent to which he is unable to perform his agreement, the vendee having been put into possession by the vendor.³ In Washington if the vendor violates his parol contract by formally conveying the property to a third person he is liable for the value of the land at the time the breach was committed and for the loss resulting to the vendee from the purchase of material designed to be used in making further improvements on the premises.⁴

On the breach of a contract to sell all the trees standing on a tract of land which are adapted for a specified purpose at an agreed price per thousand feet, their purchaser may, after a sale of all the timber to another party, recover the market value of such trees as were included in his purchase, less the price he was to have paid for them, with interest on the balance, no question as to the right to recover for the loss of profits being involved.⁵ The liability of a vendor who refuses to perform a parol contract for the sale of lands cannot, in a suit to recover the purchase-money, be mitigated by showing a depreciation in their value subsequent to the making of it.⁶ Where there has been no written contract of sale binding on the vendor, but the matter rests on an oral agreement invalid by the statute of frauds, the purchaser has no means of recovering the expenses incurred by him in investigating the title. He may, however, recover the deposit and auction duty as money paid upon a consideration that has failed.⁷ Where one owning a life estate in land made a parol agreement to lease the same for a term of years, and died before the term

¹ *Luton v. Badham*, 127 N. C. 96, 37 S. E. Rep. 143.

² *Miller v. Metz*, 103 Wis. 220, 79 N. W. Rep. 213.

³ *Cuddy v. Foreman*, 107 Wis. 519, 83 N. W. Rep. 1103.

⁴ *Cade v. Brown*, 1 Wash. 401, 25 Pac. Rep. 457.

⁵ *Clements v. Beatty*, 87 Ala. 238, 6

So. Rep. 151; *Mackey v. Olssen*, 12 Ore. 429, 8 Pac. Rep. 357.

⁶ *Shryer v. Morgan*, 77 Ind. 479.

⁷ Cases cited in n. 1, p. 1659; *Nicholson v. Wadsworth*, 2 Swanst. 387. See *Welch v. Lawson*, 32 Miss. 170, 66 Am. Dec. 606; *Hertzog v. Hertzog*, 34 Pa. 418.

was to commence and before a lease was executed, the other party was entitled to recover from the administrator no more than his actual damages, namely, money paid on the agreement and interest; he could not recover the value of his bargain.¹ If the contract is for land and machinery thereon as a part of it, and the vendee has sold the machinery and used the proceeds to pay the vendor, the liability of the vendor is for the land as it was after the removal of the machinery.² If the owner of lands agrees with another to give him a portion of the purchase-money, and also a certain parcel of land for his services in effecting a sale of the land of the former, there being no note or memorandum in writing of the promise, the whole contract, as well for the money as the land, is void; and no action will lie for either. In such case the injured party has no remedy at law upon the contract; he may, however, ignore it, and maintain his action to recover any money paid, and the value of the services rendered.³ But if the other party is able and willing to fulfill, the party paying in money or services has not the option to disaffirm the contract.⁴ The consideration for the parol contract to convey land being the assignment of a contract, the purchaser's damages were not measured by the value of the contract, but by the value of the land after deducting the value of a life estate.⁵ As has been shown on the repudiation by the vendor of a parol contract the vendee may recover the money paid under it.⁶ Such a contract is void only at the instance of the party who pleads the statute, and he cannot take any advantage of it, but is left in the condition he was in at the time he abandoned it. If the vendee repudiates after a demand by the vendor for compliance, he cannot recover the money paid although the vendor, one year after making such demand, conveyed the land to another.⁷

¹ *McClowry v. Chrogan's Adm'r*, 31 Pa. 22.

² *Hawley v. McCall*, 4 Ky. L. Rep. 626 (Ky. Super. Ct.).

³ *Clark v. Davidson*, 53 Wis. 317, 10 N. W. Rep. 384; *Fuller v. Reed*, 38 Cal. 99.

⁴ *Shaw v. Shaw*, 6 Vt. 69; *McKinney v. Harvie*, 38 Minn. 640, 35 N. W. Rep. 668; *Plummer v. Buckman*, 55

Me. 105; *Gray v. Gray*, 2 J. J. Marsh. 21; *Ketchum v. Evertson*, 13 Johns. 359, 7 Am. Dec. 384.

⁵ *Bryant v. Everley*, 22 Ky. L. Rep. 345, 57 S. W. Rep. 231.

⁶ *Wilkie v. Womble*, 90 N. C. 254.

⁷ *Durham Consolidated Land & Imp. Co. v. Guthrie*, 116 N. C. 381, 21 S. E. Rep. 952.

§ 584. **Elements of damage where *Flureau v. Thornhill* does not apply.** Where damages for loss of the bargain are recoverable by the vendee he is entitled to recover the difference between the contract price and the actual or market value¹ of the land at the time when the conveyance should have been made, whether then enhanced by improvements or otherwise, and all other damages which result from the vendor's breach of the contract; further, he must place his vendee, as near as money can do so, in the same position in which he would have been if he had obtained that for which he contracted.² This rule applies to one who undertakes to procure a conveyance from another and fails on account of the refusal of that person,³ and to one who assumes, without authority, to

¹ It is error to charge the jury that the market value of land is the highest price which the land will bring in the market, regardless of the causes that contribute to its value, because land may bring under peculiar circumstances and on very favorable terms, much more than its fair cash value. *Dady v. Condit*, 188 Ill. 234, 240, 58 N. E. Rep. 900.

² *Erickson v. Bennet*, 39 Minn. 326, 40 N. W. Rep. 157; *Lancoure v. Dupre*, 53 Minn. 301, 55 N. W. Rep. 129; *Holland v. Hardy*, 3 N. S. W. 450; *Kempner v. Cohn*, 47 Ark. 519, 58 Am. Rep. 775, 1 S. W. Rep. 869; *Skaaraas v. Finnegan*, 31 Minn. 48, 16 N. W. Rep. 456 (the time when the agreement was made is that at which the market value of the property is to be determined, not the time of purchaser's eviction by the true owner); *S. C.*, 32 Minn. 107, 19 N. W. Rep. 729 (improvements made in good faith recovered for); *Kirkpatrick v. Downing*, 58 Mo. 32; *Hartzell v. Crumb*, 90 Mo. 629, 3 S. W. Rep. 802; *Combs v. Scott*, 76 Wis. 662, 45 N. W. Rep. 532; *Muenchow v. Roberts*, 77 Wis. 520, 46 N. W. Rep. 802; *Wilson v. Robertson*, 1 Brun. Coll. Cas. 109, 1 Overt. 464 (the value of the land was determined as of the

time of the trial); *Sanford v. Cloud*, 17 Fla. 532, 554; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Chartier v. Marshall*, 56 N. H. 478; *Yokom v. McBride*, 56 Iowa, 139, 8 N. W. Rep. 795; *Turner v. Lord*, 92 Mo. 113, 4 S. W. Rep. 420 (the same rule applies in an action for the breach of a bond to convey as for the breach of the contract to be performed, so long as the penalty of the bond is not exceeded); *Allen v. Atkinson*, 21 Mich. 351; *Cannell v. McClean*, 6 Har. & J. 297; *Hopkins v. Yowell*, 5 Yerg. 305; *Dustin v. Newcomer*, 8 Ohio, 49; *Trull v. Granger*, 8 N. Y. 115; *Engel v. Fitch*, L. R. 3 Q. B. 314, 4 id. 659; *Martin v. Wright*, 21 Ga. 504; *Cox v. Henry*, 32 Pa. 18; *Burr v. Todd*, 41 id. 206; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463; *Drake v. Baker*, 34 N. J. L. 358; *Godwin v. Francis*, L. R. 5 C. P. 295; *Sweem v. Steele*, 5 Iowa, 352; *Case v. Wolcott*, 33 Ind. 5.

³ *Skaaraas v. Finnegan*, 31 Minn. 48, 16 N. W. Rep. 456, 32 Minn. 107, 19 N. W. Rep. 729; *Gale v. Dean*, 20 Ill. 320.

In *New Haven & N. Co. v. Hayden*, 117 Mass. 433, the defendant agreed to secure for the plaintiff a

act as agent for the owner and makes a contract as such to convey.¹ The vendee may not only recover payments he may have made, with interest, and expenses of investigating the title, but damages with reference to an enhanced value, which he could make on a resale pursuant to an actual contract,² or caused by improvements made by him.³ Expenses incurred in getting a survey made of the estate or plans preparatory to the making of the contract, but before it was actually entered into, cannot be recovered by the purchaser, nor can the expense of a conveyance prepared before the title has been approved and before it is known whether objections raised to the title can be answered by the vendor.⁴ If interest has been recovered on the purchase price there cannot be a recovery for the loss of interest on money which has lain idle, nor for the loss of a lease made before notice of the vendor's refusal to comply with his contract.⁵ If a vendor sells land to a third person he is liable to a previous purchaser for its value at the time of such

right of way free of expense. On his failure to perform, plaintiff resorted to the usual proceedings and subsequently brought an action for the breach of the contract. The following items entered into the damages: 1. Land taken for the road-bed five rods in width, and also land outside that limit if it was required. 2. Damages for land taken for the use of the road and ordered paid by the commissioners, although payment had not been made. 3. Money paid for building farm bridges over the road and for building a bank wall if the land damages were decreased thereby to an amount equal to their cost. 4. The ordinary legal costs and compensation to attorneys and other agents for their services in settling the damages for land taken. The defendant was not liable for land taken exclusively for stations or for procuring material to be used in the construction of the road, nor for money paid to the public officers for their services in assessing damages to lands taken.

¹ Godwin v. Francis, L. R. 5 C. P. 295; Spedding v. Nevell, 4 id. 212; Gibbs v. Jamison, 12 Ala. 820; Hammon v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; Holland v. Hardy, 3 N. S. W. 450.

² Engel v. Fitch, L. R. 3 Q. B. 314; Godwin v. Francis, L. R. 5 C. P. 295; Hopkins v. Grazebrook, 6 B. & C. 31; Bigler v. Morgan, 77 N. Y. 312.

³ Witherspoon v. McCalla, 3 Desaus. 245; Thompson v. Kilcrease, 14 La. Ann. 340; Winters v. Elliott, 1 Lea, 676.

The purchaser at a void guardian's sale who enters upon land under the deed and *bona fide* makes permanent improvements thereon may recover therefor to the extent that the market value of the land is enhanced thereby. Hicks v. Blakeman, 74 Miss. 459, 21 So. Rep. 7, 400.

⁴ Hodges v. Earl of Litchfield, 1 Scott, 413; 2 Addison on Cont., § 529.

⁵ Kempner v. Cohn, 47 Ark. 519, 58 Am. Rep. 775, 1 S. W. Rep. 869.

sale.¹ The rule of liability, stated in general terms, is for such damages as may reasonably be said to have naturally arisen from the breach of contract, or which may reasonably be supposed to have been in the contemplation of the parties as likely to arise therefrom.²

[228] Where the vendor's title is imperfect, and he is for that reason unable to perform his contract, but the vendee has perfected the title by extinguishing an incumbrance or buying in an adverse title, his damages will be limited to his outlay for this purpose,³ and he can charge no more to the vendor for moneys expended in perfecting the title than would otherwise be recoverable for breach of the contract as damages.⁴

§ 585. **Defaulting vendee's rights.** If a vendee who has partly performed makes default, in consequence of which the sale fails of consummation, he is seldom entitled to relief or compensation for his part performance; he cannot recover a deposit or the money paid.⁵ If the vendor has in his hands a

¹ Phillips v. Herndon, 73 Tex. 378, 22 Am. St. 59, 14 S. W. Rep. 857.

² Jaques v. Miller, 6 Ch. Div. 153; Jones v. Gardiner, [1902], 1 Ch. 191.

³ Kerley v. Richardson, 17 Ga. 602; Baker v. Corbett, 28 Iowa, 317; Hull v. Harris, 64 Ga. 309. But compare Martin v. Atkinson, 7 Ga. 228, 50 Am. Dec. 403.

⁴ Spring v. Chase, 22 Me. 509, 39 Am. Dec. 595; Foote v. Burnett, 10 Ohio, 334; Dimmick v. Lockwood, 10 Wend. 142; Donohoe v. Emery, 9 Met. 63; Davis v. Lyman, 6 Conn. 255; Cox's Adm'r v. Henry, 32 Pa. 18.

⁵ Bradford v. Parkhurst, 96 Cal. 102, 31 Am. St. 189, 30 Pac. Rep. 1106; Joyce v. Shafer, 97 Cal. 335, 32 Pac. Rep. 320; Garberino v. Roberts, 109 Cal. 125, 41 Pac. Rep. 857; Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. Rep. 713, 69 Am. St. 17, 43 L. R. A. 199; Patterson v. Murphy, 41 Neb. 818, 60 N. W. Rep. 1; Whiteman v. Perkins, 56 Neb. 181, 76 N. W. Rep. 547; Ex parte Barrell, L. R. 10 Ch. 512; Ketchum v. Evertson, 13 Johns. 365; Green v.

Green, 9 Cow. 46; Battle v. Rochester City Bank, 5 Barb. 414; Davis v. Hall, 52 Md. 673; Estes v. Browning, 11 Tex. 237, 60 Am. Dec. 238; Fuller v. Hubbard, 6 Cow. 13; Hudson v. Swift, 20 Johns. 24; Gillet v. Maynard, 5 id. 85, 4 Am. Dec. 329; Roach v. Waid, 2 T. B. Mon. 142; Essex v. Daniell, L. R. 10 C. P. 538; Power v. North, 15 S. & R. 12; Frost v. Frost, 11 Me. 235; Rounds v. Baxter, 4 Me. 454; Page v. McDonnell, 46 How. Pr. 52; Haynes v. Hart, 42 Barb. 58.

In Bullock v. Adams, 20 N. J. Eq. 367, 374, Chancellor Zabriskie said: "It is common both in sales at auction and other sales to stipulate that the percentage or part paid on the contract shall be forfeited if the purchaser does not comply with his contract, and I am not aware of any case where the payment so made has been recovered at law, even where the vendor, upon resale, has received a higher price. I know of no principle upon which such payment can be recovered either at law or in equity."

sum paid him on the contract of purchase largely in excess of the damages sustained by him in consequence of the loss of the bargain he may retain it, because while the contract subsists the party in default cannot recover it, or any equivalent of it, in damages, the vendor not being in default.¹ A recent California case, which was carefully considered and the opinion in which is worthy of examination, lays down these propositions: If time is made of the essence of the contract and performance by the purchaser a condition precedent, and it is further expressed that he shall forfeit all rights under the contract and all moneys paid thereon, the purchaser, being in default, cannot, without excusing his default, by tendering the amount due, acquire either a legal or equitable right to recover the moneys paid; such right exists only when, after a breach by the purchaser, the vendor agrees to a mutual abandonment of the contract. The vendor's refusal to accept such a tender and to convey does not rescind the contract. If time is made of the essence equity will not ignore that condition, nor relieve against it. The vendor's right to retain the money paid is independent of any express condition of the contract to that effect.²

Where the contract is terminated by the vendor for the vendee's default, according to the English doctrine, the [229] question whether a deposit is forfeited depends on the intention of the parties. A. agreed to demise a house to B. for a term in consideration of 300*l.* then paid "by way of deposit, and in part of 5,500*l.*," the whole purchase-money; possession to be delivered and accepted on a day named; B. agreed to accept the demise, but on the day fixed therefor refused; A. afterwards disposed of the house to a third person. This agreement contained a clause providing for a penalty of 1,000*l.* to be paid by either party making default. And being silent in respect to forfeiture of the deposit in case of the vendee's

¹Downey v. Riggs, 102 Iowa, 88. ²Glock v. Howard & Wilson Col-
70 N. W. Rep. 1091, quoting the text; ony Co., 123 Cal. 1, 69 Am. St. 17, 43
Lawrence v. Miller, 86 N. Y. 131; 12 R. A. 199, 55 Pac. Rep. 713; Grant
McManus v. Blackmarr, 47 Minn. 331, v. Munch, 54 Minn. 111, 55 N. W.
50 N. W. Rep. 230; Grant v. Munch, Rep. 902.
54 Minn. 111, 55 N. W. Rep. 902;
Martin v. McCormick, 4 Sandf. 366.

default, it was in this case held not forfeited because there was evidence in the agreement of a different intention. Lord Denman, C. J., said: "The ground on which we rest this opinion is that in the absence of any specific provision the question whether the deposit is forfeited depends on the intent of the parties to be collected from the whole instrument; but as this imposes on either party that could make a defense a penalty of 1,000*l.*, the intent of the parties is clear that there should be no other remedy. . . . The consequence appears to be that this vendor may sue for the penalty and recover such damages as a jury may award; but he cannot retain the deposit; for that must be considered, not as an earnest to be forfeited, but in part payment. But the very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser."¹

If the agreed deposit has not been paid it cannot be recovered as such when the vendee has refused to perform—even if the intention is manifest that in that event the deposit shall be absolutely forfeited. One of the conditions of a sale² was that, should the purchaser neglect or fail to comply with any of the conditions, his deposit money should be actually forfeited to the vendor, who should then be at liberty to resell the property at public auction or private sale; and if the amount or price obtained on the second sale should not be sufficient to cover the amount bid at the present sale, with all the expenses incidental to it, the deficiency to be paid by the defaulter to [230] the vendor. The deposit was not paid, and on a resale a less sum than the defendant's bid was realized. In an action on the contract Lord Campbell, C. J., said: "There having been an actual forfeiture of the deposit, by the express words of the seventh condition, the deposit, if paid, could not in any event be recovered back by the purchaser; and the seller would have been entitled to any additional benefit on a resale. But the seller having obtained a right to the forfeited deposit, and making a further demand of damages sustained on the resale, it becomes necessary to consider what was the nature of the deposit. Now it is well settled that by our law, following the

¹ *Palmer v. Temple*, 9 A. & E. 508. ² *Ockenden v. Henly*, El., B. & E. 485.

rule of the civil law, a pecuniary deposit upon a purchase is to be considered as a payment of part of the purchase-money, and not as a mere pledge.¹ Therefore, in this case, had the deposit been paid, the balance only of the purchase-money would have remained payable. What then, according to the . . . condition, is the deficiency arising upon the resale which the seller is entitled to recover? We think the difference between the balance of the purchase-money on the first sale and the amount of the purchase-money obtained on the second sale; or, in other words, the deposit, although forfeited, so far as to prevent the purchaser from recovering it back, as without a forfeiture he might have done,² still it is to be brought by the seller into account if he seeks to recover as for a deficiency on a resale." Under a contract with a like condition in another case,³ where the deposit had been paid, but there had been no resale, Lord Coleridge, C. J., said: "The deposit, therefore, is absolutely forfeited, and the vendor is at liberty, not bound, to resell; and may recover against the purchaser any deficiency on the second sale, together with the expenses of the abortive sale. The property not having been resold, in this case, the expenses to which the vendor has been put with reference to the abortive sale are recoverable from the purchaser, plus the deposit money. The case of *Ockenden v. Henly*⁴ has been referred to; but the circumstances of that case, which are somewhat complicated, are wholly different from those of the present; the deposit had never been paid, and the action was [231] brought for the loss on the resale, and the expenses of the resale; these expenses formed part of the deficiency on the resale, occasioned by the default of the purchaser, and the loss on the second sale would be the deficiency of price and the expenses."

§ 586. **Same subject; conflict of American cases.** There is much conflict in the American decisions as to a purchaser's right in respect to payments made on a contract of purchase, after the vendor has put an end thereto for the vendee's default. One class of cases holds that, under such circumstances,

¹ 1 Sugden on Vendors, p. 73 (4th Am. ed.). See 2 Warvelle on Vendors, § 927 (2d ed.).

² *Essex v. Daniel*, L. R. 10 C. P. 538.

³ *El. B. & E.* 495.

⁴ *Palmer v. Temple*, 9 A. & E. 503.

the payments made are forfeited and lost; and another, that the putting an end to a contract by the vendor for such cause is a rescission, and entitles both parties to be put in *statu quo*. In a case of the former class the contract contained this clause: "And in case of failure on the part of said party of the second part to make either of the preceding payments when due, or in any respect to fulfill this contract, the same shall become void on such failure, if the party of the first part shall elect to rescind it, and on his previously giving notice of at least thirty days of such election; . . . and besides, the party of the second part shall, in case of such failure and consequent rescinding of the contract, forfeit \$100, as the ascertained and liquidated damages, and shall retain no legal or equitable interest in the premises after this contract is rescinded." There was afterwards default, rescission by notice, and surrender of possession. Welles, J., said: "The cases in which a vendee is allowed to recover back money paid on a contract for the purchase of real estate where the contract has been rescinded are, first, where the rescission is voluntary, and by the mutual consent of both parties, and without the default or wrong of either; second, where the vendor is incapable or unwilling to perform the contract on his part; or third, where the vendor has been guilty of fraud in making the contract. In either of those cases it would be against equity and conscience for the vendor to retain the money, and the law implies a promise on his part to refund it. But in a case where the vendor has in all respects performed his part, and the rescission is entirely in consequence [232] of the unexcused default of the vendee in making further payment, to allow him to recover back the money paid would in my opinion be little short of offering a bounty for the violation of contracts."¹ But in a subsequent case in the same state, and in numerous cases in other states, it is held that where a vendor, in pursuance of a right reserved in the con-

¹ Battle v. Rochester City Bank, 5 Barb. 414. See Ashbrook v. Hite, 9 Ohio St. 357, 75 Am. Dec. 463.

The rescission of a contract does not operate as though it had never existed, and if the vendee sues upon the contract he is bound by a clause

of it forfeiting payments made if default should occur. He cannot ignore the contract because it would follow that the payments sought to be recovered were voluntarily made. Patterson v. Murphy, 41 Neb. 818, 60 N. W. Rep. 1.

tract of sale, declares the contract void, and re-enters and takes possession of the lands, and sells the same to another person, the contract is rescinded; and the vendee may recover payments made by him in an action for money had and received;¹ and the reasonable value of improvements made in good faith while he was in possession, less the value of the use of the premises.² If the vendor has sustained actual damage by the breach of the contract, the vendee's recovery is diminished to that extent.³ In the absence of proof showing such damage, if the vendee, notwithstanding his default, is willing and able to take the land, it is immaterial that it has depreciated in value and that the vendor has removed a cloud on the title.⁴ If there is mutual default money paid "as a forfeit" by the purchaser remains in the vendor's hands as if it were had and received for the use of the other, and may be recovered by him after the vendor has recouped the damage sustained by reason of the failure to purchase.⁵

On principle, if a contract is rescinded by the vendor, even for the vendee's default, the former should restore what he has received upon it; and this view is believed to be sustained by the weight of authority.⁶ Even if the contract shows that the parties intended that on default of the vendee all previous payments should be forfeited, and it be declared void at the vendor's option, this intention should be disregarded for the same reasons that govern in other cases of penalties.⁷ If the

¹ *Merrill v. Merrill*, 103 Cal. 287, 35 Pac. Rep. 768, 37 id. 392; *Miller v. Metz*, 103 Wis. 220, 79 N. W. Rep. 213, citing the text; *Phelps v. Brown*, 95 Cal. 572, 30 Pac. Rep. 744; *Utter v. Stuart*, 30 Barb. 20, 2 Hill, 288; *Jacoby v. Stettler*, 4 Atl. Rep. 342 (Pa.); *Wotring v. Shoemaker*, 102 Pa. 496; *Hudson v. Reel*, 5 id. 279; *Lawrence v. Simons*, 4 Barb. 354; *Fancher v. Goodman*, 29 id. 315; *Ellenwood v. Putts*, 63 id. 321; *Fenay v. Decamp*, 15 S. & R. 227; *Gilbreth v. Grewell*, 13 Ind. 484, 74 Am. Dec. 266; *Burge v. Cedar Rapids, etc. R. Co.*, 32 Iowa, 101; *Franklin v. Miller*, 4 A. & E. 599; *Hunt v. Silk*, 5 East, 449; *Beed v. Blandford*, 2 Y. & J. 392.

278; *McCarty v. Moorer*, 50 Tex. 287.

² *Sheard v. Welburn*, 67 Mich. 387, 34 N. W. Rep. 716.

³ *Phelps v. Brown*, 95 Cal. 572, 30 Pac. Rep. 744; *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. 257, 25 Pac. Rep. 749; *Easton v. Cressey*, 100 Cal. 75, 34 Pac. Rep. 622.

⁴ *Easton v. Cressey*, *supra*.

⁵ *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. 187, 24 Pac. Rep. 280.

⁶ Cases cited in first three notes to this section.

⁷ *Allison v. Cocke's Ex'rs*, 21 Ky. L. Rep. 434, 51 S. W. Rep. 593, 23 Ky. L. Rep. 1589, 65 S. W. Rep. 42, 66 id. 392.

vendee comes to a court of equity to be relieved of the loss of his earnest money, the case will be disposed of on equitable principles. If the vendor has paid out some of the money in reasonable expenses fairly incurred in making or attempting to carry out the contract, he will not be liable therefor. And in determining how much the vendor may retain the court will not confine itself to a consideration of his disbursements, but will regard his rights in view of the situation in which he is left. If at the termination of the contract, the reasonable market value of the land was not equal to the amount due the vendee the vendor would be the loser to that extent by reason of the vendee's breach of the contract. He will not be allowed to make a profit out of his wrong, and cannot be placed in a more favorable situation than he would have occupied if he had complied with his contract. His recovery can only go to the extent that the vendor should not be allowed to retain money over and his costs and reasonable expenses on account of the contract.¹ If the vendee elects to consider the contract at an end and the vendor rests upon the former's breach, he alleging that the vendor has no title, and issue is joined upon that allegation, no claim for specific performance being set up by the vendor, and it is adjudged in equity that the title is good, there cannot be a recovery of the money paid, neither will the vendee be entitled to specific performance of the contract.²

It is provided by statute in South Dakota that where an obligation imposes a forfeiture by reason of failure to comply with all its provisions, the party may be relieved therefrom on making full compensation to the other, and that contracts for stipulated damages shall be void, except in cases where it would be impracticable or extremely difficult to fix the actual damages. A contract for the sale of land provided that the purchaser should take possession, pay therefor in instalments, and that in case of default all payments made should be retained by the vendor as rent, free and clear of any demand of the vendee. Four days after being ejected the vendee offered in

¹ Allison v. Cocke's Ex'rs, 23 Ky. L. Rep. 1589, 1598, 65 S. W. Rep. 342, 66 id. 392.

² Steinhardt v. Baker, 163 N. Y. 410, 57 N. E. Rep. 629, affirming 25 App. Div. 197, 49 N. Y. Supp. 357.

good faith to pay the full sum due the vendor, which he refused to accept. The recovery of the difference between the amount paid on the purchase price and the reasonable value of the use of the land was sustained.¹

§ 587. *Adjustment of counter demands on rescission.* In Kentucky, where the vendee recovers against the vendor purchase-money and interest as damages for breach of a covenant to convey lands, there can be no deduction at law for rents and profits received by the covenantee. If the latter has had possession, taken the rents and profits, made improvements, or committed waste, these things are too complicated for a jury, and properly belong to chancery and must be settled there.² In that state, whether a judgment at law be given for either vendor or vendee, and whether the vendee is entitled to recover only consideration paid and interest, or enhanced damages by reason of the vendor's fraud or wilful default, it may be suspended by a suit in equity until there has [233] been an adjustment in the latter forum of rents and profits, compensation for improvements or waste; and the amount of the judgment will be subject to equitable deductions which result from that adjustment. The rule on these subjects appears to be the same in such cases as upon rescission of the contract in equity at the instance of either party.³ On the re-

¹ Barnes v. Clement, 12 S. D. 270, 81 N. W. Rep. 301.

² Combs v. Tarlton's Adm'r, 2 Dana, 464 (1834).

³ In Wickliffe v. Clay, 1 Dana, 585, it was decided that where one in possession of land, held *bona fide* as his own, has erected buildings thereon, he or those claiming under him may remove them without incurring any responsibility to the owner of the paramount title. If one buys land with buildings upon it, which he moves off, and then loses the land by a better title appearing, his vendors, upon a rescission of their contract, will be entitled to retain out of the consideration to be restored the value of the buildings so removed, assessed at their value when removed; not their

estimated value at the time of the sale, but so much as they would have been worth—preserved with common care—as additions to the land at the time of the erection, and equivalent to what the occupant could have recovered for them of the successful claimant. And where the removal was without the consent or privity of the party against whom the decree for restoration of the purchase-money is obtained, he may, because of the difficulty of the proof, elect to return the value of the buildings according to the above rule or as movable structures. The use of land, and the interest on the consideration paid for it, are, in general, to be considered equivalent, and to be set off against each other. But, as the evictor may recover for *mesne*

scission of a contract by a vendee he has a lien upon any part of the land owned by the vendor for any sum he may have paid upon the purchase price, whether the vendee was ever in possession or not.¹

profits for five years, the party evicted is entitled to interest for the same time on the consideration recovered from his vendor, and such vendee should pay interest on so much of the consideration as was unpaid while he held possession.

Williams' Heirs v. Wilson, 4 Dana, 507 (1836): Part of the consideration remaining unpaid, the purchaser was required to account for the same proportion of the total value of the rents that the unpaid part bore to the whole consideration.

Richardson v. McKinson, Litt. Sel. Cas. 320 (1821): Where a vendee of land has been let into possession, and the contract of sale has been rescinded on account of the misrepresentations of the vendor, and his inability to make a good title, the vendee cannot be compelled to pay rent beyond the profits actually received. In such a case, an inquiry how much the premises would have been reasonably worth annually to a man of ordinary industry and diligence is alike unnecessary and irrelevant. The vendee will be entitled to pay for the improvements made by him when the premises go out of his hands into the hands of the vendor.

Caldwell's Heirs v. White, 4 T. B. Mon. 561: Where the vendee rescinds the contract he must account for the rents from the date of his purchase.

Gainess v. Bryant, 4 Dana, 395: Where the possession is wrongfully withheld from a vendee he is not obliged to pay interest on purchase-money due.

Barnett v. Higgins, 4 Dana, 565 (1836): A purchaser who had received the possession, but failing to get a title had recovered judgment against his vendor for the purchase-money and interest, is accountable in equity to the vendor for the rents and for waste, and is entitled to pay for improvements. And if he is allowed in the adjustment for improvements made by him in clearing land, etc., at their value when first made, he should be charged with the rent of them as well as for those which were on the land when he entered. In adjusting an account of rents, improvements, etc., for a decree, the rents were computed up to a certain time, and decree rendered for the balance; the cause was then appealed, reversed and remanded, with directions to ascertain by a commissioner the value of the use, not before included, of certain improvements, and also the amount of rents, of waste, etc., accrued after the period to which the accounts were brought down in the former adjustment, and up to the time when the purchaser would relinquish the possession, and for a decree for the balance so ascertained.

Stephenson v. Harrison, 3 Litt. 171 (1823): Where a man covenants to convey land to which he knows he has no title, and to deliver possession on a particular day, the value of the land on the day the possession was to have been delivered, with interest, is the measure of damages. Judgment at law had been recovered for the purchase-money, and a bill in equity was filed for compensation

¹ *Bullitt v. Eastern Kentucky Land Co.*, 99 Ky. 324, 36 S. W. Rep. 16.

In Texas if a husband makes an executory contract for the sale of a part of his homestead with one who had no knowledge of the character of the property and who, with the consent of the covenantor and his wife, makes valuable improve-

for failure of title to part of the land. The court say: "Here it is apparent that Harrison not only had no title to the tract. . . . but that prior to his sale to the complainant, he must have had a perfect knowledge of Hays' right; and, although the sale was for three thousand one hundred acres, including the tract of Hays, it is in proof that the four hundred acres of Hays formed such an essential inducement to the purchase, that without the separate and specific covenant of Harrison for that part the complainants would not have completed the purchase. Besides, the proof is satisfactory that the tract of Hays is in value greater than an average four hundred acres, and was so considered by the complainant when making the purchase, and, after selling the land, Harrison, for an adequate sum, might have obtained from Hays his four-hundred-acre tract. The failure of Harrison to comply with his covenant thus made, and which might have been thus fulfilled, instead of being the result of an honest inability to perform his undertaking, must be ascribed to a wilful and fraudulent intention not to comply with his stipulations in relation to the tract of Hays, and ought to subject him to the complainants' demand for compensation in a sum equal to the value of the tract of Hays together with the accruing interest thereon. The value should be ascertained by the request of a jury, who, in their inquiry, ought to be confined to the 1st of October, 1817, the time when by the covenant of Harrison the possession of Hays' tract was to be delivered to the complainants."

In *Combs v. Tarlton's Adm'r*, 2 Dana, 464 (1834), Judge Underwood said: "Where the profits of the land in the possession of the vendee are of more value than the interest of the money enjoyed by the vendor, it is utterly unjust to allow the vendee to recover the purchase-money with its interest, and to hold the profits of the land. If the vendee is evicted by an adverse paramount claim, and becomes responsible to the evictor for the *mesne* profits, then he ought to recover interest from his vendor for as many years as he is or may be required to account to the evictor for the profits. But where the vendee is not bound to account for the profits of the land to any one, and where, as in this case, the profits greatly exceed the interest of the purchase money, manifest injustice would result from permitting the vendee to recover interest, and likewise to keep the profits. The principle upon which all contracts ought to be *rescinded* is that the parties should be placed in *statu quo*. If the contract between the vendor and the vendee is set aside by the chancellor he would never give interest to the vendee and allow him also to keep the profits. On the contrary, he would say to the vendee: 'As you have enjoyed all you contracted for, and as the profits of the land are as valuable, or more so, than the interest on the purchase-money, you shall not have both; but if you require a restoration of the purchase-money and interest, you must restore, on your part, the land and its profits; but as by the contract you and the vendor regarded the land and purchase-money equivalent to each

ments thereon, there may be a recovery for their value.¹ The right thereto does not depend upon the statutes regulating the action of trespass to try title, but on the principles of equity.²

other, I (the chancellor) will regard the use of each as of the same value, and take no account between you for interest or profit.' This doctrine—where the land yields a profit, or can be made, by such care, attention and management as proprietors usually bestow, to yield a profit equal to the interest on the purchase-money—is sustained by the clearest principles of reciprocal justice. But where the land yields no profit, and cannot be made to yield any without the expenditure of money, or labor, or both, then there may be strong reasons for insisting, in case the contract be rescinded, that the purchase-money with its interest should be restored by the vendor. In such a case the vendee generally regards the prospect of a rise or appreciation in the price of land as the equivalent or consideration which he receives for the interest on the purchase-money; and if he cannot, in consequence of the default of the vendor, get the land, being deprived of the contemplated rise which constituted the leading motive for the contract, and, receiving no esplees or profits, the land not being in condition to yield any, justice would require the restoration of the purchase-money with interest upon a rescission of the contract. The cases first decided by this court were, in all probability, of this description.

"Whether the rules which would govern in chancery can be applied with safety to a trial at law has been a subject of much consideration with the court. The rules of right ought

to be the same in every tribunal, and should be applied so as to settle controversies with all practicable speed. To avoid the expense and delay of another suit would be desirable, if insuperable objections did not present themselves. There are, however, too many questions growing out of the rescission of a contract between vendor and vendee put into possession to allow them to be considered and settled by a jury upon the trial of an action of covenant. The vendor may be entitled to a set-off for the profits of the land; for waste and damage; and against these claims the vendee may be entitled to an allowance for improvements. To settle such multifarious and complicated matters, the chancellor is more competent to administer justice than the common-law judge aided by the hasty inquiry of a jury. We shall therefore leave the rule at law to stand as we found it, and as recognized by the case of *Cox's Heirs v. Strode*, 2 Bibb, 273. The vendee is entitled to his judgment at law for the amount of purchase-money and interest, and then the vendor may resort to the chancellor for a settlement of the rents, profits, waste and improvements, and for such decree as equity requires."

Cornish v. Stratton, 8 B. Mon. 586 : C. sold S. three tracts of land, on one of which was a grist-mill and a saw-mill. The purchase-money having been paid, the vendee brought an action of covenant against the vendor, alleging a failure to convey. C. filed a bill for specific perform-

¹ *Eberling v. Deutscher Verein*, 72 Tex. 339, 12 S. W. Rep. 205.

² *Patrick v. Roach*, 21 Tex. 256.

It is a general rule that if the rescission is on account of a defect in the title the purchaser may recover purchase-money and interest and for permanent improvements, less the value of the rents while he had possession or control.¹ He cannot recover rents and profits if he had no right to the possession before paying the purchase price; and if he was relieved of liability for interest after the debtor became in default, he had no claim to the profits thereafter. Any injury sustained by

ance, and to restrain the action at law. This bill was dismissed, but without prejudice to any claim the vendor might have for rent or waste. The vendee proceeded with his action and obtained judgment for the consideration and interest, \$3,000. After the recovery of this judgment the vendor filed a bill setting forth the foregoing facts, alleging waste by negligent burning of the mills and otherwise; that the rental value of the mills was \$500 per annum; also that the vendee was unable to pay the rent and damages for waste, unless by set-off of his judgment; there was a prayer for injunction against that judgment which was awarded him, and a rescission of the contract. The destruction of the mills was found to have resulted from a want of reasonable care and attention on the part of the vendee. He was held responsible for the loss, and the amount deducted from the judgment; as to the residue, the injunction was dissolved. The vendee in his action at law recovered a judgment for \$149 more than the *ad damnum* in his declaration, and he remitted it. But in the final adjustment the vendor was required to pay it to do equity.

Williams' Heirs v. Wilson, 4 Dana, 507 (1836); The general rule, according to former decisions (Cogswell's Heirs v. Lyon, 3 J. J. Marsh. 41; Morton's Heirs v. Ridgway, id.

254; Taylor v. Porter, 1 Dana, 421, 25 Am. Dec. 155), is, that where a contract for the sale of improved land of which the purchaser has had possession is rescinded, the use of the land and interest on the purchase-money shall be deemed equivalents, constituting set-offs one against the other. But there are many cases where this rule would not be equitable, and would not, therefore, be applied, e. g., where the sale was of wild land — where much of the tract was unimproved, and especially where the purchase was not made with a view of deriving profit from the use of the land. In such cases the interest would be decreed to the purchaser with the purchase-money, deducting the value — if anything — of the use of the land, provided money was paid, and he was not chargeable with improper delay in urging the consummation of the legal title, or a rescission of the contract. There has never been any universal rule for adjusting and setting off rents against interest upon rescission of a sale of lands. As cases vary, the equity of allowing rents and interest must vary — the object in every case being to place the parties as near as possible in *statu quo*.

¹ Mason v. Lawing, 10 Lea, 264; Hawkins v. Merritt, 109 Ala. 261, 19 So. Rep. 589; Eberg v. Heisler, 12 Pa. Super. Ct. 388; Lancoure v. Dupre, 53 Minn. 301, 55 N. W. Rep. 129.

the vendee because of such default must be redressed in a suit for damages.¹ In Wisconsin where a sale of land by a county was void because of an error of the officer who executed the deed, the purchase-money being covered into the treasury, there was a right of action in favor of the purchaser to recover the same; but the right to interest thereon did not antedate the demand for the return of the money. Because the purchaser had conveyed some of the land to third persons and was incapable of restoring the vendee to its former position, it not appearing that he was liable to his grantees, the amount of the purchase-money recovered was abated to the extent of the sum received from such sale.²

In Tennessee the vendee, when he procures rescission on the [247] ground that the vendor cannot make title, may recover interest on purchase-money recovered, from the time when it was paid, as well as for valuable improvements.³ Generally he will not be allowed for improvements, taxes and other beneficial expenditures, except as a set-off against rents and profits, where only nominal damages for loss of the bargain would be given at law unless there is fraud in the sale;⁴ and he will be

¹ *Hayes v. Elmsley*, 23 Can. Sup. Ct. 623.

² *Rice v. Ashland County*, 114 Wis. 130, 89 N. W. Rep. 908.

³ *Winters v. Elliott*, 1 Lea, 676; *Mason v. Lawing*, 10 id. 264.

⁴ *Conger v. Weaver*, 20 N. Y. 140; *Peters v. McKean*, 4 Denio, 550; *Coffman v. Huck*, 19 Mo. 435; *Gibert v. Peteler*, 38 N. Y. 170, 97 Am. Dec. 785; *Hoover v. Calhoun*, 16 Gratt. 109; *Bright v. Boyd*, 1 Story, 478; *McMalkin v. Bates*, 46 How. Pr. 405; *Lemmon v. Brown*, 4 Bibb, 308; *Jones' Heirs v. Perry*, 10 Yerg. 59, 30 Am. Dec. 430; *McKinley v. Holliday*, 10 Yerg. 477; *Wilhelm v. Fimple*, 31 Iowa, 131, 7 Am. Rep. 117; *Gillet v. Maynard*, 5 Johns. 85, 4 Am. Dec. 329; *Morris v. Terrell*, 2 Rand. 6; *Putnam v. Ritchie*, 6 Paige, 390.

Where the owner of leasehold premises under a lease in fee died, leaving several infant children, and

their mother, who was the administratrix of his estate, assigned the lease to the owner of the rent as heir of the lessor, in consideration of his discharging his claim for the rent against the estate of the decedent: Held, that the assignment was void, and that the children of the decedent were not divested of their legal estate in the premises; and that the assignee of the lease having, under a misapprehension of his legal rights in the premises, made large and valuable improvements thereon, the owners of the legal estate were not bound to pay him for these improvements. The chancellor: "The arrangement for giving up the lease being wholly unauthorized, the defendants (claiming under that lease) are therefore entitled to the benefit of the natural increase in the value of the property since that time. I am not aware that the law of any

chargeable for any waste and deteriorations which occur [248] by his acts or negligence.¹ But when the circumstances are such that the vendee would be entitled to recover for loss of the bargain at law he is entitled, on rescission in equity, or

civilized country has directly deprived the legal owner of property of the natural accession to the same; although the supreme court of the United States, in the case of *Green v. Biddle* (8 Wheat. 1), appear to have supposed that the occupying claimants' law of Kentucky was calculated to produce that effect indirectly. But the rule of natural equity appears to be different in regard to industrial accessions or permanent improvements made upon the property of another by a *bona fide* purchaser. By the rules of the civil law, the possessor of the property of another, who had erected buildings or made other improvements thereon in good faith, supposing himself to be the owner, was entitled to payment for such improvements, after deducting from the value thereof a fair compensation for the rents or use of the property during the time he occupied it. Puffl., B. 4, ch. 6, § 6; Code Napol., art. 555; 3 Partida, tit. 28; Bell's Law of Scotland, 130, art. 538; Rutherford, Inst. 71; Inst. of Law of Spain, 102. This principle of natural equity has been adopted by the law of England and in this state to a limited extent, in the action for *mesne* profits, where the *bona fide* possessor of property is permitted to offset or recoup in damages the improvements he has made upon the land, to the extent of the value of the rents and profits during his occupancy. Here the use of the lot, subject to the widow's right of dower, which the complainant is equitably entitled to under her as-

signment of the lease, although it could not be sold so as to pass the legal title before it was set off to her, is probably equal to two-thirds of the rent reserved upon the lease. And if I felt myself authorized to introduce this principle of natural equity into the law of this court farther than it has been adopted here, I should direct a reference to a master to ascertain the present value of the lot, exclusive of the buildings, subject to the widow's dower and to the future rents, exclusive of her share thereof, and also to ascertain the present value of the buildings, subject to the right of dower therein; and should give the defendants the right to elect, upon the coming in of the master's report, whether they would retain the legal title to the lot, subject to the rent and right of dower, and pay to the complainant the value of such improvements, or would release to him their legal estate in the premises upon being paid the value thereof as thus ascertained exclusive of the buildings. This principle of natural equity is constantly acted upon in this court, where the legal title is in the person who has made the improvements in good faith, and where the equitable title is in another, who is obliged to resort to this court for relief. The court, in such cases, acts upon the principle that the party who comes here as a complainant, to ask equity, must himself be willing to do what is equitable. I have not, however, been able to find any case, either in this country or in England, wherein the court of chancery has

¹ *Cornish v. Stratton*, 8 B. Mon. 586; *Foster v. Gressett's Heirs*, 29 Ala. 393.

where damages are given in lieu of specific performance, not only to recover the purchase-money and interest, but to be fully compensated for improvements and beneficial expenditures, with proper deductions for the rents and profits which he has enjoyed.¹

The allowance for improvements cannot exceed the value added thereby to the land.² One who has erected a building cannot be allowed anything on account of it if he put one of the walls on the land of a third party, and the building will be rendered worthless by removing the wall.³ The vendor is entitled to such allowance for rental value as the land would bring, regardless of the sum for which it was in fact rented.⁴

In an action by the vendee of a mine to rescind the contract of sale, the vendor, who held notes of the vendee secured by a deed of trust on the property, counter-claimed for damages resulting from the breach of a contract to work the mine properly, alleging that the mine was injured by being improperly worked. The legal title to the property was in a trustee, but he was not a party to the contract respecting the working of the mine, and was a party to the action only because he held such title. The vendor occupied the position of a mortgagee, having, under the local law, only a lien upon

assumed jurisdiction to give relief to a complainant who has made improvements upon land the legal title to which was in the defendant, where there was neither fraud nor acquiescence on the part of the latter after he had a knowledge of his legal rights." See *Bright v. Boyd*, 1 Story, 478; *Herring v. Pollard*, 4 Humph. 362, 40 Am. Dec. 633; *Green v. Biddle*, 8 Wheat. 79.

¹ *Perry v. Boyd*, 126 Ala. 162, 28 So. Rep. 711; *Peabody v. Tarbell*, 2 Cush. 226; *Case v. Wolcott*, 33 Ind. 5; *Carroll v. Rice*, Walk. Ch. 373; *Putnam v. Ritchie*, 6 Paige, 390; *McConnell's Heirs v. Dunlap's Devisees*, Hardin, 41, 3 Am. Dec. 723; *Fisher's Heirs v. Kay*, 2 Bibb, 434; *Gerault v. Anderson*, id. 543; *Patrick v. Marshall*, id. 40, 4 Am. Dec. 670; *Thompson v. Bell*, 37 Ala. 438.

In the last case there was misrepresentation of quantity in a particular parcel included in the purchase; and it was held that the proper mode of computing damages is to multiply the average value (not of the entire tract but) of the particular parcel per acre by the difference between the number of acres which it actually contained and the number which it was represented to contain.

² *Conlan v. Sullivan*, 110 Cal. 624, 42 Pac. Rep. 1081; *Lancoure v. Dupre*, 53 Minn. 301, 55 N. W. Rep. 129; *North v. Bunn*, 128 N. C. 196, 38 S. E. Rep. 814.

³ *Laevison v. Baird*, 91 Ky. 204, 15 S. W. Rep. 252.

⁴ *Worthington v. Campbell*, 8 Ky. L. Rep. 416, 1 S. W. Rep. 714.

the property. The issue, therefore, was between the vendor and the vendee. The only interest of the former was by way of security for his claims. If the security was not impaired he had not suffered damage, although the land may have been depreciated in value by reason of the breach of the contract. Hence, the injury done could be recovered for only to the extent that the security was affected.¹ On the breach by the purchaser of the terms of the agreement under which property was conveyed to him, if the vendor has had the advantage of the transaction for a considerable time, and the parties cannot be placed in the positions they formerly occupied, the vendor cannot rescind the contract and recover the value of the property; his relief is limited to the damages sustained from the breach of the agreement.²

§ 588. Adjustment of counter equities in specific [234] performance. The manner of accomplishing such adjustments is not everywhere the same; but there is uniformly recognized the elements which may be involved.³ The [235] general principle is that he who withholds possession after it is his duty to deliver or surrender it shall make compensation to the party to whom such delivery or surrender was [236] due for benefits received from such possession, while withheld, or the value of the use, and for waste or deterioration resulting from his acts or neglect. After the purchaser is en- [237] titled to possession, if the vendor retain it or prevent its de-

¹ Belmont Mining & Milling Co. v. Costigan, 21 Colo. 471, 42 Pac. Rep. 647.

² Marston v. Singapore Rattan Co., 163 Mass. 296, 39 N. E. Rep. 1113.

³ The damages are to be ascertained upon an equitable basis. If the vendee has been kept out of possession by the wrongful act of the vendor, the general rule is that the latter will be regarded as a trustee of the land for the benefit of the former, and must account to him for the rents and profits which he received or might have realized by due diligence. The rule is not inflexible in its application, for if there are no rents and profits, or if they are less

than the value of the land, the vendor, in the discretion of the court, may be charged with the value of such use during the time the vendee is so kept out of possession. In special cases, where equity requires it, the court will not allow the vendor any interest on the purchase price during the time he retains possession of the land, nor charge him with *interim* rents and profits. Equity will in each case place the parties, so far as possible, in the same situation as they would have been in if the contract had been performed according to its terms. *Abrahamson v. Lamberson*, 79 Minn. 135, 81 N. W. Rep. 768.

livery, the vendee is entitled to compensation for the loss. He will be allowed the value of the rents and profits, and where these are less than the interest on the purchase-money the latter will be allowed instead.¹ In ascertaining the amount of the rents and profits the necessary expenses of raising, securing and marketing the crops, and the amount paid, if anything, for taxes and necessary repairs, must be deducted; but nothing can be allowed for the personal services of the vendor in superintending the management of the land, he being a trustee in his own wrong.²

From the date of the contract everything that forms part of the inheritance belongs in equity to the purchaser; and if severed and converted by the vendor he is bound to make compensation either on the basis of the value of the severed property or the diminished value of the land, according to the circumstances.³ There is an interesting discussion of this liability in a New York case.⁴ P. contracted to convey certain lands to the plaintiff, but conveyed them instead to the defendant, M., who had knowledge of the prior agreement. The plaintiff in 1844 filed his bill in chancery to compel a specific performance of the agreement, and obtained a decree. This decree directed a reference to a master to ascertain the amount of [238] damages sustained by the plaintiff by reason of having been kept out of possession, and by reason of waste committed by defendant M. The purchase-money was paid by the plaintiff, according to the decree, and P. executed and tendered

¹ Id.; *Seaver v. Hall*, 50 Neb. 878, 70 N. W. Rep. 373, 52 Neb. 316, 72 N. W. Rep. 217; Kentucky cases cited in preceding section; *Esdale v. Stephenson*, 1 Sim. & S. 122; *Jones v. Mudd*, 4 Russ. 118; *Burton v. Todd*, 1 Swanst. 255; *Kennedy v. Koopmann*, 166 Mo. 87, 65 S. W. Rep. 1020.

² *Abrahamson v. Lamberson*, *supra*.

³ *Caldwell's Heirs v. White*, 4 T. B. Mon. 561; *Robertson v. Skelton*, 12 Beav. 260; *Dyer v. Hargrave*, 10 Ves. 506; *Barnett v. Higgins*, 4 Dana, 565; *Combs v. Tarlton's Adm'r*, 2 id. 464; *Cornish v. Stratton*, 8 B. Mon. 586; *Shawhan v. Long*, 26 Iowa, 488, 96 Am. Dec. 164; *Gaines v. Bryant*, 4

Dana, 395; *Hepburn v. Dunlap*, 1 Wheat. 179, 3 id. 231; *Bolling v. Lerner*, 26 Gratt. 36. See *Burgett v. Bisell*, 14 Barb. 638.

In South Carolina only such damages as were done to the freehold and such compensation as may be just for the use and detention of the land are recoverable in actions for specific performance. There cannot be a recovery for the removal by the vendor of wood cut on the land by the vendee. *Latimer v. Marchbanks*, 57 S. C. 267, 278, 35 S. E. Rep. 481.

⁴ *Worrall v. Munn*, 38 N. Y. 137, 55 Am. Dec. 330.

a conveyance of the premises, but defendant M. continued in possession pending sundry appeals until 1859. These appeals related to the question of damages as found and assessed, first by the master and subsequently by a referee. It was also a part of the case, and it appeared in evidence, that the lands were of little value for agricultural purposes, and were purchased by the plaintiff for the manufacture of brick. It was held: 1. That the general rule which allows to the vendor the interest on the purchase-money, and to the purchaser the rents and profits, failing here to apply as an equitable remedy because of the peculiar circumstances of the case, the equitable indemnification of the plaintiff for being kept out of possession is found in allowing him as damages an annual sum equal to the interest on the purchase-money paid by him. 2. He should be allowed the damages sustained by the deterioration from waste committed by the defendant. 3. These should be continued down to the time when the plaintiff was let into possession. 4. Upon the damages caused by being kept out of possession, interest should be computed on each actual amount from the end of each year down to the time of the assessment or report: and upon the damages caused by waste only from the time when the plaintiff was let into possession to the time of the assessment or report.¹ Following the principles enun-

¹ Woodruff, J., said: "The present case is peculiar in two respects, viz.: First, the purchase-money, with the interest thereon, was payable, and was properly decreed to be paid, to the defendant Pratt, the original owner and vendor of the premises, who acquiesced in the decree and executed a deed in obedience to its requirements, while the possession was held by the defendant Munn; and second, the principal value of the lands consisted in the deposits of clay, adapted by the consumption thereof to the manufacture of brick on the premises. The inapplicability of the general rule above stated to land of this description may be rendered quite apparent by an illustration closely analogous to the present.

For example, suppose a sale of land, of no value for ordinary use because incapable of cultivation and entirely unsuited to pasture, and yet by reason of a bed of valuable ore of very large value, and for that sole reason, sold at a large price. On a decree for specific perform- [239] ance, shall the purchaser be charged with interest on the purchase-money for the period during which he is kept out of possession, and the vendor pay nothing (because the rents and profits are nothing) for depriving the purchaser of the opportunity of working the mine or ore bed during the period of delay? Or, if the purchase-money has been paid, shall the vendor, who has enjoyed the use of the purchase-money, have the advan-

ciated in this case it has been ruled by the New York court of common pleas that upon a judgment in favor of the plaintiff in an action for specific performance of a contract to sell land which he purchased for the purpose of improving, and from

tage of his own wrong, and make no compensation to the purchaser for his loss of opportunity? The answer must be, not so, unless the rules of equity are so imperfect that such injustice cannot be prevented. Does it follow that the damages are to be ascertained by inquiring what profits the purchaser could have made by working the mine? That question is in substance this: Was the referee right, on the first reference in the present case, in inquiring how much the plaintiff might have received for the privilege of making brick on the land, thereby exhausting the bed of clay, which, in fact, now remains to him to be worked presumptively with equal benefit, and thereupon allowing the plaintiff interest on such possible receipts from year to year as damages for the delay? This mode of estimating his damages proceeded upon the ground, not that the plaintiff lost the clay beds (which constituted the chief value of the land), but that he lost the opportunity of converting them into money so soon as, perhaps, he might have done if he had obtained the possession when he was entitled thereto. I find no warrant for any such speculative rule or measure of damages: no case is cited to us, and I think it may be safely averred that no case can be found, in which such a rule was adopted. No analogy can be found in any rule of assessment of damages at law. The rule, then, is the value of the use, not the profits of the consumption of the property detained, when in fact the entire property is restored to the plaintiff's possession. . . . The plaintiff offered to prove that he

purchased for the express purpose of devoting it to the making of brick, and to converting its contents into money. Now suppose the plaintiff, although he had contracted to pay therefor a large sum, had, in fact, paid no part of the purchase-money, and he was now to be put in possession and permitted to carry into effect the purpose for which he bought the property. He would be completely indemnified against loss by relieving him from the payment of interest. True, he would fail to realize at so early a day as he anticipated, the profits of his bargain, but he has now that chance of profits, and meantime he has had the use of the purchase-money. In short, the general rule which allows to the vendor the interest, and the purchaser the rents and profits, failing to apply, because, from the character of the land, there are no rents and profits, or an amount grossly inadequate to a just indemnity, the purchaser is equitably entitled to be indemnified, if any definite and certain mode can be found by which to ascertain it. Relief from the payment of interest is, in such a case, palpably the most obvious, as it is the most equitable, mode of doing so. For, otherwise, the vendor is permitted to profit by his own wrong, and the purchaser compelled to submit to a certain loss. . . . [240] But it is one of the peculiarities of this case that the purchase-money and interest was due to the defendant Pratt, and has been paid while the defendant Munn has been in possession, and during the period of litigation down to 1859, at least, has kept the plaintiff out of possession.

which no rents or profits were derivable so long as it remained unimproved, that inasmuch as the damage sustained by being kept out of possession was not capable of legal ascertainment, the plaintiff should not be charged with interest upon the un-

The plaintiff has lost the interest on the purchase-money, and the nature of the property is such that there can be no measure of damages founded on the rents and profits, or the value of the use of the premises, which furnishes any indemnity. Within the principles of the cases referred to, and, as I think, in most just conformity to reason and equity, the defendant should be charged with the amount of that interest as damages down to the time when the plaintiff was let into possession."

The question whether the damages for waste committed by a vendor pending a contract of purchase should be measured by the injury to the inheritance occasioned thereby, or by the value of the materials taken from the premises, or where timber has been cut, or stone has been quarried, or earth removed by him; or whether either method may be adopted in the ascertaining the damages, was not particularly considered in the opinion from which the foregoing quotation has been made. The judgment directed that in ascertaining the damage sustained by reason of waste committed by the defendant, the court should allow to the plaintiff the "actual value of the clay and sand taken from the premises by the defendant, and of any timber or trees cut thereon and removed by him, with interest on such value from the time the plaintiff was let into possession until the time of the assessment." The damages were subsequently assessed in accordance with the judgment, and judgment was given for the same. This judgment having been affirmed at general term, the de-

fendant again brought the case, by appeal, before the court of appeals. The defendant asked reversal on the ground that the rental value of the premises for ordinary purposes of husbandry is the only criterion of damages for keeping the plaintiff out of possession; and that the diminished value of the land, and not the value of the materials taken therefrom, should be adopted as the measure of compensation to which the plaintiff was entitled for the injury in the nature of waste committed. It was held that the assessment was in strict conformity to the directions given on the former appeal, and that the judgment should be affirmed on the principle of *stare decisis*, unless there was a plain error committed by the court in giving those directions." The principles laid down in the former opinion were reaffirmed in respect to the right to assess damages down to the time of assessment and to the adoption of interest on the purchase-money paid as a measure of damages for the plaintiff being kept out of possession. On the other question, Andrews, J., said (53 N. Y. 185, 189): "It is not denied that the defendant is liable to the same extent as the vendor would have been. He entered under a contract with him, and with notice of the plaintiff's rights; and the waste was committed *pendente lite*. It is clear, I think, that the deterioration in the value of the land would be an appropriate method of fixing the amount of the injury. In some cases it would be the only way in which compensation for waste could be given, in view of the nature of the plaintiff's interest

paid purchase-money, and the defendant should be charged with all interest and taxes accruing prior to the delivery of his deed, without being allowed anything for the increase in the value of the land.¹ A purchaser who obtains a decree for

and the character of the injury. A mortgagee or lienor could only recover on proof that his security was rendered inadequate by the injury to the freehold. If the soil, having no value separate from the land, was stripped from it, so as to render it unproductive and unfit for the use to which it was applied, the diminished value of the land would be the only adequate measure of compensation. So, also, where trees designed for shade or ornament have been cut down, whereby the value of the land has been greatly lessened. And in cases of permissive waste, where a purchaser has been kept out of possession, and the land has suffered from lack of cultivation, the court would compel an allowance to be made by the seller for the injury to the land. (*Foster v. Deacon*, 3 Madd. 394; 3 Sugd. on V. & P. 133 [2 id. (4th Am. ed.) 336].) But the diminished value of the land is not the exclusive measure of relief for an injury in the nature of waste committed by a wrong-doer on the land of another. In many cases it would substantially exempt him from responsibility. Cutting a few trees on a timber tract, or taking a few hundred tons of coal from a mine, might not diminish the market value of the tract, or of the mine, and yet the value of the wood or coal, severed from the soil, might be considerable. The wrong-doer would, in the cases instanced, be held to pay the value of the wood and coal, and he could not shield himself by showing that the property from which it was taken was,

as a whole, worth as much as it was before. (*Martin v. Porter*, 5 M. & W. 351; *Morgan v. Powell*, 3 Q. B. 278; *Bennett v. Thompson*, 13 Ired. 146.) The liability of the vendor who, pending a contract of purchase, commits waste upon the premises by cutting timber, trees, or removing stone, sand or clay therefrom, to pay or account to the purchaser for the value thereof, results, I think, from the principle that in equity everything which forms a part of the inheritance belongs to the purchaser from the date of the contract. The purchaser is deemed in equity to be the owner of the land, and a court of equity will, in an action for specific performance, adjust the respective rights and liabilities of the parties upon this assumption. I am satisfied that the judgment declaring the defendant liable for the value of the sand, clay and timber taken by him from the premises was not inadvertently pronounced, but is supported by reason and authority; and I shall content myself by citing some authorities bearing on the subject, without further discussion: *Nelson v. Bridges*, 2 Beav. 239; *Attersol v. Stevens*, 1 Taunt. 183; *De Visme v. De Visme*, 1 Macn. & G. 336; *Dart on Vend.* 116; 3 Sugd. on Vend. 134 [2 id. (4th Am. ed.) 336]; *Paine v. Miller*, 6 Ves. 349; *Moore v. Wait*, 3 Wend. 104, 20 Am. Dec. 667."

In Pennsylvania a purchaser who has been prevented by the vendor from paying the balance of the purchase-money is treated as a trustee thereof, and, on securing specific

¹Selleck v. Tallman, 11 Daly, 111.

specific performance may elect to pay interest on the purchase price for the time elapsed since the conveyance should have been made and take the rents and profits received by the vendor, or allow the latter to retain these and thereby relieve himself of liability for interest.¹

If the vendor retains possession as security for the purchase-money pending a question incidental to specific performance, where that relief as to the principal part of the land is not disputed, but mutually contemplated, he will be charged in respect to it like a mortgagee in possession. In an English case² a dispute arose between trustees for a deceased vendor and a purchaser, the latter claiming to be entitled under his agreement to an additional piece of land. The trustees filed a bill and obtained a decree for specific performance, excluding such piece. They had not allowed the purchaser to take possession of the rest of the land whilst the purchase-money remained unpaid, and in the meantime it was allowed to lie waste. It was held that the purchaser should be allowed to set off against the interest payable by him the amount which might have been received, and the amount of deterioration. The lord chancellor said: "By the effect of the contract, assuming there to be no ground on either side for simply setting it aside according to the principles of equity, the right of the property passes to the purchaser, and the right of the vendor is turned into a money right to receive the purchase-money, he retaining a lien upon the land which he has sold until the purchase-money is paid. Let us for a moment suppose the case of any other description of security, and that the holder of the security insisted, for his protection, upon entering into possession of the land over which the security extended; then, is not such a person so entering into possession answerable, when the account under the security comes to be taken, for not keeping the property in the condition in which a person in possession ought to keep it? I apprehend that he is so answerable; and, on principle, I can see no reason

performance of the contract, is liable for interest unless he shows that he has kept the money unappropriated. *Conover v. Wright*, 9 Pa. Dist. Rep. 658.

¹ *Lynch v. Wright*, 94 Fed. Rep. 703.

² *Phillips v. Silvester*, L. R. 3 Ch. 173.

why a vendor, who insists upon continuing in possession of the land over which he has security, the contract being one which, in the view of a court of equity, has changed the title of the land,—I see no reason why such a vendor should not be under the same obligations as those under which any other person would be, who, having security on land, insisted on the possession of the land as a farther security. He, when the account comes to be taken between himself and the purchaser, will be entitled to credit for all proper expenditures, for the purpose of maintaining the purchaser's property in a proper condition, as against the account of rents and profits to which he is necessarily subject. He will receive, on the other hand, the interest which, by the contract, he is entitled to receive. Perfect justice is done in that way; and it is wholly unimportant, as it appears to me, that he has the right, which undoubtedly he has, to insist upon retaining possession until [243] payment of the purchase-money is made and the conveyance is accepted. He has that right; but the question is upon what terms that right is to be exercised. It appears to me that it must be upon the terms of his undertaking the duties of possession while he insists upon retaining possession. He is *pro tanto* a trustee in possession for the purchaser, although he holds the purchaser at arm's length, and a trustee, therefore, who is bound to do those things which he would be bound to [244] do if he were a trustee for any other person.¹ . . . My

¹ The further remarks of the lord chancellor are important. He said: "The vendors run no serious risk if they take that course, assuming always that the property is worth being preserved. No doubt there might be special circumstances tending to show that it was not worth being preserved, if the expenses of the necessary repairs would be greater than those which the property would bear. In that case it is very possible that a purchaser might have no claim, if previous notice were given to him that, unless he would supply the vendors with funds in order to make the necessary repairs, the property must be left to

take its chance. But no case of that kind is alleged here. There is nothing whatever to show, or to suggest, that this was not property which would bear the expense of keeping it in a proper state of repair; there is nothing to show or suggest that the purchaser was not a person who could be made responsible for anything that might be due from him in pursuance of the contract. I entirely agree that the vendors were acting in their strict right, and were doing nothing wrong in insisting as they did upon retaining possession until the purchase-money was paid; yet on the other hand, I cannot admit that that is any reason why they

opinion is that, in that state of things, there being proof of careless, and, I must say, of wantonly negligent conduct on the part of the plaintiff, which has caused serious dilapidations, I cannot differ from the master of the rolls, or see any reason

should be exonerated from the obligations attaching to persons insisting upon remaining in possession. As far as appears they would have incurred no risk in allowing possession (the purchase-money remaining unpaid) to be taken by a solvent and responsible purchaser, retaining, as they might have done, their lien for the purchase-money over the estate. They were not bound to do so; but they cannot play fast and loose, and in one breath say: 'The time has come when you might have taken, and ought to have taken, possession, and therefore you must bear the consequences of all the subsequent deterioration;' and in another breath say: 'We have a right to refuse you possession, and we choose to exercise that right.' Now, the authorities appear to me to be entirely consistent with this view. One or two were referred to, but they simply come to this: that from the time when the party might have taken possession, and when it was his duty actually to take possession, if he does not do so he may be answerable for deterioration. I have no doubt whatever, that if in this particular case the plaintiffs had sent to Mr. Silvester and had said: 'We are perfectly willing to let you go into possession subject to the question between us,' and Mr. Silvester had said in reply: 'I am willing to take possession, but I am not willing to pay the purchase-money;' or if he had said: 'I will not take possession unless you give a conveyance and the whole thing is closed up,' Mr. Silvester would have put himself within the reach of those authorities. In that case, according to the contract, the time for taking

possession would have come, possession would have been offered to him, and there would have been no obstacle or impediment to his taking it except one, which, in the exercise of his strict rights, he would have himself created. But although it is true that each party is entitled to refuse to alter the possession until the whole contract is completed, it is not true that when the parties differ upon some subordinate question as to the manner of completing the contract, whether in the form of the conveyance or in the parcels, each party being minded that the contract should go on, it is not true that giving possession to the vendee would be a departure from the ordinary course of proceeding. Possession may be changed before completion. But payment of the purchase-money before completion is not according to the ordinary course of proceeding, although sometimes the money is paid into court. Here there was a very small question between the parties as to this land occupied by the railway—a question as to parcels merely. The purchaser was willing to complete, and the vendor desired to compel them to complete, however that question might be determined. The purchaser was perfectly solvent, and there was no good reason why he should not be let into possession, pending the settlement of the question, leaving the question of payment to stand over. At one time it appears to have been contemplated that on the payment of a small sum of money, £250, he might and would have been let into possession. But there was some misunderstanding as to the payment, and the delay unfort-

to alter his lordship's order in this respect." The order of the master was that the plaintiff's have the balance of the purchase-money with interest; that an account be taken of the rents and profits received by them in respect of the premises, or which, but for their wilful neglect and default, might have been received; and an inquiry as to any deterioration in the premises from the date from which the interest on the purchase-money was to be computed, and as to what would be required to restore them; and it was declared that the defendant [245] would be entitled to set off against the interest the amount so found.¹ If as a consequence of withholding possession the purchaser loses a tenant who has entered into a lease

unately led to different views being taken by some of the parties, so that when the time had elapsed the consent of the vendors, which was necessary for the purchaser taking possession, was absolutely refused; and I cannot perceive that anything which afterwards took place changed the relative position of the parties."

¹The case last stated has been followed in *Royal Bristol Permanent Building Society v. Bomash*, 35 Ch. Div. 390; *Earl of Egmont v. Smith*, 6 id. 469. It has been regarded by Mr. Dart as a departure from the rule which formerly prevailed in England. He says in the last edition of his work on *Vendors & Purchasers* (vol. 2, p. 650, 5th Eng. ed.): "This decision was strongly disapproved of by Sir George Jessel, M. R., when the cause came on before him for further consideration. As his honor remarked, the reasoning upon which it is based is wholly inconsistent with the law as laid down by the court in *Sherwin v. Shakespear* [5 De G., M. & G. 517, 536, 17 Beav. 267], and followed in subsequent cases. A vendor who retains possession of the estate until completion of the purchase does so, not in the character of a mortgagee for better protecting his lien for unpaid purchase-money, but in the character of trustee (using the term in a qualified sense, and not as implying the obligations of an ordinary trusteeship) for the purchaser; and, as in the case of a trustee, so *a fortiori* in the case of a vendor so circumstanced, it is only under special circumstances that he ought to be charged with wilful default as respects the due preservation of the property: especially where, as in the case just referred to [*Phillips v. Silvester*, *supra*], the non-completion of the purchase by the appointed time is occasioned by the purchaser's own default. If the rule were otherwise a vendor might find himself compelled to make a heavy outlay for repairs or the like (as on the sale of a mill and machinery), which might be objected to by the purchaser as unnecessary or improper; and, unlike a mortgagee or trustee, he would have no means except by a suit or possibly by a summons of recovering from the purchaser the amount which he has so expended." This view coincides with that of the court in *Royal Bristol Society v. Bomash*, *supra*, though the rule of *Phillips v. Silvester*, being authoritative, was followed.

of the premises the vendor is liable for the rent lost;¹ and if residence property deteriorates in value because the vendor allows it to remain unoccupied during the pendency of a suit brought by the purchaser to obtain specific performance, the latter is entitled to an allowance on account of such deterioration.² According to principles which are elsewhere exemplified,³ special damages resulting from the failure to make a resale can only be recovered where the contract for resale was brought to the knowledge of the vendor, and where, by reason of his special knowledge of the circumstances, he impliedly undertook, in case of default, to pay such damages.⁴ Where the contract provided that if the title to land was so defective that it could not be remedied it should be void, and that the payment made should be returned; also, that if the vendee did not make the full payment required the money paid should be forfeited, and the title to part of the premises failed, and the vendee sued for specific performance, which was refused, he obtained judgment for the payment made, with interest and costs.⁵ If timber has been cut and removed from lands by another than the vendor under a contract in force when the conveyance was made, the cutting being done thereafter, the vendee is entitled to an allowance therefor and also to interest thereon from the date of the last payment made to the vendor by the vendee of the timber.⁶

§ 589. *Same subject.* Where there is a rescission of a land contract the parties are to be put in *statu quo* as nearly as possible. There cannot be a literal restoration where the contract has been acted upon, payments made, or possession enjoyed; then rescission requires compensation for what has been mutually enjoyed under the contract, as well as for deteriorations.⁷ If the contract be rescinded in equity, even on the ground of fraud in the purchase, the court will in general direct an allowance to be made to the purchaser for

¹ Royal Bristol Permanent Building Society v. Bomash, 35 Ch. Div. 390. S. W. Rep. 29. See Rice v. Ashland County, stated in § 587.

² Lynch v. Wright, 94 Fed. Rep. 703.

³ § 45 *et seq.*

⁴ Lynch v. Wright, 94 Fed. Rep. 703.

⁵ Ryan v. Dunlap, 111 Mo. 610, 20

N. W. Rep. 253, 67 id. 739.

⁶ Gates v. Parmly, 93 Wis. 291, 66

⁷ Foster v. Gressell's Heirs, 29 Ala.

393; Smith v. Stewart, 83 N. C. 406;

West v. Waddill, 33 Ark. 575.

beneficial expenditures, substantial improvements and repairs.¹ This allowance, however, when the sale is set aside at the suit of the purchaser, will not extend to improvements, or even repairs — except such as are essential to the preservation of the property — where they are made subsequently to the discovery of the matter on which he grounds his right to relief.² Such expenditures as are made before discovery of the defect in the title will be allowed, upon proper pleading, to the vendee;³ but subject to the counter-claim of rents and profits received, or which, without his wilful default, might have been received; and this is especially so where the improvements or expenditures have been made in pursuance of the contract.⁴

In the absence of a promise to convey, the occupation of land and the expenditure of money thereon do not create an implied promise to convey, and the value of the use of the premises and the receipt of the proceeds thereof will be set off against any equity created by expenditures made in permanent improvements.⁵ But this principle, according to the supreme court of New York, does not apply where, in pursuance and upon the faith of a parol promise to convey land, the promisee has taken actual possession and remained in occupation of the premises, having made permanent and valuable improvements, thereby taking the parol agreement out of the statute of frauds and entitling him to specific performance of the contract. In that case the value of the occupation of the premises by the promisee is not to be set off against the expenditures made by him thereon and a decree for the conveyance denied because the value of such occupation equals or exceeds the expenditures made. In equity the property became the promisee's at the time of performance on his part entitling him to a deed; he was not, therefore, liable for the subsequent rental of it.⁶

¹ Dart on Vendors & P. 222; *McClure v. Lewis*, 72 Mo. 314. See *Jackson v. Ludeling*, 99 U. S. 513.

² *Id.*

³ Dart on Vendors & P. 330; *Patrick v. Roach*, 21 Tex. 251.

⁴ *Davis v. Strobbridge*, 44 Mich. 157, 6 N. W. Rep. 205; *Gibert v. Peteler*, 38 Barb. 488. 38 N. Y. 165, 97 Am. Dec. 785; *Sheard v. Welburn*, 67

Mich. 387, 34 N. W. Rep. 716; *Bitch v. Edwards*, 96 Ga. 606, 24 S. E. Rep. 147.

⁵ *Wack v. Sorber*, 2 Whart. 387, 30 Am. Dec. 269; *Walton v. Walton*, 70 Ill. 142; *McMahill v. McMahon*, 69 Iowa, 115, 28 N. W. Rep. 470.

⁶ *Young v. Overbaugh*, 76 Hun, 151, 27 N. Y. Supp. 553.

Where vendees have made expenditures upon the premises, not only in good faith and relying upon the performance of the agreement by their vendors, but in actual and direct compliance with their own covenants in that agreement, the vendor, who is unable to perform the contract by giving a good title, cannot recover the possession of the lands without repaying these expenditures. If a vendor is unable to make a good title to a portion of the premises, the vendees are entitled to elect whether they will rescind the contract *in toto*, and receive back their expenditures under it, or will accept such conveyance of the whole property as the vendor can give, paying him the price stipulated, less such deduction as [246] may be just for the defect.¹ If, in such a case, the vendees elect to rescind the agreement *in toto*, they are entitled to be repaid the amount which they have expended in compliance with its terms in permanent improvements; and that sum will be made a lien upon the premises, or its payment a condition to the surrender of the possession or the recovery thereof by the legal owners.² But if the vendees elect to receive such title as the vendors can give, with compensation for the defect, they have a right to ask for a judgment to that effect. The vendor cannot recover possession until the vendees have had an opportunity to make their election, and have it complied with either by the repayment to them of the expenditures, or by the payment of the sum which shall be fixed as the proper purchase-money, and a tender of a conveyance of the vendor's title. Purchasers will not be compelled to take part only of what they have agreed to buy as an entirety. The compensation for the deficiency, in cases where a performance is decreed in part, consists in an abatement from the price for the diminution in value of the whole property in consequence of defects or incumbrances and not in a deduction of what may be supposed to be a proportionate part of the whole price for a part not conveyed at all with a conveyance of the residue only.³ If the vendee has had possession

¹ *Phinizy v. Guernsey*, 111 Ga. 346, *Hawkins v. Merritt*, 109 Ala. 261, 19 36 S. E. Rep. 796, 50 L. R. A. 680; So. Rep. 589, citing the text.

Kares v. Covell, 180 Mass. 206, 62 N. E. Rep. 244. ³ *Id.*; *Archer v. Turrell*, 66 Ark. 171, 49 S. W. Rep. 568. See *King v.*

² *Gibert v. Peteler*, 38 N. Y. 195; *Thompson*, 9 Pet. 204.

under the contract, and afterwards procures a rescission on the ground of the vendor's failure to convey, he is entitled to have the purchase-money refunded, to interest upon it during the time that he is liable to another party as owner of the paramount title for rents and profits;¹ but not while in receipt of the rents and profits, in the absence of such liability, unless they are of less value than the interest.² A vendee in possession is entitled to the profits and is liable for interest on the unpaid purchase-money.³ If payment is made in depreciated currency, or in property, the refunding on rescission is to be according to its value.⁴ The vendee's liability for interest under a contract exempting him therefrom on deferred payments, these to be made within a reasonable time, dates from the filing of the vendor's cross-bill to the bill for specific performance, no previous demand for interest being shown.⁵

[249] § 590. **Damages in suits for specific performance.** In suits for specific performance equity may retain the case to give compensation in lieu of specific performance, or that may be decreed in part and compensation allowed for the

Where the building on a lot burned before the vendor could convey the title and before the vendee took possession, the loss was the vendor's, and he was entitled to the insurance money. The vendee, seeking specific performance of the contract, was entitled to an abatement of the price, the rule for fixing the amount being to ascertain if there was any difference on the day the contract became binding between the market value of the entire property and the contract price. If there was no difference, the purchaser would be entitled to a decree requiring a conveyance upon payment of a sum equal to the market value of the lot without the building on the day the contract was made. If, when the contract became effectual, the market value of the property was greater than the contract price, a sum representing this difference should be deducted from the market value of the lot without the building, and

the balance would be the amount which the plaintiff should pay for a conveyance. This would give the purchaser the benefit of his bargain. If the contract price exceeded the market value the purchaser should pay, in addition to the market value of the lot without the building, the difference between the market value of the property at the date of the contract and the contract price, thus giving the vendor the benefit of his bargain. *Phinizy v. Guernsey*, 111 Ga. 346, 36 S. E. Rep. 796, 50 L. R. A. 680.

¹ *Talbot v. Sebree's Heirs*, 1 Dana, 56; *Oakes v. Buckley*, 49 Wis. 592, 6 N. W. Rep. 321.

² See cases cited in note 4, *ante*, p. 1678.

³ *Brown v. Norcross*, 59 N. J. Eq. 427, 45 Atl. Rep. 605.

⁴ *Bodley v. McChord*, 4 J. J. Marsh. 477.

⁵ *Brown v. Brown*, 124 Mo. 79, 27 S. W. Rep. 552.

residue;¹ but equity will not retain a bill for specific performance for the purpose of assessing damages if the complainant knew, when he filed it, that the vendor had parted with the title to the property.² Where the entire relief which can be afforded in a suit of that character is compensation, courts of equity have sometimes granted it;³ the measure is the same as that given at law.⁴ If there is a defect or an excess of quantity there will be an abatement or increase of the purchase-money according to the average price per acre of the whole tract;⁵ and this defense of deficiency is generally good at law by way of recoupment;⁶ but for the loss of a distinct

¹ *Union Coal Mining Co. v. McAdam*, 38 Iowa, 663; *Leach v. Forney*, 21 id. 271, 89 Am. Dec. 574; *Presser v. Hildenbrand*, 23 Iowa, 483; *Hazelrig v. Hutson*, 48 Ind. 481; *Case v. Wolcott*, 33 id. 5. Compare *Sternberger v. McGovern*, 15 Abb. Pr. (N. S.) 257. See *Reynolds v. Johnson*, 13 Tex. 214; *Longworth v. Mitchell*, 26 Ohio St. 334.

² *Sellers v. Greer*, 172 Ill. 549, 50 N. E. Rep. 246, 40 L. R. A. 589.

³ *Combs v. Scott*, 76 Wis. 662, 45 N. W. Rep. 532; *Peabody v. Tarbell*, 2 Cush. 226; *Andrews v. Brown*, 3 id. 130; *Pratt v. Law*, 9 Cranch. 494; *Payne v. Graves*, 5 Leigh, 561; *Morse v. Elmendorf*, 11 Paige, 277; *Ferrier v. Buzick*, 2 Iowa, 136; *Sternberger v. McGovern*, 15 Abb. Pr. (N. S.) 257; *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45; *Rockwell v. Lawrence*, 6 N. J. Eq. 190; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Aday v. Echols*, 18 Ala. 353, 52 Am. Dec. 225; 2 Story's Eq. § 798; *Carroll v. Rice*, Walk. Ch. 373; *Berryman v. Hewitt*, 6 J. J. Marsh. 462; *Reeder v. Trullinger*, 151 Pa. 287, 24 Atl. Rep. 1104; *Ellis v. Salmon*, 57 App. Div. 118, 67 N. Y. Supp. 1025; *Haffey v. Lynch*, 143 N. Y. 241, 38 N. E. Rep. 298.

⁴ *Peabody v. Tarbell*, 2 Cush. 226; *Carroll v. Rice*, Walk. Ch. 373; *Dustin v. Newcomer*, 8 Ohio. 49; *Taylor v. Smith*, 2 Whart. 432; *Lee v. Dean*,

3 id. 316; *Coe v. Lindley*, 32 Iowa, 437; *Smith v. Sillyman*, 3 Whart. 589; *Gerault v. Anderson*, 2 Bibb, 543; *Patrick v. Marshall*, id. 40, 4 Am. Dec. 670; *McConnell v. Dunlap*, Hardin, 14; *Fisher v. Kay*, 2 Bibb, 434.

⁵ *Gallup v. Bernd*, 132 N. Y. 370, 30 N. E. Rep. 743; *Connor v. Potts*, [1897] 1 Irish, 534; *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453.

⁶ *Walsh v. Hale*, 25 Gratt. 314; *Nelson v. Carrington*, 4 Munf. 332, 6 Am. Dec. 519; *Gray v. Handkinson*, 1 Bay, 278; *State v. Gaillard*, 2 id. 11, 1 Am. Dec. 628; *Sumter v. Welsh*, 2 Bay, 558; *Adams v. Wylie*, 1 N. & McC. 78; *Hoback v. Kilgore*, 26 Gratt. 442, 21 Am. Rep. 317; *Quesnel v. Woodlief*, 6 Call, 218; *Hundley v. Lyons*, 5 Munf. 342, 7 Am. Dec. 685; *Harrell v. Hill*, 19 Ark. 102, 68 Am. Dec. 202; *Funk v. McKeoun*, 4 J. J. Marsh. 169; *Hampton v. Eubank*, id. 631; *Burk's Appeal*, 75 Pa. 141, 15 Am. Rep. 587; *Harder v. Woodward*, 75 Pa. 479; *Kent v. Carcaud*, 17 Md. 291; *Stow v. Bozeman*, 29 Ala. 401; *Rowland v. Shelton*, 25 id. 220; *Worthy v. Patterson*, 20 id. 172; *Whiteside v. Jennings*, 19 id. 784; *Marshall v. Wood*, 16 id. 812; *Willis v. Dudley*, 10 id. 938; *Joliffe v. Hite*, 1 Call, 262; *Hall v. Cunningham*, 1 Munf. 310; *Hall v. Mayhew*, 15 Md. 551. See *Courcier v. Graham*, 2 Ohio, 341.

parcel there will be an abatement of the purchase price of that parcel, or of its actual value, according to the circumstances; [250] that is, whether as to that parcel the damages for loss of the bargain should be substantial or only nominal.¹ Where a tract of land is sold for a sum *in gross*, and not by the acre, and the quantity stated is qualified by the words "more or less," there is no warranty of quantity, and there can be no abatement if the number of acres is less than that stated, nor compensation allowed for any excess.² The force of the qualifying word "about" is comparatively slight; while it does not bind the parties to the precise number of acres, it imports that the actual quantity is a near approximation to that stated, "that is to say, within a fraction of an acre, or perhaps it might cover a discrepancy of one or two acres."³ The right to an abatement is not affected by the value of the land actually conveyed; and if the full purchase price has been paid the purchaser is entitled to interest on the sum abated.⁴

The English chancery amendment act of 1858,⁵ commonly called Lord Cairn's Act, provides that in all cases in which the court of chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunc-

¹ Thompson v. Bell, 37 Ala. 438; Gibson v. Marquis, 29 id. 668; Walsh v. Hale, 25 Gratt. 314. See Ragsdale v. Meridian Land & Ind. Co. 71 Miss. 284, 14 So. Rep. 193.

² Sprague v. Griffin, 22 App. Div. 223, 47 N. Y. Supp. 857; Clay County Land & Cattle Co. v. Angelina County, 23 Tex. Civ. App. 220, 55 S. W. Rep. 1121; Hall v. Mayhew, 15 Md. 551; Commissioners v. Thompson, 4 McCord, 241, 17 Am. Dec. 735; Tucker v. Cocke, 2 Rand. 51; Chipman v. Briggs, 5 Cal. 76; Voorhees v. De Meyer, 2 Barb. 37; Harrell v. Hill, 19 Ark. 102, 68 Am. Dec. 202; Ketchum v. Stout, 20 Ohio, 453; Ty-

son v. Hardesty, 29 Md. 305; Seamounts v. McGinnis, 3 Gratt. 319; Faure v. Martin, 7 N. Y. 210, 57 Am. Dec. 515; Mack v. Patchin, 29 How. Pr. 20; Jones v. Tatum, 19 Gratt. 735; Reed v. Patterson, 7 W. Va. 263. Compare Triplett v. Allen, 26 Gratt. 724, 21 Am. Rep. 320. See Estes v. Odom, 91 Ga. 600, 18 S. E. Rep. 355, for the rule under the code of Georgia.

³ Baltimore Permanent Building & L. Society v. Smith, 54 Md. 187, 204, 39 Am. Rep. 374. See § 636.

⁴ Estes v. Odom, *supra*.

⁵ 21-22 Vict., ch. 27, sec. 8.

tion or specific performance. It has been held that under this statute the court would not interfere to award damages where it would not have interfered to grant relief before.¹ It will not grant relief where the bill is filed for damages only;² and this is the general doctrine of equity.³ In a case which was decided in England in 1874 a railway company agreed for a valuable consideration with a land-owner to erect, construct and fit up a station on certain lands which they had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The [251] company having refused to perform and substituted a station at a distance of two miles, the land-owner instituted a suit for specific performance. The court, under the act mentioned, held that the case was one in which justice could be better done by an inquiry as to damages than by a decree for specific performance. The lord chancellor thus contrasted these modes of relief: "It has been a matter of some surprise to us that the plaintiff should have been dissatisfied with that conclusion; for if the view which has been already expressed is correct, supposing the court to have given him specific performance, it could not have extended the express obligation of the company, and therefore could only have given him the very minimum of that which is expressed in the terms creating the obligation; whereas, in the case of damages, as it appears to me, the plaintiff will be entitled to the benefit of such presumptions as, according to the rules of law, are made in courts both of law and equity against persons who are wrong-doers in the sense of refusing to perform, and not performing, their agreements. We know it to be an established maxim, that, in assessing damages, every reasonable presumption may be made as to the benefit which the other parties might have obtained by the *bona fide* performance of the agreement. On the same principle, no doubt, in the celebrated case of the diamond which had disappeared from its setting, and

¹ *Scott v. Rayment*, L. R. 7 Eq. 112, 116.

² *Middleton v. Magnay*, 2 Hem. & Mill. 232; *Betts v. Gallais*, L. R. 10 Eq. 392.

³ *Richmond v. Dubuque, etc. R. Co.*,

33 Iowa, 422; *Black v. Black*, 15 Ga. 445; *Lewis v. Yale*, 4 Fla. 418; *McQueen v. Chouteau*, 20 Mo. 222, 64 Am. Dec. 178; *Wright v. Taylor*, 9 Wend. 538.

was not forthcoming, a great judge directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there. I do not say that that analogy is to be followed here to the letter; the principle is to be reasonably applied according to the circumstances of each case. So applying it to the circumstances of the present case, it appears to me that a jury might, with perfect propriety, take into account the probable benefit which the plaintiff's estate might have derived from the existence of a stopping place on the line, to which traffic might have been attracted, or which might have been convenient to the persons resident upon that estate. They might take into account the reasonable probability that if the company had *bona fide* performed the agreement, they would have made the station in a reasonable manner as regards the mode of construction and the extent of accommodation; and they might also take into account [252] the reasonable probability that if the company had made the station, they would, in their own interest, have thought it worth while to make a reasonable use of it. All these are elements, no doubt, more or less of an indefinite character, but proper for the consideration of a jury on the question of damages and proper for the consideration of this court when it discharges the functions of a jury."¹

There are cases in which a vendor may obtain specific performance, although in some particulars he is unable to fulfill the contract on his part. Thus, it was allowed, though the land, which was sold at auction, was described in the particulars preceding the sale as all within a ring fence, and the house in good repair, when they were otherwise.² But in such cases the court allows compensation for the defect, if the variation be such, and to the extent that it diminishes the value of the purchase.³ A purchaser is allowed more liberally than the vendor to have specific performance in part, and compensation for the rest, where the latter is not able and cannot be com-

¹ Wilson v. Northampton, etc. R. Co., L. R. 9 Ch. 279.

Sweeny, 715; Reynolds v. Vance, 4 Bibb, 213.

² Dyer v. Hargrave, 10 Ves. 505. See King v. Bardeau, 6 Johns. Ch. 33, 10 Am. Dec. 312; Guynet v. Mantel, 4 Duer, 94; Beyer v. Marks, 2

³ Id.; Nagle v. Newton, 22 Gratt. 814; Merges v. Ringler, 24 N. Y. Misc. 317, 53 N. Y. Supp. 674.

pelled to completely execute the contract of sale.¹ And in such cases the rule of abatement is the same.²

A vendor who affirms the validity of his contract to sell and convey by unsuccessfully suing upon it cannot limit his liability to the damages stipulated in the contract and which were payable if he should declare the contract void. The vendee may recover expenses incurred in searching the title in consequence of the attempt to enforce the contract.³ By waiving the right to sue for damages and by proceeding for a specific performance, the right to collect attorney's fees because of bad faith in breaching the contract is waived, if it existed.⁴

SECTION 3.

COVENANTS FOR TITLE — OF SEIZIN AND GOOD RIGHT TO CONVEY.

§ 591. **Their purport; when broken.** A purchaser [253] under a general agreement to convey is entitled to a perfect title; to a deed properly framed to convey it, and containing the usual covenants.⁵ The acceptance of a deed operates as a fulfillment of the agreement, whether the deed is strictly in conformity therewith or not, and the contract is thus merged in the deed.⁶ Henceforth, in the absence of fraud, accident or

¹ Wood v. Griffith, 1 Swanst. 54; Dart on Vendors & P. 499, 500; Mortlock v. Buller, 10 Ves. 315; 1 Sugd. on Vendors, 351; Mestaer v. Gillespie, 11 Ves. 621, 640; Seaman v. Vawdrey, 16 id. 390; Western v. Russell, 3 V. & B. 187; Ketchum v. Stout, 20 Ohio, 453; Painter v. Newby, 11 Hare, 26.

² Dale v. Lester, 16 Ves. 7, 11; Lemon v. Brown, 4 Bibb, 308; Clagett v. Easterday, 42 Md. 617.

³ Van Schaick v. Lese, 31 N. Y. Misc. 610, 66 N. Y. Supp. 64.

⁴ Brunswick Co. v. Dart, 93 Ga. 717, 10 S. E. Rep. 631.

⁵ Mend v. Altgeld, 136 Ill. 298, 26 N. E. Rep. 388; Dikeman v. Arnold, 71 Mich. 656, 674, 40 N. W. Rep. 12; Allen v. Atkinson, 21 Mich. 361; Bryant v. Wilson, 71 Md. 440, 18 Atl. Rep. 916; Rogers v. Borchard, 82 Cal. 317, 22 Pac. Rep. 907; Burwell v.

Jackson, 9 N. Y. 535; Doe v. Stanion, 1 M. & W. 701; Shreck v. Pierce, 3 Iowa, 360; Cullum v. Branch Bank, 4 Ala. 21, 37 Am. Dec. 725; Gibson v. Richart, 83 Ind. 313.

A vendor who sells land by a contract incorporating certain conditions of the transfer of land act which refers to an existing certificate of title, and to the vendor signing a "transfer" of the property, is bound to sell under that act, although he has not made any other representation as to the title being under it. Skinner v. Australian & British Land, Deposit & Agency Co., 15 Vict. L. R. 674.

⁶ Aird v. Alexander, 72 Miss. 358, 18 So. Rep. 478; Brandt v. Foster, 5 Iowa, 287; Wheeler v. Ball, 26 Mo. App. 443; Wheeler v. Wayne County, 137 Ill. 599, 24 N. E. Rep. 625; Gibson

mutual mistake, the purchaser must look to the covenants which the deed contains for his indemnity, if the title is defective or fails.¹

The usual covenants are, first, of seizin and good right to convey; second, of warranty and for quiet enjoyment; and third, against incumbrances. The covenants of seizin and of good right to convey are not precisely alike, but they are practically so similar that they are connected and are generally of the same import and effect, and directed to one and the same object.² The former asserts an estate in the covenantor which may pass by his deed; the other is satisfied by the covenantor having even a naked power to convey. They are generally regarded as covenants for title, not merely for possession. A covenant that one is seized in fee is a covenant for title. And whenever the covenant is expressed, as it usually is in England, in formal and precise terms, as evincing an intention to assure the highest title, it has uniformly received a construction to require the title specified.³ Whenever the [254] grantor plainly covenants that he has an indefeasible estate in fee-simple, or any other specified and clearly defined estate, anything less will constitute a breach, or the covenant

v. Richart, 83 Ind. 313; Howes v. Barker, 3 Johns. 506, 3 Am. Dec. 526; Bull v. Willard, 9 Barb. 641.

The fact that the deed warrants the title and that the grantee has not been disturbed in his possession does not prevent him from insisting upon the performance of a contract to furnish an abstract showing a complete or perfect title. Loring v. Oxford, 18 Tex. Civ. App. 415, 45 S. W. Rep. 395.

¹ Stocum v. Bracy, 55 Minn. 249, 56 N. W. Rep. 826, correcting *obiter* in Donlan v. Evans, 40 Minn. 501, 42 N. W. Rep. 472; Thorkildsen v. Carpenter, 120 Mich. 419, 79 N. W. Rep. 636; McLennan v. Prentice, 85 Wis. 427, 55 N. W. Rep. 764; Fisk v. Duncan, 83 Pa. 197; Witbeck v. Waine, 16 N. Y. 535; Williams v. Hathaway, 19 Pick. 388; Earle v. De Witt, 6 Allen.

520; Jobe v. O'Brien, 2 Humph. 34; Maney v. Porter, 3 id. 347. See § 567.

In Montana a contract to give a deed that shall convey the premises is not satisfied by the delivery of a warranty deed, it being subsequently determined that the vendor had no title. The vendee may recover the money paid without being ousted and suing on the covenants in the deed. Colburn v. Northern Pacific R. Co., 13 Mont. 476, 34 Pac. Rep. 1017.

² Howell v. Richards, 11 East, 633.

³ Coleman v. Clark, 80 Mo. App. 339; Mercantile Trust Co. v. South Park Residence Co., 94 Ky. 271, 22 S. W. Rep. 214; Prescott v. Trueman, 4 Mass. 631; Smith v. Strong, 14 Pick. 128; Raymond v. Raymond, 10 Cush. 134; Garfield v. Williams, 2 Vt. 327; Pierce v. Johnson, 4 id. 247; Abbott v. Allen, 14 Johns. 252; Collier v. Gamble, 10 Mo. 472.

will be construed to bind the covenantor for the title specified.¹ But there is great diversity in the forms of this covenant in the United States. It does not uniformly state, except as implied in the word *seized* or *seizin*, that the grantor has the highest title. In Massachusetts and Maine such an equivocal covenant is construed to mean only a seizin in fact or actual possession under color of title.² In the former state the court held this language in an action upon these covenants: "The defendant, to maintain the issue on his part, was obliged to prove his seizin when the deed was executed. But it was not necessary to show seizin under an indefeasible title. A seizin in fact was sufficient, whether he gained it by his own disseizin, or whether he was in under a disseizin. If, at the time he executed the deed, he had the exclusive possession of the premises, claiming the same in fee-simple, by a title adverse to the owner, he was seized in fee, and had a right to convey. If the defendant's grantor had no right to convey the premises to the defendant, yet, if in fact he entered under color, though not by virtue, of that deed, and acquired a seizin by disseizin, by ousting the former owner, he has not broken these covenants."³ A similar doctrine has been advanced in Nebraska and Illinois.⁴ In the latter state, however, the law is settled, by repeated adjudications, in accordance with the prevailing rule, that the covenant of seizin is broken as soon as made if the grantor has not the covenanted title, and delivery of possession will not satisfy it.⁵ And in Maine if the grantee does not enter into possession he is evicted from the time the covenant is made.⁶

¹ In Iowa, before sec. 1937 of the Code was enacted, a husband who joined with his wife in conveying land owned by her was liable on his covenant. *Bellows v. Litchfield*, 83 Iowa, 36, 48 N. W. Rep. 1062.

Both husband and wife are liable on a joint deed containing full covenants of seizin. *Bolinger v. Brake*, 4 Kan. App. 189, 45 Pac. Rep. 950. See § 593.

² *Marston v. Hobbs*, 2 Mass. 439, 3 Am. Dec. 61; *Raymond v. Raymond*, 19 Cush. 134, 146; *Twambly v. Henley*, 4 Mass. 441.

³ *Slater v. Rawson*, 1 Met. 450; *Hacker v. Storer*, 8 Me. 228; *Ballard v. Child*, 34 id. 355.

⁴ *Scott v. Twiss*, 4 Neb. 133; *Watts v. Parker*, 27 Ill. 224. But see *Brady v. Spurek*, id. 478; *Furniss v. Williams*, 11 id. 229.

⁵ *Baker v. Hunt*, 40 Ill. 264, 89 Am. Dec. 346; *Brady v. Spurek*, 27 Ill. 478; *King v. Gilson*, 32 id. 318, 83 Am. Dec. 269; *Frazer v. Supervisors*, 74 Ill. 291; *Tong v. Wilson*, 81 id. 529; *Wadhams v. Swan*, 109 id. 46.

⁶ *People's Savings Bank v. Hill*, 81 Me. 71, 16 Atl. Rep. 337.

A statute declaring that the words "grant, bargain and sell," unless limited by express words, shall operate as an express covenant that the grantor was seized of an estate free from incumbrances made by him, does not warrant that he was seized of a fee-simple estate, but only of some estate of freehold; the existence of a life estate satisfies the covenant, which is not enlarged because the *habendum* clause contains the words, "to have and to hold" the property to the grantee, his heirs forever "in fee-simple."¹

[255] § 592. Same subject. When the covenants in express terms, or by construction, require the conveyance of a specified title, they have effect accordingly; and if the title of the grantor, or the title which he has power to convey, is less, to the whole or any part of the granted premises, the covenant is broken; in other words, the covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which his conveyance purports to convey.² Being covenants *de presenti*, if broken at any time they are broken when made. And a suit may be brought at once though the grantee goes into possession and has not been evicted.³ In England, and in some of the states, it is held

¹Cunningham v. Dillard, 71 Miss. 61, 13 So. Rep. 882.

²Howell v. Richards, 11 East, 633; Gray v. Briscoe, Noy, 142; Guthrie v. Pugsley, 12 Johns. 126; Kingdom v. Nottle, 4 M. & S. 53; Smith v. Strong, 14 Pick. 128; Park v. Cheek, 4 Cold. 20; Kincaid v. Brittain, 5 Sneed. 119; Gilbert v. Buckley, 5 Conn. 262, 13 Am. Dec. 57; Hall v. Gale, 20 Wis. 292; Parker v. Brown, 15 N. H. 176; Pickering v. Staples, 5 S. & R. 107, 9 Am. Dec. 336; Mott v. Palmer, 1 N. Y. 573.

A covenant by the grantor "for his heirs, executors and administrators" does not bind him. Bowne v. Wolcott, 1 N. D. 497, 48 N. W. Rep. 426; Rufner v. McConnel, 14 Ill. 168; Traynor v. Palmer, 86 Ill. 477.

³Meservey v. Snell, 94 Iowa, 222, 62 N. W. Rep. 767, 58 Am. St. 391; Mercantile Trust Co. v. South Park Resi-

dence Co., 94 Ky. 271, 22 S. W. Rep. 314; Bement v. Ohio Valley Banking & Trust Co., 99 Ky. 109, 35 S. W. Rep. 139, 59 Am. St. 445; Adkins v. Tomlinson, 121 Mo. 487, 26 S. W. Rep. 573; Colburn v. Northern Pacific R. Co., 13 Mont. 476, 34 Pac. Rep. 1017; Ilsley v. Wilson, 42 W. Va. 757, 26 S. E. Rep. 551; Curtis v. Brannon, 98 Tenn. 153, 38 S. W. Rep. 1073, quoting the text; McLennan v. Prentice, 85 Wis. 427, 442, 55 N. W. Rep. 764, citing the text; Building, Light & Water Co. v. Fray, 96 Va. 559, 32 S. E. Rep. 58; Parkinson v. Woulds, 125 Mich. 325, 84 N. W. Rep. 292; Bolinger v. Brake, 57 Kan. 663, 47 Pac. Rep. 537, 4 Kan. App. 180, 45 Pac. Rep. 950; Jewett v. Fisher, 9 Kan. App. 630, 58 Pac. Rep. 1023; Egan v. Martin, 71 Mo. App. 60; De Long v. Spring Lake, etc. Co., 65 N. J. L. 1, 7, 47 Atl. Rep. 491, citing the text; Benton

that these covenants run with the land, if there is not a total breach at first. A distinction is made between a mere formal breach, from which no injury results, and a final and complete breach, by which the possession is lost or other actual injury sustained.¹

It is held that where the covenantor is in possession claiming title, and delivers possession to the covenantee, the covenant of seizin is not a mere present engagement, made for the sole benefit of the covenantee, but is one of indemnity, [256] entered into in respect to the land conveyed, and intended for the security of all subsequent grantees, when it is finally and completely broken; and consequently, on such nominal breach when the covenant is made, no such right of action accrues to the covenantee as is sufficient to arrest the covenant or to deprive it of the capacity of running with the land for the benefit of the person holding under the deed when the eviction takes place or other real injury is sustained. The possession of the land, or seizin in fact under the deed by the covenantee and those claiming through him, is considered such an estate as

County v. Rutherford, 33 Ark. 640; Brandt v. Foster, 5 Iowa, 287; Sac County Bank v. Foster, 77 id. 435, 42 N. W. Rep. 363; Price v. Deal, 90 N. C. 290; Dickey v. Weston, 61 N. H. 23; McInnis v. Lyman, 62 Wis. 191, 22 N. W. Rep. 405 (unoccupied lands); Morrison v. Underwood, 20 N. H. 369; Triplett v. Gill, 7 J. J. Marsh. 433; Spencer's Case, 1 Smith's Lead. Cas., pt. 1, p. *179; Smith v. Jeffs, 44 N. H. 482; Bartholomew v. Candee, 14 Pick. 167; Lawless v. Collier, 19 Mo. 480; Pringle v. Witten's Ex'r, 1 Bay, 256, 1 Am. Dec. 612; Abbot v. Allen, 14 Johns. 252; Brady v. Spurek, 27 Ill. 478; McCarty v. Leggett, 3 Hill, 134; Mott v. Palmer, 1 N. Y. 573; Pollard v. Dwight, 4 Cranch, 421; Chapman v. Holms, 10 N. J. L. 24; Fowler v. Poling, 2 Barb. 300; Garrison v. Sandford, 12 N. J. L. 261; Fitzhugh v. Crogan, 2 J. J. Marsh. 429, 19 Am. Dec. 139; Lawrence v. Montgomery, 37 Cal. 183,

188; Murphy v. Price, 48 Mo. 247; Mitchell v. Warner, 5 Conn. 497; Dale v. Shively, 8 Kan. 276; Innes v. Agnew, 1 Ohio, 179; Kennison v. Taylor, 18 N. H. 220; Morrison v. Underwood, 20 id. 369; Parker v. Brown, 15 id. 176; Bickford v. Page, 2 Mass. 455; Gilbert v. Bulkley, 5 Conn. 262, 13 Am. Dec. 57; Clark v. Swift, 3 Met. 390; Logan v. Moulder, 1 Ark. 313, 33 Am. Dec. 338; Ingram v. Morgan, 4 Humph. 66, 40 Am. Dec. 626; Craig v. Donovan, 63 Ind. 513.

It was held in the last case that a deed executed in Indiana of lands in another state should be governed by the laws of the latter as to the conveyance; but the covenant of seizin should be expounded by the laws of Indiana, and if false was broken immediately.

¹ But see Spoor v. Green, L. R. 9 Ex. 99; Turner v. Moon, [1901] 2 Ch. 825.

carries the covenant along with it.¹ In Ohio the covenant of seizin is held to be one for title; that it runs with the land where the grantor has an actual seizin; but that it is broken in such a case only when there has been an actual disturbance of the purchaser, or some one claiming under him; or in other words, until actual injury is sustained there is not even a nominal breach. If, however, there is no actual seizin and nothing passes by the deed the covenant is broken immediately.²

The general doctrine held in this country, however, is that these are personal covenants; and if broken at all are so at the moment they are made, and are thereby turned into mere rights of action incapable of assignment, or of being sued upon at law by any but the covenantee and his personal representatives.³ The covenant is broken if the grantor has not the very estate in quantity and quality which he purports to convey.⁴ It is broken if another has a paramount right to divert a natural spring;⁵ or if the deed contains a conveyance of and covenant for raising a dam to a certain height, and raising it

¹ Rawle on Cov. Tit. 325, and note; *Kingdon v. Nottle*, 4 M. & S. 53; *Schofield v. Iowa Homestead Co.*, 32 Iowa. 317, 7 Am. Rep. 197; *Turner v. Moon*, [1901] 2 Ch. 825; *Martin v. Baker*, 5 Blackf. 232; *McCradey's Ex'r v. Brisbane*, 1 N. & McC. 104, 9 Am. Dec. 676; *Mecklem v. Blake*, 22 Wis. 495; *Eaton v. Lyman*, 30 id. 41; *Boon v. McHenry*, 55 Iowa. 202, 7 N. W. Rep. 503; *Cockrell v. Proctor*, 65 Mo. 41; *Allen v. Kennedy*, 91 id. 324, 2 S. W. Rep. 142; *Graham v. Baker*, 10 Up. Can. C. P. 426; *Scriver v. Myers*, 9 id. 225; *Banon v. Frank*, 14 id. 295; *Ravenal v. Ingram*, 131 N. C. 549, 42 S. E. Rep. 907.

² *Backus v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 585; *Foot v. Burnett*, 10 Ohio, 334; *Devore v. Sunderland*, 17 id. 60, 49 Am. Dec. 442; *Stambaugh v. Smith*, 23 Ohio St. 584, 588; *Great Western Stock Co. v. Saus*, 24 id. 542.

³ *Bowne v. Wolcott*, 1 N. D. 497, 48 N. W. Rep. 336; *Prestwood v. McGowin*, 128 Ala. 267, 274, 29 So. Rep. 386; Rawle on Cov. Tit. 319, 320;

Greenby v. Wilcocks, 2 Johns. 1, 3 Am. Dec. 379; *Hacker v. Storer*, 8 Me. 228; *Heath v. Whidden*, 24 id. 383; *Smith v. Jeffs*, 44 N. H. 482; *McCarty v. Leggett*, 3 Hill. 134; *Thayer v. Clemence*, 22 Pick. 490; *Slater v. Rawson*, 1 Met. 450; *Fitzhugh v. Crogan*, 2 J. J. Marsh. 429, 19 Am. Dec. 139; *Mitchell v. Warner*, 5 Conn. 497; *Clark v. Swift*, 3 Met. 390; *Davis v. Lyman*, 6 Conn. 249; *Bickford v. Page*, 2 Mass. 455; *Marston v. Hobbs*, id. 439, 3 Am. Dec. 61; *Williams v. Wetherbee*, 1 Aik. 233; *Garfield v. Williams*, 2 Vt. 327; *Pierce v. Johnson*, 4 id. 247; *Richardson v. Dorr*, 5 id. 9; *Potter v. Taylor*, 6 id. 676; *Hamilton v. Wilson*, 4 Johns. 72, 4 Am. Dec. 253; *Bartholomew v. Candee*, 14 Pick. 167; *Lot v. Thomas*, 2 N. J. L. 297; *Carter v. Denman*, 23 id. 260.

⁴ *McLennan v. Prentice*, 85 Wis. 427, 55 N. W. Rep. 764; *Howell v. Richards*, 11 East. 633.

⁵ *Clark v. Conroe*, 38 Vt. 469; *Turner v. Moon*, [1901] 2 Ch. 825.

to that height would cause a tortious flooding of lands belonging to third persons.¹ The covenant extends not only to the land itself, but to all such things as should be properly appurtenant to it, and pass by conveyance of the freehold. Thus it has been held to be broken where the grantor had, before the conveyance, sold to another a quantity of rails which had been erected into a fence and thereby became a fixture.² And the same doctrine has been applied generally to buildings and other fixtures upon the land, the right to remove which was vested in other parties, and did not pass to the purchaser by the conveyance.³ A judgment perpetually enjoining the grantee from using an easement which the grantor assumed to convey may be treated as an eviction.⁴ In cases of such breaches, the plaintiff is entitled to recover damages according to the difference in value between the property in the condition it was covenanted to be and its actual condition.⁵ The covenant is not broken by an outstanding inchoate right of dower, because the technical seizin of the grantee is not affected. His deed carries the title, and although the dower right may be an incumbrance from which he may be protected by his covenant against incumbrances, his possession or legal title is not affected.⁶ The covenant of seizin is not broken although the front wall of the building encroached over the line of the street, or the side wall encroached on the land of the adjoining owner.⁷ The existence of railways and other highways over land at the time a deed is executed is presumed to have been within the knowledge of the purchaser, and they constitute no breach of the covenants. In respect to railways, where the power of eminent domain is exercised in their be-

¹ Walker v. Wilson, 13 Wis. 522;

Hall v. Gale, 20 id. 292; Adams v. Conover, 87 N. Y. 422, 41 Am. Rep. 381.

² Mott v. Palmer, 1 N. Y. 561.

³ Larson v. Cook, 85 Wis. 564, 55 N. W. Rep. 793; Brantley Co. v. Johnson, 102 Ga. 850, 29 S. E. Rep. 486; Gates v. Parmly, 93 Wis. 294, 66 N. W. Rep. 253, 67 id. 739; Powers v. Dennison, 30 Vt. 752; Van Wagner v. Van Nostrand, 19 Iowa, 427; West v. Stewart, 7 Pa. 122; Rawle on Cov. Tit. (4th ed.) 78, 79.

⁴ Harrington v. Bean, 89 Me. 470.

⁵ 36 Atl. Rep. 986; Scheible v. Slagle, 89 Ind. 323.

⁶ Hall v. Gale, 20 Wis. 292; Turner v. Moon, [1901] 2 Ch. 825.

⁷ Building, Light & Water Co. v. Fray, 96 Va. 559, 32 S. E. Rep. 58.

⁸ Stearn v. Hesdorfer, 9 N. Y. Misc. 134, 29 N. Y. Supp. 281, citing Sasserath v. Metzgar, 30 Abb. N. C. 107, 27 N. Y. Sup. 959; Burke v. Nichols, 1 Abb. Ct. of App. 260.

half, their being on the premises is not a breach of the covenants of title in any case.¹ An unlawful intrusion on lands is not a breach of any of the ordinary covenants.²

[257] § 593. **Damages for breach of these covenants.** For a total breach of the covenant of seizin or good right to convey, where nothing passes by the conveyance, the measure of damages is the amount of the consideration paid and interest.³

¹*Smith v. Hughes*, 50 Wis. 620, 7 N. W. Rep. 653; *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85; *Frost v. Earnest*, 4 Whart. 86; *Ellis v. Welch*, 6 Mass. 246, 4 Am. Dec. 122; *McLennan v. Prentice*, 85 Wis. 427, 434, 55 N. W. Rep. 764; *Bailey v. Miltenberger*, 31 Pa. 37.

²*McLennan v. Prentice*, *Bailey v. Miltenberger*, *supra*.

³*Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271, 23 S. W. Rep. 314; *Bellows v. Litchfield*, 83 Iowa, 36, 45, 48 N. W. Rep. 1062; *Doom v. Curran*, 52 Kan. 360, 34 Pac. Rep. 1118; *Looney v. Reeves*, 5 Kan. App. 279, 48 Pac. Rep. 606; *Harrington v. Bean*, 89 Me. 470, 36 Atl. Rep. 986, citing the text; *Bradley v. Norris*, 63 Minn. 156, 169, 65 N. W. Rep. 357; *Evans v. Fulton*, 134 Mo. 653, 36 S. W. Rep. 230; *Curtis v. Brannon*, 98 Tenn. 153, 38 S. W. Rep. 1073, citing the text; *McLennan v. Prentice*, 85 Wis. 427, 445, 55 N. W. Rep. 764, citing the text; *Curran v. Carnell*, Newf. Rep. 1884-96, 375; *De Long v. Spring Lake, etc. Co.*, 65 N. J. L. 1, 7, 47 Atl. Rep. 491; *Horne v. Walton*, 117 Ill. 130, 135, 7 N. E. Rep. 100, 103; *Price v. Deal*, 90 N. C. 290; *Wilson v. Peele*, 78 Ind. 384; *Wright v. Nipple*, 92 id. 310; *Rhea v. Swain*, 122 id. 272, 22 N. E. Rep. 1000, 23 id. 776; *Norman v. Winch*, 65 Iowa, 263, 21 N. W. Rep. 598; *Conrad v. Trustees Grand Grove, etc.*, 64 Wis. 258, 25 N. W. Rep. 24; *Bibb v. Freeman*, 59 Ala. 612; *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. Rep. 405; *Bickford v. Page*, 2 Mass. 455; *Sumner v. Williams*, 8

id. 162, 5 Am. Dec. 83; *Leland v. Stone*, 10 Mass. 459; *Ela v. Card*, 2 N. H. 175, 9 Am. Dec. 46; *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61; *Caswell v. Wendell*, 4 Mass. 108; *Smith v. Strong*, 14 Pick. 128; *Stubbs v. Page*, 2 Me. 378; *Willson v. Forbes*, 2 Dev. 30; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Nutting v. Herbert*, 35 N. H. 120; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Sterling v. Peet*, 14 Conn. 245; *Henning v. Withers*, 3 Brev. 458, 6 Am. Dec. 589; *Tapley v. Lebaume*, 1 Mo. 550; *Martin v. Long*, 3 id. 391; *Lawless v. Collier*, 19 id. 480; *Frazer v. Supervisors*, 74 Ill. 291; *Cummins v. Kennedy*, 3 Litt. 118; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 328; *Backus v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 555; *Clark v. Parr*, 14 Ohio, 118, 45 Am. Dec. 529; *Kimball v. Bryant*, 25 Minn. 496; *Cox v. Strode*, 2 Bibb, 277, 5 Am. Dec. 603; *Nichols v. Walter*, 8 Mass. 243; *Chapel v. Bull*, 17 id. 213; *Greenby v. Wilcocks*, 2 Johns. 1, 3 Am. Dec. 379; *Hacker v. Storer*, 8 Me. 228; *Bonta v. Miller*, 1 Litt. 250; *Blackwell v. Justices*, 2 Blackf. 143; *Lacey v. Mannan*, 37 Ind. 168; *Sheets v. Andrews*, 2 Blackf. 274; *Overhiser v. McCollister*, 10 Ind. 41; *Kincaid v. Brittain*, 5 Sneed, 119; *Recohs v. Younglove*, 8 Baxter, 385; *Park v. Cheek*, 4 Cold. 20; *Hacker v. Blake*, 17 Ind. 97; *Hodges v. Thayer*, 110 Mass. 286; *Farmers' Bank v. Glenn*, 68 N. C. 35; *Foster v. Thompson*, 41 N. H. 373; *Brandt v. Foster*, 5 Iowa, 287; *Blos-*

And the same rule applies where there is a breach as to the quantity of land.¹ This measure is not affected by the fact that intermediate the conveyance and the discovery that the title is defective, the value of the land has been largely enhanced by improvements or by other causes. A recovery of its value, as estimated by the parties at the time of the purchase, is precisely in accord with the standard of redress afforded by the ancient writ of *warrantia chartæ*; and this standard is now maintained as politic and just. In an early New York case² Kent, C. J., said: "Upon the sale of lands the purchaser usually examines the title for himself, and in case of good faith between the parties (and of such cases only I now speak), [258] the seller discloses his proofs and knowledge of the title. The want of title is, therefore, usually a case of mutual error; and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be if that rise was owing to the taste, fortune or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy

som v. Knox, 3 Pin. 262; *Blake v. Burnham*, 29 Vt. 437; *Phipps v. Tarpley*, 31 Miss. 433; *Campbell v. Johnston*, 4 Dana, 182; *St. Louis v. Bissell*, 46 Mo. 157.

¹ *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271, 22 S. W. Rep. 314; *Phillips v. Reichart*, 17 Ind. 120, 79 Am. Dec. 463; *McNally v. White*, 154 Ind. 163, 172, 54 N. E. Rep. 794; *Bohnger v. Brake*, 57 Kan. 663, 47 Pac. Rep. 537 (without interest); *Adkins v. Tomlinson*, 121 Mo. 487, 26 S. W. Rep. 573; *McLennan v. Prentice*, 85 Wis. 427, 445, 55 N. W. Rep. 764; *Larson v. Cook*, 85 Wis. 564, 55 N. W. Rep. 703; *Brantley Co. v. Johnson*, 102 Ga. 850, 29 S. E. Rep. 486; *Morris v. Courtney*, 120 Cal. 63, 52 Pac. Rep. 129; *Brown v. Allen*, 73 Hun, 291, 26 N. Y. Supp. 299; *Griottier v. Austin*, 66 Hun, 157, 20 N. Y. Supp. 968; *Gates v. Parinly*, 93 Wis. 294, 66 N. W. Rep. 253, 67 id. 739; *Berkholder v. Farmers' Bank*, 22 Ky.

L. Rep. 2449, 67 S. W. Rep. 832; *Doyle v. Brundred*, 189 Pa. 113, 41 Atl. Rep. 1107; *De Long v. Spring Lake, etc. Co.*, 65 N. J. L. 1, 8, 47 Atl. Rep. 494; *Sears v. Stinson*, 3 Wash. 615; *Nelson v. Matthews*, 2 Hen. & Munf. 164, 3 Am. Dec. 620; *Bond v. Quattlebaum*, 1 Mc'ord, 584, 10 Am. Dec. 702; *Morris v. Owens*, 3 Strobb. 199; *Blessing v. Beatty*, 1 Rob. (Va.) 287. See *Cornell v. Jackson*, 3 Cush. 506.

Where the purchaser removed the timber, the chief value of the land, and was thereafter evicted, the eviction was considered to be only partial, and the damages recoverable were only such part of the price paid as the value of the land at the time the title failed bore to its value with the timber thereon. *Brown v. Allen*, 73 Hun, 291, 26 N. Y. Supp. 299.

² *Staats v. Ten Eyck*, 3 Can. 111, 2 Am. Dec. 254.

purchaser without the hazard of absolute ruin." And again: "To find a proper rule of damages in a case like this is a work of some difficulty. No one will be entirely free from objection, or not at times work injustice. To refund the consideration, even with interest, may be a very inadequate compensation when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet to make this increased value the criterion where there has been no fraud may also be attended with injustice if not ruin. A piece of land is bought solely for the purpose of agriculture; by some unforeseen turn of fortune it becomes the site of a populous city, after which an eviction takes place. Every one must perceive the injustice of calling on a *bona fide* vendor to refund its present value, and that few fortunes could bear the demand. Who for the sake of one hundred pounds would assume the hazard of repaying as many thousands, to which the value of the property might rise by causes not foreseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee? The safest general rule in all actions on contract is to limit the recovery as much as possible to an indemnity for the actual injury sustained, without regard to the profits which the plaintiff has failed to make, unless it shall clearly appear from the agreement that the acquisition of certain profits depended on the defendant's punctual performance, and that he had assumed to make good such a loss also. To prevent an immoderate assessment of damages when no fraud has been practiced, Justinian directed that the thing which was the object of contract should never be valued at more than double its cost. This rule a writer on the civil law applies to a case like the one before us; that is, to the purchase of land which had become of four times its original value when an [259] eviction took place; but, according to this rule, the party could not recover more than twice the sum he had paid. This law is considered by Pothier as arbitrary, so far as it confines the reduction of the damages to precisely double the value of the thing, and is not binding in France; but its principle, which does not allow an innocent party to be rendered liable beyond the sum on which he may reasonably have calculated, being founded in natural law and equity, ought, in his opinion, to be

followed, and care taken that damages in the case be not excessive. Rather than adhere to the rule of Justinian, or to leave the matter to the opinion of a jury, as to what may or may not be excessive, some more certain standard should be fixed on. However inadequate the return of the purchase-money must be in many cases, it is the safest measure that can be followed as a general rule."¹

¹ *Pitcher v. Livingston*, 4 Johns. 1, 4 Am. Dec. 229; *Bender v. Fromberger*, 4 Dall. 436; *Rawle on Cov. Tit.* (4th ed.), 238; *Curtis v. Brannon*, 98 Tenn. 153, 163, 38 S. W. Rep. 1073.

Mr. Rawle, in his *Covenants for Title*, says: "In certain parts of the United States unimproved ground is frequently conveyed to a purchaser in fee, reserving to the vendor, as the entire consideration, an annual fee farm or ground rent which represents the value of the land, the purchaser covenanting that he will, for the purpose of securing to the vendor the rent so reserved, erect certain stipulated improvements. In this class of cases, the improvements being directly within the contract of the parties, and one of its inducements, it would seem that if the land thus improved were subsequently lost by reason of a defect of title or incumbrance created by the vendor, the damages should not be limited by the consideration, but might with propriety be increased by the value of the improvements thus made; and if there could be any doubt as to the liability of the vendor to this extent in case the defect or incumbrance were not created by himself, although within the covenants he might have given, there would seem to be none where the loss was the consequence of his own act." 5th ed., § 170. It is said in a note that "there is no direct authority for this suggestion, but it is quoted with approval in *Field on Damages*, § 497, and 2 *Sutherland on*

Damages, 259, and since it was made the following has been said by an English writer: 'I conceive that the doctrine laid down by Kent, C. J., in *Staats v. Ten Eyck*, 3 Cal. 111, 2 Am. Dec. 254, is clearly the equitable rule, where the improvements arise from causes of an entirely collateral nature, such as the growth of a town, the formation of a railway or the like. The occupier has had all the benefit of this increased value, so long as it lasted, without paying anything for it. Even supposing that he had sold again after the land had risen in value, and been forced to pay back to his purchaser according to that additional value, still, he would only be repaying money which he had actually received, and would on the same principle have a right to call on his vendor to return the sum which he had received, and no more. But the same obvious equity seems by no means to exist when the additional value arises on the outlay of the plaintiff's own capital upon the land. No doubt cases might be put in which claim of damages on this account would be clearly inadmissible; as, for instance, if a person bought a moor or a mountain for shooting over, and choose to reclaim the one or build a mansion with pleasure grounds upon the other. But suppose he purchased building ground, at so much per foot, in London or Manchester, for the express object of building; ought he not to be repaid for money laid out in this way,

[260] Where, for some purpose of the vendor, the purchaser as part of the consideration of the sale, undertakes to make improvements upon the purchased property, it would be manifestly just and in accord with the general principles that, in case of a subsequent loss of it by reason of a defect of title, the value of such improvements should be included in the assessment of damages, not only in an action for breach of these covenants, but any others which might be broken by such deprivation.¹ If there has been a constructive eviction, and before an action is begun upon the covenant the grantee's title becomes perfect by an after-acquired title of the grantor inuring to his benefit, the grantee may recover indemnity for damage done to the land by the acts of the owners of the adverse title.² In Wisconsin a married woman who joins in the execution of a deed for the sole purpose of barring her dower right in the land conveyed is not personally liable on the covenant of seizin.³

The vendee may recover the costs attending his eviction;⁴ but if he has not been evicted he cannot recover the expense incurred in buying in the outstanding title.⁵ The vendor is not liable for expenses incurred by the vendee in attempting to bring about a settlement between them.⁶ But if the vendor does not put his vendee in possession of the land he is liable for the expense incurred in obtaining possession⁷ or in unsuccessfully defending his title.⁸ There cannot be a recovery for the loss of a contract to sell the property because the building

the benefit of which is seized by a stranger? In this case the damage incurred is the direct result of the breach of contract, and a result which must have been contemplated by the party entering into the covenant. Probably this will be found to be the true ground of distinction, and that every case must be decided upon its own merits, according as the improvements were the fair consequence of the contract of sale or not.' Mayne on Damages (3d ed.), 182. See also, 2 Dart on Vendors & P. (5th ed.), 793."

¹ Id.; *Gibert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785.

² *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. Rep. 405.

³ *Sample v. Whorton*, 68 Wis. 626, 32 N. W. Rep. 690. See § 591, n., § 613.

⁴ *Cox's Heirs v. Strode*, 2 Bibb, 273, 5 Am. Dec. 603; *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271, 22 S. W. Rep. 314; *Bender v. Fromberger*, 4 Dall. 441; *Staats v. Ten Eyck*, 3 Cal. 111, 2 Am. Dec. 254.

⁵ *Mercantile Trust Co. v. South Park Residence Co.*, *supra*.

⁶ *Doom v. Curran*, 52 Kan. 360, 34 Pac. Rep. 1118.

⁷ *Coleman v. Clark*, 80 Mo. App. 339.

⁸ *Grantier v. Austin*, 66 Hun, 157, 20 N. Y. Supp. 963.

on the land encroached on the land of another, nor of the sum paid a broker for effecting such contract.¹ In the absence of an agreement as to price, if there is an exchange of lands, the agreed value or, if none, the market value of the land given in exchange, is the measure of damages.² The damages are to be computed according to the law of the state in which the deed was executed and in which suit is brought although the lands are situated in another state,³ at least if it is not shown what the law of the other state is.⁴

§ 594. Same subject; actual consideration may be proved. What the consideration of the sale is, as a basis of recovery for breach of these covenants, as well as of all the others, is open to proof as a fact *in pais*; the statement of it in the deed is only *prima facie* evidence of the amount. The recital does not preclude other proof or even parol evidence of the actual consideration, although it may establish a different one in kind or amount from that mentioned in the deed.⁵ It may be thus

¹ *Stearn v. Hiesdorfer*, 9 N. Y. Misc. 134, 29 N. Y. Supp. 281.

² *Looney v. Reeves*, 5 Kan. App. 279, 48 Pac. Rep. 606; *Hodges v. Thayer*, 110 Mass. 286.

³ *Looney v. Reeves*, 5 Kan. App. 279, 48 Pac. Rep. 606. See § 592, n.

⁴ *Hazelett v. Woodruff*, 150 Mo. 534, 51 S. W. Rep. 1048. See § 579.

⁵ *Louisville, etc. R. Co. v. Neafus*, 93 Ky. 53, 18 S. W. Rep. 1030; *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; *Barns v. Learned*, 5 N. H. 264; *Nutting v. Herbert*, 35 id. 120, 37 id. 316; *Bingham v. Weiderwax*, 1 N. Y. 509, 514; *Belden v. Seymour*, 8 Conn. 391, 21 Am. Dec. 661; *Swafford v. Whipple*, 3 G. Greene, 261, 54 Am. Dec. 498; *Hallum v. Todhunter*, 24 Iowa, 166; *Williamson v. Test*, id. 138; *Byrnes v. Rich*, 5 Gray, 518; *Harlow v. Thomas*, 15 Pick. 66; *Hodges v. Thayer*, 110 Mass. 286; *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Cushing v. Rice*, 46 Me. 393, 71 Am. Dec. 579; *Martin v. Gordon*, 24 Ga. 533; *Moore v. McKie*, 5 Sm. & M. 238; *Guinotte v. Chouteau*,

34 Mo. 154; *Rawle on Cov. Tit.* (4th ed.) 258; *Gavin v. Buckles*, 41 Ind. 528; *Henderson v. Henderson*, [261] 13 Mo. 151; *Bircher v. Watkins*, id. 521; *Pecare v. Chouteau*, id. 527; *Engleman v. Craig*, 2 Bush, 424.

In *Yelton v. Hawkins*, 2 J. J. Marsh. 1, relief in equity was granted on grounds which imply that such evidence is inadmissible at law. A bill was filed for relief against an excessive judgment for damages on a covenant of warranty. The judgment had been taken for the amount of the consideration stated in the deed, 86*l.*, alleged in the bill to be penalty and inserted in the deed through mistake, 43*l.* being the actual consideration. The relief was granted, enjoining the collection of one-half of the judgment. The court thus explains: "The chancellor had power to relieve against the mistake. Hawkins could not have resisted a judgment at law for the amount of consideration mentioned in the deed, because he would not have been able to prove the mistake; therefore he

[262] shown that one of several parcels included in the deed was inserted by mistake, and that nothing was paid for it;¹ that the consideration was property; and then its value at the date of the conveyance, with interest, will be the measure of

could make no defense on this ground at law, and consequently, as he has clearly established the mistake, it was the duty of the chancellor to grant him relief to the extent of the mistake. If he could have proved the mistake on the trial at law, still, as he did not defend the suit and rely on that ground, the chancellor will relieve him as readily as if there had been fraud." See *Trumbo v. Curtright*, 1 A. K. Marsh. 582; *Burke v. Beveridge*, 15 Minn. 205; *Steel v. Worthington*, 1 Ohio, 350; *Maigley v. Hauer*, 7 Johns. 341; *Jackson v. Delancy*, 4 Cow. 427.

In *Mayne on Damages* (6th Eng. ed.), 223, the author says: "Where the damages are to be calculated upon the basis of the purchase-money, its amount, if stated in the deed of conveyance, cannot be contradicted by parol evidence. Where any consideration is mentioned, if

it is not said also, 'and for other considerations,' you cannot enter into any proof of any other: the reason is, it would be contrary to the deed; for when the deed says it is in consideration of a particular thing, that imports the whole consideration, and is negative to any other." He cites *Lord Hardwicke in Peacock v. Monk*, 1 Ves. Sr. 128; *Rowntree v. Jacob*, 2 Taunt. 141; *Baker v. Dewey*, 1 B. & C. 704. But, as Mr. Rawle correctly remarks, "none of these cases (nor *Lampon v. Corke*, 5 B. & Ald. 606) directly support the proposition." *Rawle on Cov. Tit.* (5th ed.), § 173, note 3. This author says: "On this side of the Atlantic it may be considered as settled that although (apart from the question of fraud) evidence to contradict or vary the consideration clause is inadmissible to defeat the conveyance as such; as, for example, by showing it

¹ *Leland v. Stone*, 10 Mass. 459; *Nutting v. Herbert*, 35 N. H. 121, 37 id. 346; *Barns v. Learned*, 5 id. 264; *Stewart v. Hadley*, 55 Mo. 235; *Lloyd v. Sandusky*, 95 Ill. App. 593.

Leland v. Stone, *supra*, has been criticised on the point to which it is cited, and is disapproved in *Spurr v. Andrews*, 6 Allen, 420; *Harlow v. Thomas*, 15 Pick. 66; *Bruns v. Schreiber*, 43 Minn. 468, 45 N. W. Rep. 861.

In *Semple v. Whorton*, 68 Wis. 626, 637, 32 N. W. Rep. 690, an action to recover for the breach of the covenant of seizin as to part of the land conveyed, *Leland v. Stone* was cited to sustain the proposition that the value of the land was not to be determined from the actual and visible

conditions of the several tracts at the time of the purchase, but from the conditions then supposed to exist or contemplated by the parties, or one of them. In other words, that the tract to which the title failed should be considered in estimating values the same as though it was, when sold, unimproved, as were the other tracts, instead of an improved farm, which the parties did not know it to be. This contention, it was conceded by the court, derived some support from that case; and while it was held that the testimony did not warrant the application of the rule contended for, if it is a rule, doubt is thrown upon the authority of the case, and consequently upon the cases which follow it.

damages.¹ But if the parties at that time agreed upon its value as a consideration, such value, rather than that which might be ascertained by evidence on the trial, will be adopted as the basis of recovery.² A warrantor may show, as against his im-

void for want of consideration, as in *Wilt v. Franklin*, 1 Bin. 502, 2 Am. Dec. 474; *Farrington v. Barr*, 36 N. H. 89; *Hurn v. Soper*, 6 Har. & J. 276; *Betts v. Union Bank*, 1 Har. & G. 175, 18 Am. Dec. 283; *Clagett v. Hall*, 9 Gill & J. 91; *Cole v. Albers*, 1 Gill, 423; *Elysville Manuf. Co. v. Okisko Co.*, 1 Md. Ch. 392; *Henderson v. Henderson*, 13 Mo. 151; yet that for any purpose short of affecting the title, this clause is not conclusive, but only *prima facie* evidence of the amount therein named. *Bullard v. Briggs*, 7 Pick. 533, 19 Am. Dec. 292; *Wade v. Merwin*, 11 Pick. 280; *Clapp v. Tirrell*, 20 id. 247; *McCrea v. Purmort*, 16 Wend. 460; *Burbank v. Gould*, 15 Me. 118; *Meeker v. Meeker*, 16 Conn. 383; *Beach v. Packard*, 10 Vt. 96, 33 Am. Dec. 185; *Bingham v. Weiderwax*, 1 N. Y. 509; *Watson v. Blaine*, 12 S. & R. 131; *Bolton v. Johns*, 5 Pa. 145, 47 Am. Dec. 404; *Higdon v. Thomas*, 1 Har. & G. 139; *Wolfe v. Hauver*, 1 Gill, 84; *Duval v. Bibb*, 4 Hen. & M. 113, 4 Am. Dec. 506; *Harvey v. Alexander*, 1 Rand. 219, 10 Am. Dec. 519; *Wilson v. Shelton*, 9 Leigh, 343; *Curry v. Lyles*, 2 Hill (S. C.), 404; *Jones v. Ward*, 10 Yerg. 160; *Park v. Cheek*, 2 Head, 451; *Garrett v. Stuart*, 1 McCord, 514; *Gulley v. Grubbs*, 1 J. J. Marsh. 358; *Hartley v. McAnalty*, 4 Yeates, 95, 2 Am. Dec. 396; *Hayden v. Mentzer*, 10 S. & R. 329; *Dexter v. Manley*, 4 Cush. 26; *Jack v. Dougherty*, 3 Watts, 151, where the language of *Parker, C. J.*, in *Bullard v. Briggs*, is approvingly

quoted; *Monahan v. Colgin*, 4 Watts, 436; *Strawbridge v. Cartledge*, 7 W. & S. 399; *Click v. Green*, 77 Va. 827. In other words, the only effect of the consideration clause is to estop the grantor from alleging that the deed was executed without consideration, and that for every other purpose it is open to explanation, since the origin and purpose of the acknowledgment in a deed were merely to prevent a resulting trust to the grantor, the claim being merely formal and nominal, and not designed to fix conclusively the amount paid or to be paid. *Belden v. Seymour*, 8 Conn. 312," 21 Am. Dec. 661.

In *Shorthill v. Ferguson*, 44 Iowa, 249, the defendant had sold land and conveyed it with covenants of warranty and of right to convey, and stated the consideration in the deed to be \$500, although in fact it was much less. The grantee sold and conveyed to the plaintiffs. On a total breach, by which the plaintiffs were entitled to full damages, the question was raised whether the damages were limited to the real consideration received by the defendant from his grantee, or whether the plaintiffs were entitled to the amount of the consideration expressed in the deed. And the court say: "Parol proof of consideration to contradict that expressed in the deed is admissible between the original parties, but it is not admissible in a suit against the original grantor by one to whom his grantee has transferred the land. *Greenvault v. Davis*, 4

¹ *Hodges v. Thayer*, 110 Mass. 286; *Bonnon's Estate v. Urton*, 3 G. Greene, 128; *Lacey v. Marnan*, 37

Ind. 168. See *Davis v. Hall*, 2 Bibb, 590.

² *Williamson v. Test*, 24 Iowa, 138.

mediate grantee, that the consideration was less than that recited in the deed; but this cannot be proven as against a remote grantee who purchased without notice of the actual consideration.¹

§ 595. Same subject; when not measured by the consideration. In cases where this measure cannot be applied, as [263] where the consideration cannot be ascertained,² or where it is paid by a third person on whose request the conveyance with the covenants is made,³ so that the damages must be determined according to the circumstances of the particular case, the value of the land at the time of the intended conveyance with interest from that date will be the measure of damages.⁴ It does not matter that the consideration is in fact paid or delivered to another person than the grantor; or that it is itself before delivery the property of another than the grantee, provided that it is agreed upon between the grantor and the grantee as the consideration upon which the deed is given. Their contract creates the privity between them in relation to the consideration, and constitutes it the price of the agreed conveyance. It thereby becomes the measure of the grantee's loss.⁵ Shaw, C. J., said:⁶ "The rule of damages is perfectly well settled in this commonwealth; it is the amount of the consideration actually paid by the grantee to the grantor, with interest from the time of the payment. We say paid by the grantee to the grantor, which is the most common case. But there may be anomalous cases, especially where it is not a direct negotiation between the parties to the deed, but where, in a negotiation between two, there is a stipulation by one with the other, upon a certain consideration, to execute a deed, and

Hill, 643. We are of the opinion, therefore, that the plaintiffs are entitled to recover, upon tender of conveyance to defendant, the sum of \$500, and interest thereon at six per cent. from the date of the deed. . . . The consideration in the defendant's deed is to be taken as a conclusive admission by defendant." *Hunt v. Orwig*, 17 B. Mon. 73, 16 Am. Dec. 144; *Hanson v. Buckner*, 4 Dana, 251, 29 Am. Dec. 401.

As between persons not parties to it, the consideration stated in a deed is not *prima facie* evidence of the value of the land. *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. Rep. 142.

¹ *Allison v. Pilkins*, 11 Tex. Civ. App. 655, 33 S. W. Rep. 293.

² *Smith v. Strong*, 14 Pick. 128.

³ *Byrnes v. Rich*, 5 Gray, 518.

⁴ *Id.*

⁵ *Hodges v. Thayer*, 110 Mass. 286.

⁶ *Byrnes v. Rich*, *supra*.

convey certain land to a third person, and a deed is given accordingly." He stated the case under consideration, to which his observations applied: "The plaintiff agreed to receive of one L. a certain lot of land in M. in full satisfaction and discharge of a debt. L. then agreed with the defendant to purchase of him the same land, and then requested the defendant to make the deed direct to the plaintiff with warranty; he executed it accordingly, upon a large nominal consideration expressed, and handed it to L., who delivered it to the plaintiff in satisfaction of his debt. Then what was the actual [264] consideration as between the plaintiff and defendant? It is very clear that the consideration expressed in the deed is no criterion; the actual consideration may be always inquired into by evidence *aliunde*. Nor is it the sum agreed to be paid to the defendant by L.; to that the plaintiff is a stranger. It seems, therefore, to be a case to which the ordinary general rule cannot apply, and which must be determined according to its particular circumstances upon the general principle applicable to breaches of contracts: the party shall recover a sum in damages which will be a compensation for the loss. The case is very similar in principle, and considerably so in its facts, to that of *Smith v. Strong*.¹ It was there laid down that in such case the measure of damages is the consideration paid with interest from the date of the deed; but if the consideration cannot be ascertained, the value of the land at the time of the intended conveyance with interest from the date of the deed will be the measure of damages. It appears to us that this rule will afford indemnity in the present case. If the failure of title extended to the whole of the land, then the entire value of the land is the measure; if to part only, and the plaintiff does not tender a reconveyance of the part upon which the conveyance operated to give title to the grantee, then the value of the part the title to which failed with interest will be taken as the measure of damages."²

§ 596. Same subject; effect of recovery on a total breach. Where there is a breach of these covenants extending to the entire subject of the purchase, and the plaintiff has never got

¹ 14 Pick. 123.

Rechos v. Younglove, 8 Baxter,

² See *Staples v. Dean*, 114 Mass. 128; 385.

into possession, and, in consequence of the want of title, never can, the recovery of the purchase-money and interest is clearly and uniformly held to be the proper measure of damages. The action on the covenant then comes in place of an action for money had and received on failure of consideration.¹ The action on the covenant does not, however, proceed, as an action for money had and received does, upon the theory of [265] rescission, though practically the result is the same. The recovery of damages for such a breach is a bar to any further recovery;² and hence the covenant would have no validity afterwards. On a breach, its force is spent, and the covenantee has but a right of action. Satisfaction of the judgment for damages may, moreover, well have the effect to preclude the assertion of any right under the conveyance. It would be manifestly unjust that a grantee should recover either the purchase-money or the value of the land against the grantor, upon an alleged breach of covenant that nothing passed by the deed, and yet that he should be considered the owner of the land under the very deed which he had alleged to be inoperative.³ When a warrantee in *warrantia chartæ* recovers and has a seizin of other lands of the warrantor to their value, he cannot afterwards recover of the warrantor the lands warranted; for although the warrantor cannot aver against his own deed, yet the warrantee may aver against that deed; and if his averments are verified by matter of record the warrantor may afterwards avail himself of that record against the warrantee, the record being of a higher nature than a deed.⁴

§ 597. Same subject; only a nominal sum recovered if actual loss not shown. Any recovery beyond nominal damages is dependent upon proof of actual loss, and is restricted to it. In *Hartford and Salisbury Ore Co. v. Miller*⁵ the court

¹ *Baber v. Harris*, 9 A. & E. 532; *Mayne on Dam.* (6th Eng. ed.) 216.

² *Duchess of Kingston's Case*, 2 Smith's L. Cas. (7th ed.) 778; *Outram v. Morewood*, 3 East, 346; *Donnell v. Thompson*, 10 Me. 174, 25 Am. Dec. 216; *Nosler v. Hunt*, 18 Iowa, 212; *Markham v. Middleton*, 2 Str. 1259; *Rawle on Cov. Tit.* (5th ed.), § 178 and note.

³ *Stinson v. Sumner*, 9 Mass. 143, 6 Am. Dec. 49; *Parker v. Brown*, 15 N. H. 176; *Porter v. Hill*, 9 Mass. 34; *Blanchard v. Ellis*, 1 Gray, 202; *Kincaid v. Brittain*, 5 Sneed, 119. See *Johnson v. Simpson*, 36 N. H. 96.

⁴ *Porter v. Hill*, 9 Mass. 34; *Foss v. Stickney*, 5 Me. 390.

⁵ 41 Conn. 112.

say: "The general rule is in actions upon contracts that the plaintiff shall recover the actual damages sustained. An action for breach of the covenant of seizin in a deed is not an exception to the rule. It is doubtless true that in such actions generally the actual damage is in fact the consideration paid and interest, because the party takes nothing by his deed. It is in its inception, and continues to be, a nullity. But if the [266] party takes anything by his deed, directly or indirectly, by its own force, or by its co-operation with other instruments or other circumstances, whether it be the entire thing purchased or a part of it, its value must be considered in estimating the damages." The whole consideration money and interest cannot be the criterion of damages except in those cases where the purchaser derives no benefit from the conveyance. The consideration and interest is *prima facie* the damage resulting from the breach; but this may be varied by circumstances.¹ If the grantor is in actual possession, but without any title, in theory at least he can confer no benefit on his grantee by the ceremony of making a deed to him and delivering possession. The deed would vest no title, and, the possession being wrongful, the purchaser would incur a liability to the true owner for his occupation. Such a transaction, at best, would only give the purchaser an opportunity by continuous wrong to acquire title by virtue of the statute of limitations. In such a case may not the purchaser, although in actual possession, elect to consider himself an actual loser in respect to the whole subject of the purchase? His actual possession is no objection, except as it affects the amount of damages; for as we have seen, eviction is not necessary to give him a cause of action. It is no defense that he is in the undisturbed possession of the

¹ Kimball v. Bryant, 25 Minn. 496; Cockrell v. Proctor, 65 Mo. 41; Smith v. Hughes, 50 Wis. 920, 7 N. W. Rep. 653; McLennan v. Prentice, 85 Wis. 427, 55 N. W. Rep. 761; Lloyd v. Sandusky, 95 Ill. App. 593; Bowne v. Wolcott, 1 N. D. 415, 48 N. W. Rep. 336, citing the text; Curtis v. Brannon, 98 Tenn. 153, 38 S. W. Rep. 1073. See De Long v. Spring Lake, etc. Co., 65 N. J. L. 1, 8, 47 Atl. Rep. 491.

It is said in the Tennessee case: We see no good reason for limiting the vendee's liability for rents to the interest on the purchase-money if they have in fact been of greater value. He should account for all the benefits he has derived from the possession, and, if not responsible therefor to some other person, his vendor should have an abatement therefor to that extent.

premises.¹ If he so elects and recovers full damages as upon a total breach, the grantor may resume possession, and the parties are in *statu quo*, except that the purchaser has had possession, with its practical benefits, and there is only a possibility of being made to pay damages for it to the true owner; but this possession is deemed only the equivalent of interest on the purchase-money, and hence is to be considered only in that connection.²

A grantor may, before the eviction of his grantee, buy in the outstanding title and relieve himself from liability upon his covenants.³ The grantee is possessed of the same right, and may recover the amount paid for such purpose if it was reasonable and not in excess of the purchase price. A grantee cannot convey a greater right than this to his grantee.⁴ If a remote grantee exercises such right and it does not appear what sum he paid, no more than nominal damages can be recovered.⁵ In states where the covenant is held to run with the land, if the grantee has taken possession under his deed, he can recover only nominal damages until he has been compelled, by the assertion of the paramount title, to yield possession to the claimant. He has no right to abandon the possession and claim substantial damages.⁶

[267] Although there has been some hesitation with text-writers to regard such a case as one for recovery of full dam-

¹ Bolinger v. Brake, 57 Kan. 663, 47 Pac. Rep. 537; Akerly v. Vilas, 21 Wis. 109.

² Recohs v. Younglove, 8 Baxter, 385, 387.

³ Sayre v. Sheffield Land, Iron & Coal Co., 106 Ala. 440, 18 So. Rep. 101; Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49; King v. Gilson, 32 Ill. 356.

This exception to the general rule as to damages rests upon the fact that when the covenant is taken the money is paid with the design of acquiring title to the land, and not to make a loan, and when the vendee has obtained that which he bought he has sustained no injury. Technically there has been a breach of

the covenant for which there is a right of recovery, but only nominal damages can be recovered.

⁴ Conrad v. Trustees Grand Grove, etc., 64 Wis. 258, 25 N. W. Rep. 24; Bank v. Johnston, 105 Tenn. 521, 59 S. W. Rep. 131. See § 601.

⁵ Snell v. Iowa Homestead Co., 59 Iowa, 701, 13 N. W. Rep. 848.

⁶ Boon v. McHenry, 55 Iowa, 202, 7 N. W. Rep. 503; Hencke v. Johnson, 62 Iowa, 555, 17 N. W. Rep. 766; Norman v. Winch, 65 Iowa, 263, 21 N. W. 598; Wilson v. Irish, 62 Iowa, 260, 17 N. W. Rep. 511; Axtel v. Chase, 77 Ind. 74; Cockrell v. Proctor, 65 Mo. 41; Egan v. Martin, 71 Mo. App. 60; Smith v. Hughes, 50 Wis. 620, 7 N. W. Rep. 653.

ages, measured by the consideration money,¹ yet it is believed that in those jurisdictions at least where these covenants are not regarded as continuing and running with the land, the consideration money with interest, less any benefit the grantee has obtained from possession, is generally accepted as the proper measure of damages.² In *Parker v. Brown*³ Parker, C. J., said: "No wrong is done by the maintenance of the action; for if the grantee recovers damages for the breach of the covenant of seizin, on the ground that the grantor had no title whatever, the operation of it must be to estop the grantee from setting up the deed afterwards as a conveyance of the land against the grantor. We see not why the grantor may not again enter, if he chooses, as against the grantee. A recovery in trespass or trover, with satisfaction, vests the property in the party against whom the damages were assessed. The defendants may re-enter if they think proper, and will hold under their former possession against all persons who cannot show a better right. We are not aware of anything in the nature of the feudal investiture, or in the principles which regulate the title to land at the present time, that should require [268] a different rule in relation to real estate. The record of the

¹ 4 Dane's Abridgment, p. 340; Mayne on Damages (6th Eng. ed.), 216. This author says: "Where the plaintiff has never got into possession, and in consequence of the want of title never can, the above is clearly the proper measure of damages. . . . But it may be doubted whether the same rule would hold good as a matter of law, where the plaintiff had got into possession, and in fact continued so still. A case may be easily imagined, and indeed constantly occurs, in which there is such a defect in the title as makes it strictly unsalable, though there is little or no chance of the occupant ever being turned out. In such a case it would not be fair to allow the whole purchase-money to be recovered. The vendor has not given a salable title as he engaged; but he has given up his possessory title,

which was worth something to him, and is worth something to the purchaser."

In the first edition of Rawle on Covenants for Title (p. 83) it was said: "If nothing had been paid, and no pecuniary loss had been suffered, and the possession had not been disturbed, it is believed that nominal damages only would in general be allowed. The technical rule, therefore, that the covenant of seizin is broken, if at all, at once and completely, is, as respects the damages, little more than a technical one." See *post*, note; *Collier v. Gamble*, 10 Mo. 472; *Mason v. Cooksey*, 51 Ind. 519.

² *Curtis v. Brannon*, 98 Tenn. 153, 28 S. W. Rep. 1073; *Tone v. Wilson*, 81 Ill. 529; *Flint v. Steadman*, 26 Vt. 210.

³ 15 N. H. 176, 188.

recovery will furnish as good an estoppel as that which arises from a disclaimer.¹ . . . The measure of damages for the breach of the covenant of seizin is the value of the land at the time of the conveyance, which may be determined by the consideration paid. This was stated to be the rule in this case, and it is not controverted that the consideration expressed in the deed was the evidence of value."²

§ 598. **Same subject.** Possession without title may compensate for the interest on the purchase-money if there be no liability, which will be enforced, to the real owner.³ But the question whether such owner will ever claim the land must remain open until he is precluded by lapse of time; and the mere fact that the purchaser presently obtains no title renders his conveyance nugatory — valueless — unless so much time of adverse possession has elapsed as to afford assurance of the continued silence and inaction of that owner. The purchaser derives no property or value in the land. It does not become his; he cannot safely improve it; his claim to it has no other value than such as attaches to it in view of the possible extinction of the superior right by non-claim. That the absence of title is an element of damage which may be the basis of recovery, although there is no disturbance of possession, and

¹ Hamilton v. Elliot, 4 N. H. 182, 17 Am. Dec. 408.

² Park v. Cheek, 4 Cold. 20; Tone v. Wilson, 81 Ill. 529; Frazer v. Supervisors, 74 id. 282; Kincaid v. Brittain, 5 Sneed, 119; Richard v. Bent, 59 Ill. 38, 14 Am. Rep. 1; Lawless v. Collier, 19 Mo. 480; Harris v. Newell, 8 Mass. 262; Bickford v. Palge, 2 id. 455; Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169; Horsford v. Wright, Kirby, 3; Castle v. Peirce, 2 Root, 294; Caulkins v. Harris, 9 Johns. 324. See Tarpley v. Poage, 2 Tex. 139; Copeland v. Gorman, 19 id. 253; Cooper v. Singleton, id. 260. 70 Am. Dec. 333. In the fourth edition of Rawle on Covenants for Title in note 3. p. 281 (see *ante*, p. 1719, n. 1), the author says: "Upon subsequent consideration the opinion was formed that . . . (the passage quoted in

the preceding note) did not correctly express the law, and it was omitted in the second edition. . . . It is believed . . . that if the breach of the covenant has occurred, affecting the whole title (for where it touches part only, Morris v. Phelps, 5 Johns. (N. Y.) 56, is a distinct authority that the purchaser has no authority to rescind), the plaintiff has a right to recover damages measured by the consideration money." See Hacker v. Blake, 17 Ind. 97; Cockrell v. Proctor, 65 Mo. 41.

³ Curtis v. Brannon, 98 Tenn. 153, 38 S. W. Rep. 1053, quoting the text, and holding that a vendee in possession under a deed conveying a life estate, the life tenant living, is liable to his vendor for the rental value of the premises from the time his possession began.

indeed can be none, is evident from those cases in which the grantor undertook to convey a fee and covenanted accordingly, having only a less estate in possession. In such cases the rule has been applied to merely deduct the value of [269] the less estate conveyed from the amount which would be recoverable for a total breach,¹ or to allow to be recovered the difference between the covenanted and the conveyed estate.²

Where, however, there have been such forms of conveyance to the grantor that the defect of title is only a technical one, and there has been long possession under the conveyance, though not for the period required to quiet the title under the statute of limitations, if nothing has been paid or done to extinguish or acquire the paramount title, it is perhaps an unanswered question in the books whether full damages could be recovered, in the absence of any actual assertion of that title. Would there not be wanting the element of actual loss or danger of actual loss, which is essential to justify the assessment of damages on that basis? If the outstanding title has been bought in by the covenantee, and there was none in the covenantor, recovery might be had for the amount paid for it, to the limit recoverable for a total breach of these covenants.³

¹Tanner v. Livingston, 12 Wend. 83; Guthrie v. Pugsley, 12 Johns. 126; Lockwood v. Sturdevant, 6 Conn. 373; Terry v. Drabenstadt, 68 Pa. 400; Mills v. Catlin, 22 Vt. 98.

²Gray v. Briscoe, Noy, 142.

³Lawless v. Collier, 19 Mo. 480, is an instructive case upon the point here suggested. The opinion contains a valuable summary of the law relating to damages for breach of the covenant of seizin, and applies it to a novel state of facts. Scott, J.: "On the 29th day of September, 1831, George Collier, for the sum of \$800, conveyed to H. R. Gamble, in fee, sixteen and a fraction acres of land, with a covenant that he was seized of an in fee simple estate therein. On the 8th of November, 1831, Collier conveyed to Gamble twenty four and ninety one one-hundredths acres of land for the sum of \$1,868, with a

like covenant as in the first deed. These two tracts were contiguous and made one parcel; and on the 14th day of March, 1836, were conveyed by Gamble to Adam L. Mills, for the sum of \$12,000, by a deed containing the covenants expressed by the words 'grant, bargain and sell,' and a general warranty. Afterwards doubts began to be entertained about the validity of the title of Collier to the land conveyed to Gamble, and by Gamble to Mills; and Gamble, on the 16th day of March, 1842, purchased from Luke E. Lawless, who claimed, under the heirs of Ames Stoddard, one undivided fifth of a tract of three hundred and fifty arpens, which entirely covered the land conveyed by Collier to Gamble. In a conflict between the title of Collier and the heirs of Stoddard, the latter prevailed. Col-

The supreme court of Kansas has considered the effect of the statute of limitations upon the vendee's right of recovery in a way quite satisfactory. Conceding that where the defect in the title has been cured by adverse possession, by estoppel or otherwise, without detriment to the vendee, his recovery can-

lier claiming under a New Madrid location, and Stoddard's heirs under a concession by the Spanish government, confirmed by the act of congress of July 4, 1836. The consideration of the conveyance from Lawless to Gamble was \$1,000 and an assignment of the covenants contained in the deeds of Collier to Gamble, in trust for Virginia Lawless, the plaintiff, and wife of Luke E. Lawless. The title of Collier having been defeated by that of the heirs of Stoddard, Gamble, by means of the one-fifth part of the claim of the said heirs, which he had purchased from Lawless, was enabled to perfect the title to the land he had conveyed to Mills, and by suitable conveyances between all interested, Mills and those to whom he had conveyed were made secure 'in the possession of the land they had purchased from Gamble. Neither Mills nor those claiming under him have been actually evicted, nor has Gamble been compelled to pay any damages, by reason of any covenants contained in his deed to Mills. On this state of facts, Virginia Lawless, the beneficiary assignee of Gamble, instituted an action for the breach of the covenants of seizin contained in the deed from Collier to Gamble, claiming damages to an amount equal to the purchase-money received by Collier, with interest from the time of payment. The defendant maintained that the plaintiff was only entitled to nominal damages. The court directed the jury that the measure of damages was the sum paid by Gamble to Lawless for the interest he acquired in the claim of Stoddard's

heirs, together with interest. There was a verdict accordingly.

"1. As the title under which Collier held the land has been defeated, and as Mills and those claiming under him no longer hold by the title originally obtained from Collier, but by means of the purchase made by Gamble from Lawless of an interest in an adverse title, the rule which limits a recovery in an action on the covenant of seizin to a nominal sum until there has been an eviction has no application under the circumstances of this case. Where the title conveyed has been defeated, and the grantee or his assigns hold by an adverse title to that acquired from their grantor, there can be no necessity for submitting to the form of an eviction, in order to be entitled to a recovery of full damages for a breach of the covenant of seizin. The reason of the rule, as laid down in *Collier v. Gamble*, 10 Mo. 472, shows that it is inapplicable to the circumstances of this case as now presented. Rawle, speaking on this subject, says: 'Cases may, of course, occur in which, although the purchaser may have paid nothing to buy in the paramount title, and may still be in possession, yet, when the failure of title is so complete, and the loss so morally certain to happen, that a court might feel authorized in directing the jury to assess the damages by the consideration money.' P. 83.

"2. The weight of American authority has determined that the covenant for seizin is broken, if broken at all, so soon as it is made, and thereby the immediate right of ac-

not exceed a nominal sum, it was said in answer to the contention that where the vendee is not disturbed in his possession and has not incurred expense by reason of the outstanding title, he can recover nominal damages only on account of the admitted

tion accrues to him who has received it. But, in such case, the grantee is not entitled, as matter of course, to recover back the consideration money. The damages to be recovered are measured by the actual loss at that time sustained. If the purchaser has bought in the adverse right, the measure of his damages is the sum paid. If he has been actually deprived of the whole subject of his bargain, or a part of it, they are measured by the whole consideration money in the one case, and a corresponding part of it in the other. Rawle, 44.

"3. Under the peculiar circumstances of this case, what is the measure of damages? Can it be said that the purchase-money paid by Gamble to Lawless is the just measure? Was it by the payment of the sum of \$1,000 only that Gamble was enabled to secure the title or possession of his grantee, and thereby prevent a recourse against him on his covenant? Such an assertion is not warranted by the facts. We cannot say that Lawless in making a sale of his land did not regard the covenants of Collier as worth the full sum which they were given to secure. He did not convey to Gamble the identical land which Gamble had conveyed to Mills. His conveyance of itself did operate but partially to secure Gamble, and thereby destroy his recourse against Collier for his purchase-money. It was by the acts of Gamble subsequent to Lawless' conveyance that his vendee's title was perfected. What right had Gamble then to adopt a course of conduct which would have impaired the recourse of

Lawless' trustee on the covenants which had been assigned to him for the benefit of Virginia Lawless? In so doing he would have injured the plaintiff and have destroyed a part of the consideration he had given to Lawless for his interest in the Stoddard claim. Would not Gamble then have been liable to Virginia Lawless for the destruction of the right which he had assigned for her benefit? This is the consequence flowing from holding that the \$1,000 paid by Gamble to Lawless should be the measure of damages in this action. This would be unjust to Gamble. It would be placing him in the attitude of a wrong-doer to the plaintiff, whilst performing an act dictated by considerations of justice to himself and to those whom he was under obligations to indemnify. Is it not more just that Collier should refund the money he has received from Gamble, the consideration of which has entirely failed, than that Gamble should be placed in the condition of enriching himself at the expense of another? No one can say that without the assignment of the covenants in Collier's deeds Gamble ever would have been enabled to obtain Lawless' interest in the Stoddard claim. We know not how those covenants were estimated. No rule is known by which their value can be reduced below the sums they were given to secure.

"4. It was maintained that before there could be a recovery of the entire consideration money received by Collier, there should be a reconveyance of the title derived from him. The want of such reconveyance is no bar to the action. This

breach of the covenant of seizin,¹ that to so declare would be to construe away the force and efficacy of that covenant. "It is said that no matter how bad the title conveyed may be, yet the true owner may not assert his right until after the statute of limitation has barred it, and thus the grantee may obtain a good title by adverse possession; therefore he ought not to be allowed to maintain an action on the covenant of seizin until after he has been evicted or has purchased in the outstanding title. In other words, the risk of disturbance by the true owner is shifted from the grantor, who has for a consideration expressly assumed it, and it is thrown upon the grantee, for whose benefit the covenant was made. According to our Kansas doctrine a right of action accrues immediately upon the execution of the deed with the covenant of seizin, if the title be bad, and therefore it will be barred within five years thereafter. An adverse claimant may bring his action within fifteen years, and sometimes even later, and if he should succeed therein the grantee under the covenant of seizin is without remedy. A construction of the covenant of seizin, broken at the delivery of the deed, which requires that the covenantee must wait until his right of action is barred, unless the adverse claimant brings his suit before that time, is apparently so unreasonable as to carry its own refutation with its statement. We are not authorized to construe away the covenant of seizin because there was also a covenant of warranty in the same deed, for the grantee was entitled to the benefit of both. Under the former he had a personal right of action against the grantors as soon as the deed was made; under the latter there could be no breach until an eviction under a title paramount or something equivalent to it. By the former he was under no obligation to wait until the latter should also be broken, and the grantors perhaps dead or insolvent, before commencing his action for damages. To illustrate this principle take an example: A. and B. own a tract of land in equal undivided

matter rests in the discretion of the court. Under the circumstances of this case a court would impose no terms to prevent a recovery of the entire consideration money. A conveyance here would be a nuga-

tory act and totally unavailing for any purpose. Rawle, 84." Hooper v. Sac County Bank, 72 Iowa, 280, 33 N. W. Rep. 681.

¹ Hammerslough v. Hackett, 48 Kan. 700, 29 Pac. Rep. 1079.

shares. A., without the knowledge of B., in consideration of \$1,000, the full value of the land, makes a deed to C. with a covenant of seizin, and C. goes into possession. He afterwards learns that he has the title to the undivided one-half only, and while undisturbed in his possession, he brings his suit against A. to recover the \$500 paid without consideration on the faith of the covenant that A. was seized of the full title; but he is met with the answer that the breach is only technical, and he can recover no more than nominal damages until B. asserts his title or he buys it in. C. is not prepared to pay for the half interest a second time; he dismisses his action or takes a judgment for nominal damages. Years thereafter, B. commences his action against C. for partition and ejectment and recovers one-half in value of the land. C. then commences his action against A. to recover damages for breach of the covenant of seizin. If he dismissed his former suit without prejudice, he is met with the plea of the bar of the statute of limitations; if he took judgment for nominal damages, he is confronted with the further plea of *res judicata*. Thus, by a sort of legal jugglery, C. loses his \$500 and A. keeps that much for nothing. Counsel say, however, that B. may never assert his title, or may do so too late, and that A. for the sum of \$500, by his covenant of seizin, expressly assumed the risk, should be relieved of it, and the court should impose it upon C., who paid his \$500 to be assured against it. This is a manifest perversion of the law of contracts respecting real estate as established by the decisions of this court. If a grantor does not desire to be bound by a covenant of seizin he ought not to enter into it. When he does so, the courts ought not to annul it for his profit and to the injury of the grantee for whose benefit it was made."¹

Where personal covenants are connected with the covenants of warranty and the covenant of seizin is broken, if the grantee has sold the property, has never been disturbed in his ownership, paid anything for the paramount title, nor become liable to pay anything therefor, his recovery cannot exceed a nom-

¹ Bolinger v. Brake, 57 Kan. 663, hearing the judgment of the supreme court was reaffirmed, 58 Kan. 47 Pac. Rep. 537 (one judge dissenting), affirming 4 Kan. App. 180, 45 818, 51 Pac. Rep. 290. Pac. Rep. 950. On a motion for re-

inal sum.¹ The same rule has been applied where the deed conveyed the full equitable and beneficial title, no paramount or hostile title being asserted and the grantee not being disturbed, as where the naked legal title to land remains in the government, the entryman having all the evidence of title except the patent. It was considered that a statute declaring that the detriment caused by the breach of the covenant of seizin is to be deemed the price paid to the grantor, was not in the way of the modified rule.²

If the defect in the title is remedied by the grantee he may recover the expense actually incurred and a reasonable compensation for his services, but nothing further.³ He cannot be compelled to pursue equities to which he might be subrogated for the purpose of making himself whole.⁴ The vendor cannot offset against the amount paid by the vendee money paid for taxes on the land before it was conveyed.⁵

[270] § 599. *Same subject.* There is something incongruous in allowing, in any case, full damages as for actual loss, and yet requiring a reconveyance. This is so where no title whatever is conveyed; but if some title passes, though so far short [271] of that covenanted for that the grantee is clearly not bound to retain it for a proportional part of the purchase-money, on tendering a reconveyance and surrendering possession recovery may be had of the entire consideration and interest, together with taxes paid, less the value of rents received, or that would have been received,⁶ and such damages as may be sustained by reason of the plaintiff removing and appropriating any permanent improvements the defendant may have made on the premises.⁷ The grantor in such case may

¹ Scoffins v. Grandstaff, 12 Kan. 467; Hammerslough v. Hackett, 48 Kan. 700, 29 Pac. Rep. 1079, citing numerous cases; O'Meara v. McDaniel, 49 Kan. 685, 31 Pac. Rep. 303.

² Bowne v. Wolcott, 1 N. D. 415, 48 N. W. Rep. 336.

³ Morrison v. Underwood, 20 N. H. 369.

⁴ Royer v. Foster, 62 Iowa, 321, 17 N. W. Rep. 516.

⁵ Hooper v. Sac County Bank, 72 Iowa, 280, 33 N. W. Rep. 681.

⁶ Frazer v. Supervisors, 74 Ill. 282; Curtis v. Brannon, 98 Tenn. 153, 38 S. W. Rep. 1073, quoting the text.

⁷ Park v. Cheek, 4 Cold. 28, quoted from in Curtis v. Brannon, *supra*.

Restoration of possession is an indispensable ingredient of a decree in equity in favor of a vendee for breach of the covenant of seizin caused by an outstanding contingent remainder, the deed conveying at least a life estate, and possession being held under it. Curtis v. Bran-

elect to consider the title as wholly failing.¹ The want of reconveyance is no bar to the action, and a release by the covenantee to a third person is not nor would it on principle affect the right of the covenantee to full damages when no title passed,² except where the covenant is held to run with the land.³ The doctrine laid down in *Bickford v. Page*⁴ would seem to oppose any abatement of damages where there had been a sale for a consideration even exceeding the purchase-money paid when the covenant was made. The action was on the covenant of good right to convey. The defendant pleaded that before the plaintiff commenced the action, before he had improved the premises or added any value, he transferred them to T. R. for the consideration of \$100 in fee, without covenants rendering the plaintiff answerable for any defect of title; averring that thereby all the plaintiff's right, title, and interest thereon, and in the covenants, passed to T. R. On demurrer this was held no bar. Parsons, C. J., said: "As the defendant in his bar has not traversed this breach (of the covenant of good right to convey), nor confessed and avoided it, we must consider this covenant as having been broken by him. It must therefore have been broken immediately on the execution of the deed containing it; and the damages accruing from the breach must have been suffered by the plaintiff before his release to T. R. This covenant, having been broken before the release, was at that time a mere *chose in action* not assignable. Neither could it have passed by the release; because no estate passing to the plaintiff by the defendant's deed, there was no land to which this covenant could be annexed so as to pass to the releasee. . . . But he (the plaintiff) is entitled to [273] his damages for the breach of the defendant's covenant that he had a good right to convey. The rule for assessing the damages arising from this breach is very clear. No land passing by the defendant's deed to the plaintiff, he has lost no land by the breach of the covenant; he has lost only the considera-

non, 98 Tenn. 153, 38 S. W. Rep. 1973.

¹ *Kincaid v. Brittain*, 5 Sneed, 119; *Recobs v. Younglove*, 8 Baxter, 335.

² *Cornell v. Jackson*, 3 Cush. 506.

³ *Cockrell v. Proctor*, 65 Mo. 41; *Schoffeld v. Iowa Homestead Co.*, 32

Iowa, 317, 7 Am. Rep. 197.

⁴ 2 Mass. 455.

tion which he paid for it, amounting to 6s. 5*d*. This he is entitled to recover back with interest to this time."

Whatever the covenantee realizes as a benefit from the conveyance to him will diminish his actual loss. If the title is made good by the statute of limitations, and there has been no actual disturbance or injury, the damages would be merely nominal.¹ Though in these cases the cause of action accrues upon the execution of the deed, the damages are assessed with reference to the state of facts existing at the time when the assessment is made; and any facts occurring afterwards, even down to the actual assessment of the damages, tending to increase or diminish them, may be given in evidence and considered by the jury.² At least nominal damages are allowed for any breach of these covenants when no actual injury is sustained. The law always infers some injury, and awards this minimum of damages for every violation of contract.³

§ 600. Same subject; where covenant runs with land. In *Eaton v. Lyman*⁴ there is a forcible protest, in the dissenting opinion of Dixon, C. J., against nominal damages for a mere technical breach of such covenants when they are held to run with the land, and are available to those claiming under the covenantee. He says: "In those courts which hold that covenants of seizin and against incumbrances (for both stand upon the same footing and are regarded as of the same nature by all courts) are purely personal and *de presenti*, and so are complete and perfect, or broken and impaired, as soon as made, the doctrine of nominal breach and nominal recovery is very [274] consistent and proper. Such doctrine necessarily results from the nature of the covenants as held by them, the same being broken as soon as made, and so converted into mere choses in action or rights to sue, in the hands of the covenantee, and so deprived of all capacity to run with the land, so as to pass the benefit of them to the grantee of the covenantee. In those courts the recovery is reduced to a merely nominal one where there was seizin in fact or in deed of the

¹ *Smith v. Hughes*, 50 Wis. 620, 7 41 Conn. 112, 130; *Dickey v. Weston*, N. W. Rep. 653; *Wilson v. Forbes*, 2 61 N. H. 23.
Dev. 30.

³ *Morrison v. Underwood*, 20 N. H.

² *Morrison v. Underwood*, 20 N. H. 369; § 9.

⁴ *Miller v. Hartford & S. Ore Co.*, 30 Wis. 41.

land in the covenantor, which passed to the covenantee, who has entered and enjoyed according to the deed; and where the breach complained of is merely a paramount title in a stranger, or an outstanding incumbrance that has not yet been either asserted or extinguished. And the reason why, in such cases, the damages are only nominal is, that if for such breach the covenantee is permitted to recover the consideration and interest, he may get both the purchase-money and retain possession of the land under a title which is defeasible, but which in fact may never be defeated. The entire learning of those courts holding to the *de presenti* nature of the covenants is very concisely exhibited in the numberless citations made in *Morrison v. Underwood*.¹ . . . But this court having in . . . [*Mecklem v. Blake*]² . . . as well as others, adopted and declared the rule of interpretation that covenants of seizin and against incumbrances are real and *de futuro*, and not personal and *de presenti*, so that they run with the land and pass the benefits of them to the grantees of the covenantee, it follows as clearly and undeniably as one proposition can follow from another, that there can be no nominal breach, or nominal recovery, where the covenantee, or those holding under him, take and retain undisturbed possession of the land without molestation or loss from the paramount outstanding title or incumbrance. This follows necessarily and logically from the premises respecting the nature and operation of the covenants. They are thus placed upon the same footing as other covenants which inhere in and attach to the realty, and run with it until the breach ensues. They belong to the same category or class with the covenants for further assurance, of quiet enjoyment and of warranty, which are dependent upon posterior events, and of which there can be no breach [275] until such events happen. Such is the logical sequence of the doctrine we have adopted, and such it will be found are the decisions of those courts in which the same doctrine prevails." Nominal damages are denied in Ohio.³ A grantee who has been wrongfully prevented from using a water power may re-

¹ 20 N. H. 369.² 22 Wis. 495.³ *Backus v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 585; *Foote v. Burnett*, 10Ohio, 318, 36 Am. Dec. 90; *Devore v. Sunderland*, 17 Ohio, 52. See *Schofield v. Iowa Homestead Co.*, 32 Iowa, 317, 7 Am. Rep. 197.

cover the cost of substituting steam power, and such right was not affected because of the destruction of the mill and machinery existing at the time the conveyance was made, another mill being built in the place of that destroyed, and new machinery being put into it.¹

§ 601. How damages may be prevented or mitigated. Between the execution of the deed, when these covenants are supposed to be broken, and the assessment of damages, the defect of title which constituted the breach of the covenant of seizin may have been remedied by time or accident, the acts of strangers or of the grantor, without the interference in any way of the grantee or his assignee; as by the death of a tenant for life, the performance of a condition or the like, or by the release or purchase of opposing claims. The grantee at the time damages are assessed may, consequently, have the property and interest for which he contracted free of any defect, and this without trouble or expense to himself; and he would in such case, therefore, be equitably entitled to recover nothing more than nominal damages which are implied by law from every breach of covenant, and which give to the grantee a right of action of which he will not be deprived without some act or neglect of his own.² If, after a breach of these covenants, and before action brought to recover damages, the covenantor acquires the paramount title, and, by virtue of other covenants in the deed, that title inures to the covenantee, this fact will go in mitigation of damages and may reduce them to nominal.³ A grantor who obtains a good title cannot

¹ *Hottell v. Farmers' Protective Ass'n*, 25 Colo. 67, 53 Pac. Rep. 327, 71 Am. St. 109.

² *Morrison v. Underwood*, 20 N. H. 369.

³ *Building, Light & Water Co. v. Fray*, 96 Va. 559, 32 S. E. Rep. 58; *Looney v. Reeves*, 5 Kan. App. 279, 48 Pac. Rep. 606; *Kimball v. Bell*, 49 Kan. 173, 30 Pac. Rep. 240; *Croft v. Thornton*, 125 Ala. 391, 28 So. Rep. 84; *Sayre v. Sheffield Land, Iron & Coal Co.*, 106 Ala. 440, 18 So. Rep. 101; *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49; *Knowles v. Ken-*

nedy, 82 Pa. 445; *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 269; *Burke v. Beveridge*, 15 Minn. 205; *Kimball v. Bryant*, 25 Minn. 496, 500; *McCarty v. Leggett*, 3 Hill, 134; *Noonan v. Ilsley*, 21 Wis. 138; *Ogden v. Ball*, 38 Minn. 237, 36 N. W. Rep. 344; *Smith v. Hughes*, 50 Wis. 620, 7 N. W. Rep. 653; *Huntsman v. Hendricks*, 44 Minn. 423, 46 N. W. Rep. 910. See *Blanchard v. Ellis*, 1 Gray, 193; *Burton v. Reeds*, 20 Ind. 87; *Bingham v. Weiderwax*, 1 N. Y. 509; *Tucker v. Clark*, 2 Sandf. Ch. 96; *Boulter v. Hamilton*, 15 Up. Can. C. P. 125;

compel his grantee, after eviction by title paramount, to accept such after-acquired title in satisfaction of the covenants in his deed or in mitigation of damages for their breach.¹ It is held in Missouri that equity will compel the acceptance of such title and enjoin the prosecution of a suit for damages;² but this is contrary to the rule in New York.³ The rule is established in Indiana that the grantor cannot claim a set-off on account of the *mesne* profits enjoyed by the grantee,⁴ though the true owner fails in his action to evict to obtain a judgment for them.⁵ The covenantee cannot recover interest if he has had possession and has not responded to his evictor for *mesne* profits, and then only for such time as he shall have accounted for them.⁶ The rule is that for a total breach the measure of damages is the consideration and interest; and that for a mere technical breach a nominal sum only can be recovered. Between these extremes the recovery may be proportionate to the actual injury; this is the invariable [276] criterion and measure.⁷ Thus, where the covenant was of seizin in fee, and the estate possessed and conveyed was copyhold, the covenant was broken, and the covenantee was held entitled to damages according to the difference in value between a fee-simple and a copyhold estate.⁸ So where a fee-simple has been covenanted for and the title conveyed was subject to a life estate, the value of the latter is recoverable,⁹ and may be computed from life tables.¹⁰

Doedwine v. Webster, 2 Up. Can. Q. B. 224; Cornell v. Jackson, 3 Cushi. 596.

¹ Nichol v. Alexander, 28 Wis. 118; McInnis v. Lyman, 62 id. 191, 22 N. W. Rep. 405; Blanchard v. Ellis, 1 Gray, 199, 61 Am. Dec. 414; Bingham v. Weiderwax, 1 N. Y. 513; Burton v. Reeds, 20 Ind. 93.

² Reese v. Smith, 12 Mo. 344.

³ Tucker v. Clarke, 2 Sandf. Ch. 96.

⁴ Wilson v. Peelle, 78 Ind. 384; Wright v. Nipple, 92 id. 310.

⁵ Rhea v. Swain, 122 Ind. 272, 22 N. E. Rep. 1099, 23 id. 776.

⁶ Hutchins v. Roundtree, 77 Mo. 599.

⁷ Herndon v. Harrison, 34 Miss.

486, 69 Am. Dec. 399; Nutting v. Herbert, 37 N. H. 346; Miller v. Hartford & S. Ore Co., 41 Conn. 130; Whiting v. Dewey, 15 Pick. 428; Brown v. Allen, 73 Hun, 291, 26 N. Y. Supp. 299.

⁸ Gray v. Briscoe, Noy, 142.

⁹ Curtis v. Brunnon, 98 Tenn. 153, 38 S. W. Rep. 1073; Guthrie v. Pugsley, 12 Johns. 126; Tanner v. Livingston, 12 Wend. 85; Lockwood v. Sturdevant, 6 Conn. 373; Recois v. Younglove, 8 Baxter, 385. See Blanchard v. Blanchard, 48 Me. 174; Rickert v. Snyder, 9 Wend. 446.

¹⁰ Mills v. Catlin, 22 Vt. 98; Donnelly v. M. & M. R. Co., 18 Iowa, 289, 87 Am. Dec. 391. See § 455.

§ 602. **Same subject.** Where a deed of the entirety in fee was made with covenants of seizin, power to sell and of warranty, and the grantors owned only an undivided two-sixths and a life estate in the other four-sixths, the plaintiff was held entitled to recover damages in an action for breach of the former covenants only in proportion to the value of the part for which the title had failed; that is, four-sixths of the consideration money and interest; but, as the life estate of the defendants in the four-sixths passed to the plaintiff by the deed, the value of such life estate must be deducted; nor was interest to be allowed during the life of the defendants, as, during that time, the plaintiff could not be called on for *mesne* profits.¹ If A. conveys land to B., with covenant of seizin, and the title to part only of the land fails, the sale will not be rescinded by a recovery at law so as to give the vendee a right of action to recover the whole consideration money; but the plaintiff is only entitled to recover in proportion to the extent of the defect of title, or the value of the part lost. The measure of damages is the value of the part to which the title [277] has failed, with reference to the value of the residue. In a New York case² Kent, C. J., said: "Another question is, whether the defendant ought not to have been permitted to show that the lands in the deed of 1795, of which there was a failure of title, were of inferior quality to the other lands conveyed by the same deed. This appears to be reasonable; and the rule would operate with equal justice as to all the parties to a conveyance. Suppose a valuable stream of water, with expensive improvements upon it, with ten acres of adjoining barren land, was sold for \$10,000; and it should afterwards appear that the title to the stream with the improvements on it failed, but remained good as to the residue of the land; would it not be unjust that the grantor should be limited in damages under his covenants to an apportionment according to the number of acres lost, when the sole inducement to the purchase was defeated, and the whole value of the purchase had failed? So, on the other hand, if only the title to the

¹ *Tone v. Wilson*, 81 Ill. 529; *Scantlin v. Allison*, 12 Kan. 851; *Guthrie v. Pugsley*, 12 Johns. 126; *Ela v.*

Card, 2 N. H. 175, 9 Am. Dec. 46; *Downer v. Smith*, 38 Vt. 464.

² *Morris v. Phelps*, 5 Johns. 49, 4 Am. Dec. 323.

nine barren acres failed, the vendor would feel the weight of extreme injustice if he was obliged to refund nine-tenths of the consideration money. This is not the rule of assessment. The law will apportion the damages to the measure of value between the land lost and the land preserved. . . . The recovery in value upon the warranty at common law was regulated by the same rule. The *capias ad valentiam* was issued to take as much land of the warrantor as was equal to the value of the lands lost. *Cape de terra in balliva tua ad valentiam tante terre quod B. clamat ut jus suum*; and if the lands of the warrantor lay in another county, different from that in which the lands in controversy lay, then the lands in question were first appraised by a sheriff's inquest, and afterwards the writ went to the sheriff of the other county to take lands of equal value, which value was specified in the writ.¹ If the recovery in the present case had been of an undivided part of all the lands conveyed by the deed, then the rule of apportionment of damages according to the relative value could not have applied, and this distinction runs through the authorities on the subject. But the plaintiff's title failed only to an undivided part of a specified tract, and remained good to another and larger tract conveyed by the same [278] deed, and included in the same consideration. The apportionment, according to the relative value, is therefore strictly and justly applicable."² The prevailing rule is clearly expressed by Cassoday, J., in a Wisconsin case: "In the absence of fraud, we conclude that where the title fails to only a part of the land conveyed, the grantee may recover in an action on the covenants of seizin and right to convey, or upon an agreement to convey, such a fractional part of the whole consideration paid as the value, at the time of the purchase, of the piece to which the title fails bears to the value of the whole piece purchased, and interest thereon during the time he has been deprived of the use of such fractional part, but not exceeding

¹ Bracton, 384, a, b.

Jackson, 3 Cush. 506. See, as to the rule in Indiana, Wright v. Nipple, 92 Ind. 319; Wilson v. Peelle, 78 id. 384; Wood v. Bibbins, 58 id. 392. Compare American Cannel Coal Co. v. Seitz, 101 id. 182.

² Clapp v. Herdman, 25 Ill. App. 509; Hunt v. Raplee, 44 Hun, 149; Moses v. Wallace, 7 Lea, 413; Blanchard v. Hoxie, 31 Mo. 376; Hubbard v. Norton, 10 Conn. 422; Partridge v. Hatch, 18 N. H. 494; Cornell v.

six years.”¹ Where there is a failure of title to a part and the paramount title is extinguished by the grantee the measure of damages is the amount paid if it does not exceed the value of that part as found by the jury. If it does exceed it, the jury are to be guided, not by the quantity of land, but by the value that such part proportionately bears to the value of the whole tract as estimated by the consideration in the deed.² A peculiar case has recently been decided by the Maine court. The defendant held a mortgage as security for the mortgagor’s note. The latter arranged with the plaintiff to furnish him money on a new mortgage to discharge that held by the defendant. In lieu of such mortgage the defendant assigned his mortgage to plaintiff as security for the mortgagor’s note. In the assignment there was a covenant that there was no incumbrance on the mortgage and that the assignor had a right to sell and convey. Some years before the mortgagee had released a portion of the mortgaged premises to the mortgagor, a fact which was not in his recollection when the assignment was made. At the date of the transaction between the parties to this action the mortgage covered property worth more by several hundreds of dollars than the amount advanced by plaintiff; between then and the time of the foreclosure it depreciated so as to leave a considerable sum due on the note. It was held in an action on defendant’s covenant that he was liable only for nominal damages.³

SECTION 4.

COVENANTS OF WARRANTY AND FOR QUIET ENJOYMENT.

[279] § 603. Their scope, and the remedy for a breach. These covenants are usually treated as synonymous, since a concurrence of the same circumstances is necessary to consti-

¹ *Sample v. Whorton*, 68 Wis. 626, 32 N. W. Rep. 690. In this case Taylor, J., expressed, in a dissenting opinion, the conviction that the rule stated is merely a general one, applicable to ordinary cases, and should not be applied where the part to which the title fails is of more value than any of the other

parts of the tract purchased by reason of facts which neither of the parties knew at the time of the bargain, and which, therefore, had no influence in fixing the price.

² *Price v. Deal*, 90 N. C. 290.

³ *People’s Savings Bank v. Hill*, 81 Me. 71, 16 Atl. Rep. 337.

tute a breach, since they equally possess the capacity to run with the land, and the rule in respect to the measure of damages is the same as to both.¹ They are assurances to the purchaser and his assigns against a future loss of title to and possession of the granted premises; in other words, their meaning is that neither the grantee nor his heirs or assigns shall be deprived of the possession by force of a paramount title.² But if, when a deed is executed, the grantor had neither title nor seizin the covenant cannot be enforced by the heirs of the grantee or his assignee; the right of action is in the personal representative of the grantee.³ The purchaser may rely on the covenants although he bought the land with knowledge that the title was defective,⁴ and although the deed and the mortgage back were a part of the same transaction and contained the same covenants, and the relation of mortgagor and mortgagee subsisted between the parties when suit was instituted.⁵ A deed conveying land as a gift, there being no valuable consideration whatever, will not support an action on the covenant of warranty.⁶ The only remedy open to the covenantee is to sue for a money judgment on the covenant; he cannot have other lands owned by his grantor set aside to make up a deficiency in those to which he was entitled.⁷

¹ *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385; *Rea v. Minkler*, 5 Lans. 196; *Fowler v. Poling*, 2 Barb. 300, 6 id. 165; *Mitchell v. Warner*, 5 Conn. 497; *Herrin v. McEntyre*, 1 Hawks, 410; *Rawle on Cov. Tit.* 208, 215.

² *Rindskopf v. Farmers' Loan & Trust Co.*, 58 Barb. 36; *King v. Kerr*, 5 Ohio, 154, 22 Am. Dec. 777; *Thomas v. Bland*, 91 Ky. 1, 14 S. W. Rep. 955, 11 L. R. A. 249; *Walton v. Campbell*, 51 Neb. 788, 71 N. W. Rep. 737; *Rutherford v. Montgomery*, 14 Tex. Civ. App. 319, 37 S. W. Rep. 625; *Bensley v. Phillips*, 40 Ind. App. 182, 50 N. E. Rep. 488; *Loving v. Groomer*, 142 Mo. 1, 43 S. W. Rep. 647.

The parties to a partition, whether coparceners, joint tenants or tenants in common, are liable upon an implied warranty of title if a loss oc-

curs; but such warranty does not run with the land. *Jones v. Bigstaff*, 15 Ky. L. Rep. 821, 25 S. W. Rep. 889.

³ *Prestwood v. McGowin*, 128 Ala. 267, 29 So. Rep. 386.

⁴ *Jones v. Jones*, 87 Ky. 82, 7 S. W. Rep. 886. But in *Saunders v. Rowe*, 20 Ky. L. Rep. 1082, 48 S. W. 1083, it is held that one who bought land knowing that the mineral rights therein had been sold could not recover on the covenant of warranty.

⁵ *Harrington v. Bean*, 89 Mo. 470, 36 Atl. Rep. 986; *Hardy v. Nelson*, 27 Me. 526; *Hubbard v. Norton*, 10 Conn. 422.

⁶ *Caleote v. Elkin*, 3 Tenn. Cas. 319.

⁷ *Willbarger County v. Robinson*, 5 Tex. Civ. App. 10, 23 S. W. Rep. 824; *Doyle v. Brundred*, 187 Pa. 113, 120, 44 Atl. Rep. 1107.

§ 604. **What is a breach.** These covenants are only broken by an eviction or something equivalent thereto.¹ Formerly they were not broken unless there was an expulsion by the assertion of a paramount title and by process of law. The rule now is that there is a breach whenever there is an involuntary loss of possession by reason of the hostile assertion of an irresistible title. The eviction may be constructive, as where the purchaser is unable to obtain possession by reason of the paramount title being in a third person,² or where the holder of the paramount title demands his interest in such a way and under such conditions that the purchaser is compelled to yield and buy the outstanding paramount title to avoid an ouster.³

¹ *Oliver v. Bush*, 125 Ala. 534, 27 So. Rep. 923; *Jones v. Jones*, 87 Ky. 82, 7 S. W. Rep. 886; *Wagner v. Finnegan*, 51 Minn. 251, 55 N. W. Rep. 1129; *Watkins v. Gregory*, 69 Miss. 469, 13 So. Rep. 696; *Pence v. Gabbert*, 63 Mo. App. 302; *Griffin v. Thomas*, 123 N. C. 310, 38 S. E. Rep. 903; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385; *Owen v. Thomas*, 33 Ill. 320; *Giddings v. Canfield*, 4 Conn. 482, 10 Am. Dec. 162; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Woodward v. Allan*, 3 Dana, 164; *Rickets v. Dickens*, 1 Murph. 343, 4 Am. Dec. 555; *Norton v. Jackson*, 5 Cal. 262; *Booker v. Merriweather*, 4 Litt. 212; *Rickert v. Snyder*, 9 Wend. 416; *Innes v. Agnew*, 1 Ohio, 179; *Post v. Campau*, 42 Mich. 90, 3 N. W. Rep. 272; *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279; *Hannah v. Henderson*, 4 Ind. 174; *Woodford v. Leavenworth*, 14 id. 311; *Simpson v. Hawkins*, 1 Dana, 303; *Stewart v. Drake*, 9 N. J. L. 139; *Sisk v. Woodruff*, 15 Ill. 15; *Crutcher v. Stamp*, 5 Hayw. 100; *Meek v. Bearden*, 5 Yerg. 467; *Gilman v. Haven*, 11 Cush. 330; *Park v. Bates*, 12 Vt. 381, 36 Am. Dec. 347; *Noonan v. Lee*, 2 Black, 490; *Swazey v. Brooks*, 34 Vt. 451; *Knapp v. Marlboro*, id. 234; *Evans v. Lewis*, 5 Harr. 162; *Stewart v. West*, 14 Pa. 336;

Patton v. McFarlane, 3 P. & W. 419; *Fulweiler v. Baugher*, 15 S. & R. 45; *Knepper v. Kurtz*, 58 Pa. 480; *Clark v. McNulty*, 3 S. & R. 361; *McCoy v. Lord*, 19 Barb. 18; *Greenvault v. Davis*, 4 Hill, 643; *Hamilton v. Cutts*, 4 Mass. 349, 3 Am. Dec. 322; *Curtis v. Deering*, 12 Me. 499; *Mitchell v. Warner*, 5 Conn. 497; *Witty v. Hightower*, 12 Sm. & M. 478; *Carter v. Denman*, 23 N. J. L. 260; *Tufts v. Adams*, 8 Pick. 547; *Flanagan v. Ward*, 12 Tex. 209; *Peck v. Hensley*, 20 id. 673.

² *Butt v. Riffe*, 78 Ky. 352; *Pryse v. McGuire*, 81 Ky. 608; *Cheney v. Straube*, 43 Neb. 879, 62 N. W. Rep. 234; *Jennings v. Kiernan*, 25 Ore. 349, 55 Pac. Rep. 443; *Eustis v. Cowherd*, 4 Tex. Civ. App. 343, 23 S. W. Rep. 737; *Fritz v. Pusey*, 31 Minn. 368, 18 N. W. Rep. 94; *Murphy v. Price*, 48 Mo. 247; *Clark v. Conroe's Estate*, 38 Vt. 469; *Russ v. Steele*, 40 id. 310; *Sheffey's Ex'r v. Gardiner*, 79 Va. 313; *Duvall v. Craig*, 2 Wheat. 62; *Prestwood v. McGowin*, 128 Ala. 267, 272, 29 So. Rep. 386.

³ *Beasley v. Phillips*, 20 Ind. App. 182, 191, 50 N. E. Rep. 488; *West Coast Manuf. & I. Co. v. West Coast Imp. Co.*, 25 Wash. 627, 66 Pac. Rep. 97; *Leet v. Gratz*, 92 Mo. App. 422, 431.

If possession is yielded to such person the vendee assumes the risk of showing his right thereto.¹ The eviction must be alleged and shown to be by a paramount title existing before or at the time the defendant made his covenant.² Where [280] the grantor had title at law and in equity to the land conveyed, and the breach assigned was the making of a subsequent conveyance which, by being first recorded, enabled the grantee under the registry laws to hold the land, the court held that "the covenant of warranty relates solely to the title as it was at the time the conveyance was made; that it merely binds the grantor to protect the grantee and his assigns against a lawful and better title existing before or at the date of the grant," and that an action would not lie on a general covenant of warranty in such a case.³ The decisions are not entirely in accord as to what shall be deemed an eviction for the purpose of recovery on these covenants; but an eviction, or what is deemed equivalent, by paramount title is essential to the right to damages and is universally required.

An outstanding title in either the federal or state government is generally held to constitute an eviction.⁴ If land is actually occupied by another, at the time of the execution of

¹ *Cheney v. Straube*, 35 Neb. 521, 53 N. W. Rep. 479; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. Rep. 284; *Clark v. Munford*, 62 Tex. 531.

² *Bedell v. Christy*, 62 Kan. 760, 64 Pac. Rep. 629; *Ravenal v. Ingram*, 131 N. C. 519, 42 S. E. Rep. 967; *Wade v. Comstock*, 11 Ohio St. 71, and cases cited in first note to this section.

In *Knapp v. Marlboro*, 34 Vt. 451, the plaintiff and his grantors had been in possession of the premises in controversy for more than half a century, and then he was evicted by a third person; it was held, in an action against his covenantor, that such long continued possession raised a conclusive presumption that he was not evicted by title paramount.

In *Woodward v. Allan*, 3 Dana, 161, while the necessity of eviction by a paramount title is admitted, it is held that an allegation that the

eviction was by an adverse superior title was sufficient, and that it need not be averred to be an older title if stated to be adverse and not derived from the plaintiff himself. See *Pence v. Duvall*, 9 B. Mon. 48; *Curtis v. Deering*, 12 Me. 499; *Staples v. Flint*, 28 Vt. 791; *Lukens v. Nicholson*, 4 Phila. 22; *Maeder v. Carondelet*, 26 Mo. 112; *Scott v. Scott*, 70 Pa. 244.

³ *Wade v. Comstock*, 11 Ohio St. 71; *Droe v. Stephens*, 101 Iowa, 358, 70 N. W. Rep. 610. But compare *Curtis v. Deering*, *supra*; *Maeder v. Carondelet*, 26 Mo. 114.

⁴ *Green v. Irving*, 54 Miss. 462; *McGary v. Hastings*, 39 Cal. 360; *Brown v. Allen*, 10 N. Y. Supp. 711, 57 Hun, 219; *McLennan v. Prentiss*, 85 Wis. 427, 55 N. W. Rep. 761; *Povey v. Jones*, 71 Miss. 617, 16 So. Rep. 252, 42 Am. St. 186; *Harrington v. Clark*, 56 Kan. 614, 34 Pac. Rep. 631.

the conveyance, under an adverse and better title the covenant is broken without action by either party.¹ But if the grantee permits the possession of another to ripen into a good title by lapse of time, he has no remedy on the covenant.² If a purchaser does not investigate the title to vacant land which is already occupied and fails to take possession of it until the occupier has acquired title, he cannot recover on the covenant of warranty although he sues thereon immediately after his failure to establish his title, and no superior title was theretofore asserted.³ A vendee cannot claim damages because of an eviction which was the result of his acts.⁴ A judgment merely establishing an adverse paramount title does not constitute an eviction unless, at least, the land is vacant and unoccupied.⁵ If the action is based on the covenant against incumbrances and also on the covenant of warranty, the exercise of an outstanding right to flow a portion of the land which was covered with water, the plaintiff being thereby deprived of its use and possession, constitutes a substantial eviction, and is an eviction *pro tanto*.⁶

§ 605. The rule of damages; remote losses. The measure of compensation is not the same in all the states. In a majority the consideration, or the value of the land at the time of the sale as then agreed upon by the parties, or as determined by the price paid, with interest for such time as the purchaser has been deprived of, or is accountable to the superior owner for, the *mesne* profits, together with the costs and expenses incurred in defense of the action by which the injured party was evicted, is the measure for a total failure of title.⁷ This measure of damages does not harmonize with

¹ Shattuck v. Lamb, 65 N. Y. 499, 23 Am. Rep. 636, overruling Kortz v. Carpenter, 5 Johns. 120; Moore v. Vail, 17 Ill. 185.

² Rindskopf v. Farmers' Loan & Trust Co., 58 Barb. 36.

³ Claflin v. Case, 53 Kan. 560, 38 Pac. Rep. 1062.

⁴ Hester v. Hunnicutt, 104 Ala. 282, 16 So. Rep. 162.

⁵ Wagner v. Finnegan, 54 Minn. 251, 55 N. W. Rep. 1129.

⁶ Harrington v. Bean, 89 Me. 470, 36 Atl. Rep. 986.

⁷ Webb v. Holt, 113 Mich. 338, 71 N. W. Rep. 637; Craven v. Clary, 8 Kan. App. 295, 55 Pac. Rep. 679; Blackwell v. McBride, 14 Ky. L. Rep. 760 (Ky. Super. Ct.); Matheny v. Stewart, 108 Mo. 73, 17 S. W. Rep. 1014; Cheney v. Straube, 35 Neb. 521, 53 N. W. Rep. 479, citing the text; Rash v. Jenne, 26 Ore. 169, 37 Pac. Rep. 538 (the measure of recovery is

the rule which is applied in other cases, nor conform to the principle that a party injured by the breach of a contract shall receive compensation to such an amount as will place him in as good condition as if the contract had been performed. It

not affected by any agreement between the covenantor and his agent, nor because the purchase-money never reached the covenantor; *Hunt v. Nolen*, 46 S. C. 551, 24 S. E. Rep. 543; *Kempner v. Beaumont Lumber Co.*, 20 Tex. Civ. App. 307, 49 S. W. Rep. 412; *Roller v. Effinger's Ex'r*, 88 Va. 641, 14 S. E. Rep. 337; *Taylor v. Wallace*, 20 Colo. 211, 37 Pac. Rep. 963; *Prestwood v. McGowin*, 128 Ala. 267, 277, 29 So. Rep. 386; *Kingsbury v. Milner*, 69 Ala. 502; *Click v. Green*, 77 Va. 827; *Sheffey's Ex'r v. Gardiner*, 79 id. 313; *Moreland v. Metz*, 24 W. Va. 119, 138, 49 Am. Rep. 246; *Butcher v. Peterson*, 26 W. Va. 447, 53 Am. Rep. 89; *Cook v. Curtis*, 68 Mich. 611, 36 N. W. Rep. 692; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. Rep. 284; *Stebbins v. Wolf*, 33 Kan. 765, 7 Pac. Rep. 542; *Hoffman v. Bosch*, 18 Nev. 360, 4 Pac. Rep. 703; *Brown v. Dickerson*, 12 Pa. 372; *Cox v. Henry*, 32 id. 18; *Wood v. Kingston Coal Co.*, 48 Ill. 356, 95 Am. Dec. 554; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Dalton v. Bowker*, 8 Nev. 190; *Talbot v. Bedford*, *Cooke*, 447; *Threlkeld v. Fitzhugh*, 2 Leigh, 451; *Jackson v. Turner*, 5 id. 127; *Lowther v. Commonwealth*, 1 Hen. & Mun. 202; *Crenshaw v. Smith*, 5 Munf. 415; *Stout v. Jackson*, 2 Rand. 132; *Williamson v. Test*, 24 Iowa, 138; *Hal-lum v. Todhunter*, id. 166; *Earle v. Middleton*, 1 Cheves, 127; *Armstrong v. Percy*, 5 Wend. 535; *Bond v. Quattlebaum*, 1 McCord, 584, 10 Am. Dec. 702; *McMillan v. Ritchie*, 3 T. B. Mon. 318, 16 Am. Dec. 107; *Morris v. Rowan*, 17 N. J. L. 304; *Hanson v. Buckner*, 4 Dana, 251, 29 Am. Dec. 491; *Kennedy v. Davis*, 7 T. B. Mon. 376; *Taylor v. Holter*, 1 Mont. 688;

Cox's Heirs v. Strode, 2 Bibb, 277, 5 Am. Dec. 603; *Drew v. Towie*, 30 N. H. 531, 64 Am. Dec. 309; *Harding v. Larkin*, 41 Ill. 413; *Booker v. Bill*, 3 Bibb, 173, 6 Am. Dec. 641; *Robards v. Netherland*, 3 Bibb, 529; *Davis v. Hall*, 2 id. 590; *Marshall v. McConnell*, 1 Litt. 419; *Cummins v. Kennedy*, 3 id. 118; *Pence v. Duvall*, 9 R. Mon. 48; *Robertson v. Lemon*, 2 Bush, 301; *McClure v. Gamble*, 27 Pa. 288; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279; *Phillips v. Reichart*, 17 Ind. 120, 79 Am. Dec. 463; *Burton v. Reeds*, 20 Ind. 87; *Cincinnati, etc. R. Co. v. Pearce*, 28 Ind. 502; *Foster v. Thompson*, 41 N. H. 373; *Staats v. Ten Eyck*, 3 Cai. 111, 2 Am. Dec. 254; *Bennett v. Jenkins*, 13 Johns. 50; *Wallace v. Talbot*, 1 McCord, 466; *Grist v. Hodges*, 3 Dev. 198; *Lloyd v. Quinby*, 5 Ohio St. 262; *Wade v. Comstock*, 11 id. 71; *Tong v. Matthews*, 23 Mo. 437; *Swafford v. Whipple*, 3 G. Greene, 261; *Pearson v. Davis*, 1 McMull. 37; *Elliott v. Thompson*, 4 Humph. 99, 40 Am. Dec. 630; *Gridley v. Tucker*, *Freem.* Ch. 209; *Clark v. Burr*, 14 Ohio, 118, 45 Am. Dec. 529; *Whitlock v. Crew*, 28 Ga. 289; *Cathcart v. Bowman*, 5 Pa. 317; *Conrad v. Trustees Grand Grove, etc.*, 64 Wis. 258, 25 N. W. Rep. 24.

On the breach of the covenant of warranty and an eviction, substantial damages are recoverable. *Comstock v. Son*, 154 Mass. 389, 28 N. E. Rep. 296.

In Louisiana there may be a recovery of the purchase price, of the amount of fruits and revenues, if these have been recovered from the vendee with the property, the costs

is founded on the same consideration of justice and policy as that for breach of the covenants of seizin and good right to convey. It is not, however, as logical as in case of the latter; for there the damages are fixed by the value at the time of the breach, and the consideration paid is adopted as the value fixed by the parties. In an early case in Virginia it was said: "The measure of damages is and ought to be the same in case of eviction, whether they be claimed in an action upon a warranty, or covenant of seizin or of power to convey, or for quiet enjoyment; that this measure was settled by the common law, upon principles of justice and sound policy, to be the value at the time of the contract, without regard to the increased or diminished value, or to improvements, and the rents and profits for which the tenant is responsible to the successful owner."¹ The value of the land cannot be recovered although the tract to which the title failed was much more valuable than that which passed by the conveyance, and the latter was bought only to secure the former, and the price paid for that which was conveyed was largely in excess of its value.² The law of the jurisdiction in which the property is situated determines the measure of damages,³ and the rights of parties generally under conveyances.⁴ The right to recover attorneys' fees will be governed by the laws of the state in contemplation by the parties when the conveyance was made and in which the land was situated.⁵ Unless the laws of such state are proven the court will presume them to be the same as those of the forum.⁶

of the suit on warranty or of that bought by the original buyer; the damages suffered, if any, besides the price paid; but there cannot be a recovery based upon the increased value of the property, nor of counsel fees. *Lamerlec v. Barthelmy*, 2 McGloin, 106, and local cases cited.

¹ *Stout v. Jackson*, 2 Rand. 132. See Rawle on Cov. (5th ed.), § 164.

² *Kempner v. Beaumont Lumber Co.*, 20 Tex. Civ. App. 307, 49 S. W. Rep. 412.

³ *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. 95, 14 Atl. Rep. 302.

⁴ *Riley v. Burroughs*, 41 Neb. 296, 59 N. W. Rep. 929; *Kling v. Sejour*, 4 La. Ann. 128; *Succession of Laven-don*, 39 La. Ann. 952, 3 So. Rep. 219; *Succession of Cassidy*, 40 La. Ann. 827, 5 So. Rep. 292. Compare *Bethell v. Bethell*, 54 Ind. 428, 23 Am. Rep. 650; *Crary v. Donovan*, 63 Ind. 513; *Fisher v. Parry*, 68 Ind. 465. And see *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. Rep. 260.

⁵ *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. Rep. 1014.

⁶ *Hazelett v. Woodruff*, 150 Mo. 534, 51 S. W. Rep. 1048.

There cannot be a recovery for losses resulting to the purchaser from breaking up his business and preparing to move upon the land purchased;¹ nor for the expense of removal therefrom after eviction when he buys with knowledge of the existence of a paramount title which he might have extinguished by the expenditure of a less sum than that owing on the purchase price.² Where the conveyance was made in good faith by the actual owner in possession, subject to a mortgage, but in consequence of the failure of the record to show a deed in his chain of title the grantee was unable to borrow money on the land, and in consequence was evicted by a foreclosure of the mortgage, the grantor was not liable for the loss of the land, that being a consequence too remote, he having subsequently procured a deed to supply the missing link in his chain of title.³ A vendee who made improvements, paid taxes and instalments of the purchase-money after his entry, on being evicted by reason of the existence of a paramount title was entitled after his removal of the buildings he erected and the recovery of damages against him by the holder of such title for the detention of the land, to recover from his vendor for the loss of the bargain and the improvements, such loss being measured by deducting the purchase price of the land and all unpaid interest up to the time of eviction from the value of the land at that time; and, in addition to such difference, the taxes and instalments of the purchase-money paid, and the costs and damages awarded against him in the ejectment suit; but from these amounts was to be deducted the value, for the purpose of removal, of the buildings removed; he could recover interest on the purchase-money and on taxes paid only from the time of removal. He could not recover for loss of machinery bought to use on the land because that damage was too remote.⁴

§ 606. Same subject; where property is the consideration. If the amount of the consideration is not expressly agreed upon and has been paid in property, it would follow that the value of that property should be adopted as the basis of damages on

¹ *Gunter v. Beard*, 93 Ala. 227, 9 So. Rep. 589.

² *Id.*

³ *Lamb v. Baker*, 34 Neb. 485, 52 N. W. Rep. 285.

⁴ *Flechten v. Spicer*, 63 Minn. 454, 65 N. W. Rep. 926.

a breach of the covenant of warranty, if the consideration paid is adopted as the criterion, as we have seen is the case in assessing damages for breach of the covenant of seizin and power to convey;¹ but in some cases the value of the land to which the covenant refers is adopted as the standard.² And it has been made a question whether the value for this purpose shall be ascertained at the date of the grant and covenant, or at some earlier date when the contract of sale may have been made. By some of the early cases in Kentucky a very rigid rule was laid down, making the value of the land lost, estimated at the date of the grant, the basis of recovery, though contracted to be conveyed at a much earlier time. If the consideration was stated in the deed that was conclusive;³ not because it was the measure of damages, but because it was the value of the granted land fixed by the parties.⁴ In one case a bond was accepted in 1784, conditioned to convey five hundred acres of land as soon as a patent should issue; it contained also a provision for the conveyance of other land, equal in value, if that should be lost. It was held that the object of the bond was to provide for the contingency of the land being lost before a deed of conveyance should be executed, and did not extend to an eviction after the execution of a deed of conveyance with general warranty. In this case there was a breach of the condition of the bond by failing to execute a deed of conveyance; suit [283] was brought, and in 1805 a compromise made, and a deed with general warranty executed. The value of the land in 1805, when the deed was executed, and not in 1784, with interest, was held to be the measure of damages. The consideration paid was evidence of its value. The deed was deemed to have been received in satisfaction of the bond by the compromise, and to have extinguished all right to proceed upon the bond. The court said: "In deciding upon the amount which should be recovered . . . we must look to the covenants of warranty contained in the deeds of conveyance. It

¹ See § 575; McGuffey v. Humes, 85 Tenn. 26, 1 S. W. Rep. 506; Cook v. Curtis, 68 Mich. 611, 36 N. W. Rep. 692.

² Evans v. Fulton, 134 Mo. 653, 662, 36 S. W. Rep. 230, quoting the text;

Byrnes v. Rich, 5 Gray, 518; Hodges v. Thayer, 110 Mass. 286.

³ McMillan v. Ritchie, 3 T. B. Mon. 348, 16 Am. Dec. 107.

⁴ Marshall v. McConnell, 1 Litt. 419.

would no doubt have been competent for the parties when the deeds were executed, by a clause to that effect, to have referred to the condition of the bond, and, by adopting it as part of the covenant of warranty contained in the deeds, made the stipulations in that condition control the recovery on the covenant of warranty. But this they have not done. . . . The amount to be recovered . . . must be regulated by the value of the land at the date of the deeds, and not by the value when the bond was executed; . . . for it is incontrovertibly settled, by repeated decisions of this court, that the value of the land at the date of the covenant of warranty forms the criterion of damages to be recovered for a breach of the covenant. We know it has been said, and no doubt said correctly, that the consideration given for lands forms a proper inquiry in actions founded on a breach of the covenant of warranty. It is not, however, because the consideration in itself constitutes the measure of damages that it is inquired into; but it is resorted to as a means to ascertain the value of the land. The value of the land at the date of the warranty with interest forms the measure of damages, and the consideration given for the land constitutes evidence of that value; and where the amount of the consideration is definite and certain, it forms evidence of a very persuasive and satisfactory character of the true value. It ought, perhaps, in such a case to be conclusive on the parties; for as it shows the value which the parties themselves put on the land, if they should be concluded by it, they can have no cause to complain. But where the consideration is not of that fixed and certain character, and consists, as in the present case, in the compromise of a contest between the parties, it can form no rational means of ascertain- [284] ing the value of the land. The amount of that consideration is itself uncertain; it cannot be defined by any precise rule, and forms no inquiry in ascertaining the value of the land; but the value of the land must, in such a case, be ascertained by the introduction of other evidence.¹ But in a later case it

¹ In *Cummins v. Kennedy*, 3 Litt. 118, the court said: "The general rule, settled by a current of authorities, is, that, as the conveyance completes the sale, the value of the land conveyed, at the date of conveyance, with interest and costs, forms the criterion of damages; and also that the price stipulated is the best evidence of that value. And where the

was held, on a breach of the covenant of warranty, that restitution to the extent of the failure of consideration is the fixed and only stable and consistent rule; that the true criterion is not the value of the land at the time of the eviction, but the amount received for the lost land and all costs incurred in resisting the eviction.¹ It is believed that the general rule is to make the consideration paid the basis of recovery, and if that is paid in property at an agreed value, the value so agreed upon is taken at the actual value.² The grantor, being indebted to

parties have shown that price in the conveyance, it would not perhaps be going too far to say that they ought to be concluded by it. Hence, if the consideration was paid a long time before the date of the deed, still, if it is expressed, it would fix the criterion, though the land, when conveyed, had greatly risen in value. In this case, however, the parties have shown what constituted the consideration; but still, its then value is uncertain, because it consisted in land, the price of which was not fixed. It is not necessary now to say that in every case parties, where the deed did not fix the price, should be confined to its date, and could, in no case, travel back and show that the consideration had passed long before, and, of course, was of less value: for in this case there are circumstances that show that the warranty ought to be measured by the general rule, notwithstanding the contract was made in 1783 with the testator of the defendant." *Marshall v. McConnell*, 1 Litt. 419.

In *Penne v. Duvall*, 9 B. Mon. 48, Judge Breck said: "The criterion of damages in a case of this kind is the value of the land at the time of the sale and interest; and the best evidence of that value is held to be the price given, or the purchase-money—not the amount actually paid at the time, but the amount secured or stipulated to be paid. We

do not perceive any principle upon which the failure of the grantee to pay the stipulated price can absolve the grantor from his covenants."

¹ *Robertson v. Lemon*, 2 Bush, 301.

² *White v. Street*, 67 Tex. 177, 2 S. W. Rep. 529; *Parish v. White*, 5 Tex. Civ. App. 71, 74, 24 S. W. Rep. 572.

In *Koestenbader v. Pierce*, 41 Iowa, 204, the breach consisted of a previous condemnation of a strip of land granted for the use of a railroad. Day, J., said: "When the parties have, by their agreement, fixed the value of the premises without the incumbrance, the sum so fixed is to be regarded as such value, and must be made the basis of estimating the value with the incumbrance. This rule is just to both parties. In an action on a covenant of warranty, the grantee is entitled to recover such sum as will place him in as good condition as if the covenant had not been broken. *Funk v. Cresswell*, 5 Iowa, 62. Suppose, for illustration, the land in question to have been sold for \$1,500, and that, in fact, at the time of sale, it was worth, unincumbered, only \$1,000, and that the incumbrance depreciates its value \$500. Then, if the actual value of the land at the time of sale, incumbered and unincumbered, is to be made the basis of damages, the grantee could recover only one-third of the consideration paid, although the land is depreciated in value one-half. This does not place him in the

the grantee, issued to the latter bonds, secured by a mortgage, each of which expressed that it was at all times receivable, with accrued interest thereon, at par in payment for lands held by the grantor at the market price. The vendee accepted such bonds for the purpose of acquiring lands from the vendor, and in pursuance of that purpose the deed thereto was made. In an action on the covenant of warranty, it was determined that by these acts the respective parties in effect declared the true value of the bonds and the lands conveyed to be equal — the face value of the bonds, and that they were bound by their acts.¹

§ 607. Same subject; in England and Canada. In [285] England and her Canadian provinces the consideration does not appear to be fixed as the measure of recovery. In *Bunny v. Hopkins*² a sale of building lots was made, with covenants for title, to one who erected buildings thereon and sold them. His purchaser was evicted from a part at the suit of a grantee under a prior deed from the covenantor. This covenantor having died, the evicted party was permitted to claim as a specialty creditor the value of the property, including improvements. The master of the rolls said: "I am of opinion that the measure of the damages upon these covenants includes the amount expended in converting the land into the purposes for which it was sold."³ "Where the plaintiff, who was the lessee of a

condition he would have occupied if no incumbrance existed. Upon the other hand, suppose the price paid is \$1,000, and that the actual value of the land, unincumbered, is \$1,500, and the value, as incumbered, is but \$500 making the depreciation \$1,000. Then, upon the basis of the actual incumbered and unincumbered value, the grantee would recover the whole consideration paid, and he would have the land for nothing. The true rule is this: If the land is worth \$1,500 without incumbrance, and \$1,000 with it, it is damaged to the extent of a third of its value, and if sold for \$1,000, the purchaser is damaged \$333 1-3." *Cook v. Curtis*, 68 Mich. 611, 36 N. W. Rep. 692; *McGuffey v. Humes*, 85 Tenn. 26, 1 S. W. Rep. 596.

¹ *Northern Pacific R. Co. v. Montgomery*, 30 C. C. A. 17, 86 Fed. Rep. 251.

² 27 Beav. 565.

³ In *Hodgins v. Hodgins*, 13 Up. Can. C. P. 146, the plaintiff's father, by indenture of bargain and sale, conveyed to him certain land, the dower of the grantor's wife, the plaintiff's stepmother, not being barred in the deed, whereby he (the grantor) covenanted for quiet enjoyment in consideration, among other things, of five shillings. Upon the grantor's death his widow brought an action for dower against the grantee and recovered judgment, and this action was brought by the covenantor against the grantor's executors for breach of the covenant for quiet enjoyment. Upon a special

term, was evicted, it was held that in actions on the covenant for title or quiet enjoyment the measure of damage was the value of the unexpired part of the term, and the amount of damage recovered against the plaintiff by the ejector as *mesne*

case it was held that the measure of damages in an action founded on a breach of a covenant for quiet enjoyment was not to be governed by the consideration money in the deed of conveyance, and therefore that the plaintiff was entitled to substantial damages, and was entitled to the value of the crops lost by reason of the eviction. But because the plaintiff should have satisfied the demand for dower upon receiving notice, the costs of her action against the plaintiff and of the defense of the same were disallowed. Draper, C. J., in the course of his opinion said: "The widow of the testator brought an action of dower against the now plaintiff, who was testator's son by a former wife, and recovered judgment. He defended the action. The damages he claims now consist of the following items:

£ s. d.

The demandant's costs, etc.,			
in her action of dower..	24	2	0
The now plaintiff's costs of			
defending that action..	10	7	1
The value of plaintiff's			
growing crops upon the			
portion of land assigned			
by metes and bounds to			
demandant	27	10	0
The value of the life inter-			
est of the demandant in			
the land purchased by			
plaintiff.....	100	0	0

"The court is to decide what part, if any, of the above sums should be disallowed. It further appeared that the consideration mentioned to have been paid by the plaintiff to the testator in the deed containing the covenants sued on was only 5s., and the court is called upon also to

determine whether this affects, and if so to what extent, the plaintiff's right to recover and to reduce the verdict accordingly. So far as I can gather from the English decisions, and they are not numerous, the consideration actually paid or expressed in the deed does not affect the amount of damages recoverable in an action for breach of covenant for quiet enjoyment; and upon the principle of some of the cases to which I refer to below I think it clear that the plaintiff has a right to recover for the crops he has lost and the price he has had to pay to secure quiet enjoyment for the future of all the land which the testator conveyed to him. These damages have been ascertained.

"No consideration was proved except what appeared on the face of the deed, which, according to the pleadings, appears to be 'in consideration, among other things, of five shillings.' This is obviously a merely nominal consideration, and consequently cannot be treated as the price agreed upon between the vendor and vendee as the actual value of the land. The foundation, therefore, of the alleged rule recognized or established in the case of *McKinnon v. Burrows*, 3 Up. Can. Q. B. (old series) 590, is wanting. When it is shown that the grantor was father to the grantee, . . . we may fairly assume that the true consideration was natural love and affection, coupled probably with a desire to provide at once for the child of his first wife. Suppose such a consideration to have been expressed without even a nominal money consideration, with full covenants for

profits, without interest.¹ And where an action is brought against the occupier by a person with superior title, and the former compromises by paying money, he is entitled in an action upon the covenant for title to recover the whole sum so

title, and the vendor's own title to have proved defective, the plaintiff would either have been entitled to the indemnity now sought as to the dower or the covenants would be wholly nugatory. The plaintiff's cause of action does not arise from a latent defect in the vendor's title which existed when he acquired it. The right of dower was, at the date of the conveyance to the plaintiff, only inchoate, and springs from the vendor's own act against which he expressly covenants. The action is upon the covenant for quiet enjoyment, which differs from that of title. The latter is broken as soon as entered into, and the damages for that breach are, not without sufficient reason, referred to the time of the breach. Hence, the purchase-money and interest thereon have been held to form the true measure of damages, and the value of the improvements made by the purchaser have been generally excluded from consideration. In this case there was no breach until the vendor died; for till then the right of dower was not consummated. If the time of the breach is to be referred to as affecting the measure of damages, then the plaintiff is entitled to the

amount by which the value of the estate granted is diminished, which amount may be given him without conflicting with the decisions that he shall not recover for improvements made by himself before the breach. None of those decisions, I believe, was in a case where the eviction was made by a dowress, deriving her right from the vendors, and as the authorities seem to establish that she has a right to be endowed of the value at the death of her husband, there would be some ground for a distinction as to the amount of damages recoverable in such a case by the husband's vendee for the eviction and for taking into account the value of his improvements; but it is not necessary to decide this question, as the parties have not raised it." After stating the doctrine laid down in *Bunny v. Hopkins*, the judge continues: "Here the plaintiff seeks only an amount which will satisfy him for not obtaining what the testator covenanted to give him, viz. uninterrupted quiet enjoyment. He asks satisfaction for a partial and temporary interruption. If the vendor had covenanted that in the event of his wife surviving him a sum equal to the value of

¹ *Williams v. Burrell*, 1 C. B. 402.

"So, where a lessor, being tenant for life, with power to grant leases in possession, granted to a lessee in possession a reversionary lease, which, on the lessor's death, reversioner refused to ratify, the lessee recovered from the lessor's executor the premium which he had paid to the lessor, and the difference in value between the term professed to

be granted by the lessor and that ultimately granted by the reversioner, together with the excess of the costs of the second lease over that of the void lease. *Lock v. Furze*, 19 C. B. (N. S.) 96, affirmed L. R. 1 C. P. 441; *Jenkins v. Jones*, 9 Q. B. Div. 128; *Henty v. Wray*, 19 Ch. Div. 492, reversed on another point, 21 Ch. Div. 392."

paid and his costs as between attorney and client, even though he gives the covenantor no notice of his intention to compromise. The only effect of want of notice is to let in the party who is called upon for an indemnity to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident bargain, and that the defendant might have obtained better terms if the opportunity had been given him."¹ Where a trustee, who was not liable on his covenants, conveyed an undivided moiety of land and the beneficial owner of the other undivided moiety conveyed it to the same grantee, the liability of such owner for a breach of the covenant of quiet enjoyment by reason of the existence of rights of way was limited to one-half the damages sustained by the vendee, which were measured by the difference in the value of the land free from and fettered with the rights of way, and the costs incurred by the vendee in defending an action brought to establish the right of way and the costs of an appeal from the judgment in such action.²

§ 608. Same subject; rule in some of the older states. [286] It is not surprising that in a country where the value of real estate fluctuates very little, and is seldom suddenly increased by expensive improvements, that damages for breach [287] of these covenants should be measured by the value of the land at the time of the loss by failure of title and eviction. This rule obtained an early and firm footing in New England, and was for a time in some degree recognized in the early

her dower should be paid the plaintiff as an indemnity, the plaintiff's right to that sum could not have been questioned. Looking at all the circumstances of the present case, I think the covenant for quiet enjoyment entitles the plaintiff to a similar indemnity, and that the sum paid to compromise the widow's claim and the value of the crops lost by the plaintiff should be allowed to him." Compare *Empire Gold Mining Co. v. Jones*, 19 Up. Can. C. P. 245, 257; *Platt v. Grand Trunk R. Co.*, 12 Ont. 119.

In the last case, which is affirmed in 19 Ont. App. 403, the defendant

granted the plaintiff lands with the right and easement of erecting a dam at a designated point. No power to grant such right existed; but it was shown that a dam could not be maintained at such point. The defendant was not liable for the full purchase-money, less the actual value of the land without the supposed right, but only the actual practical value of such right, which was nothing.

¹ *Mayne on Dam.* (6th Eng. ed.) 218; *Smith v. Compton*, 3 B. & Ad. 407; *Rolph v. Crouch*, L. R. 3 Ex. 44.

² *Sutton v. Baillie*, 65 L. T. Rep. 523.

days of other older states.¹ In Maine,² Vermont,³ Mas- [288] sachusetts,⁴ and Connecticut,⁵ it has been adhered to. In Massachusetts no exception is made to the liability for improvements because, prior to their completion, a bill in equity had been brought to restrain the grantee from making them. He may rely upon the warranty and will be protected if he proceeds in good faith.⁶ The rule also prevails in Louisiana, but will not be applied to improvements made after the vendee has notice of a suit begun by the owner of the paramount title unless they added to the value of the land or benefited the warrantor.⁷ In the newer portions of this country the value of real estate rapidly advances with a general or local increase of population; and such increase has been steady and widespread. The regions thus occupied are dotted with cities and villages, built where but lately land was worth little more than government price. A parcel of land sold for five hundred dollars has not unfrequently been so built upon, and so surrounded with improvements, that before an adverse title would be barred by the statute of limitations it has been worth a million of dollars. If the purchaser is evicted by a paramount title, it seems unjust that he should have a legal demand against the vendor who received the five hundred dollars to make good the loss. The parties had equal means of learning the actual state of the title. The sudden increase of

¹ *Liber v. Parsons*, 1 Bay, 19; *Guerard v. Rivers*, id. 265; *Eveleigh v. Stitt*, id. 92; *Witherspoon v. McCalla*, 3 Desaus. 245; *Nelson v. Matthews*, 2 Hen. & Munf. 164, 3 Am. Dec. 620; *Mills v. Bell*, 3 Call, 277.

The rule in South Carolina was changed by *Yurman v. Elmore*, 2 N. & McC. 189, 10 Am. Dec. 586, and in Virginia by *Threlkeld v. Fitzhugh*, 2 Leigh, 451.

² *Cushman v. Blanchard*, 2 Me. 268, 11 Am. Dec. 76; *Swett v. Patrick*, 12 Me. 9; *Hardy v. Nelson*, 27 id. 525; *Elder v. True*, 30 id. 104; *Doherty v. Dolan*, 65 id. 87, 20 Am. Rep. 677; *Williamson v. Williamson*, 71 Me. 412.

³ *Drury v. Shumway*, D. Chip. 111;

Park v. Bates, 12 Vt. 381, 36 Am. Dec. 347; *Keith v. Day*, 15 Vt. 660; *Keeler v. Wood*, 30 id. 242.

⁴ *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182; *Caswell v. Wendell*, 4 Mass. 108; *Bigelow v. Jones*, id. 512; *Norton v. Babcock*, 2 Met. 516; *White v. Whitney*, 3 id. 81. See *Sumner v. Williams*, 8 Mass. 221, 5 Am. Dec. 83. See next section for some limitations to the rule.

⁵ *Beecher v. Baldwin*, 55 Conn. 419, 3 Am. St. 57, 12 Atl. Rep. 401; *Horsford v. Wright*, Kirby, 3; *Sterling v. Peet*, 14 Conn. 245.

⁶ *Ceccont v. Rodden*, 147 Mass. 164, 16 N. E. Rep. 749.

⁷ *Coleman v. Ballard's Heirs*, 13 La. Ann. 512.

value was not in the contemplation of the vendor. So far as it was the result of improvements, he did not consciously become a guarantor. The party making them proceeded on his own judgment, and with a view to his own advantage, with equal knowledge of the title. The rule of damages generally adopted is a reasonable limitation of the vendor's responsibility, and equalizes and apporions between the parties, according to their respective interests, the hazard of loss from failure of title.¹

§ 609. **Same subject; rule in case of partial breach and where lien is satisfied.** For a partial breach damages will be assessed *pro tanto*, according to the recognized standard for [289] a total breach. Thus, for example, if a conveyance is made of several parcels and the grantee is evicted by paramount title from one of them, the value of that parcel, measured by the consideration, or the valuation at the date of eviction, as the rule may be, will be the measure of damages.² Applying the same rule to a case where a part of one parcel is lost by failure of title, or the title to the undivided part of the whole, the measure of damages is a ratable part of the consideration or value of such parcel, or of the entirety, ascertained in the same manner.³ If the breach results from an unexpired term or lease the measure of damages will be the value of the use of the premises during the time the purchaser

¹ See *King v. Kerr*, 5 Ohio, 154, 73 Am. Dec. 777; *Stebbins v. Wolf*, 33 Kan. 765, 7 Pac. Rep. 542, quoting the text. In *Wade v. Comstock*, 11 Ohio St. 71, the court says the rule rests on principles of public policy.

² *Whitzman v. Hirsh*, 87 Tenn. 513, 11 S. W. Rep. 421; *Mette v. Dow*, 9 Lea. 93; *Scheible v. Slagle*, 89 Ind. 323; *Butcher v. Peterson*, 26 W. Va. 447, 53 Am. Rep. 89; *Clarke v. Hargrove*, 7 Gratt. 399; *Dickins v. Shepard*, 3 Murph. 526; *Raines v. Callo-way*, 27 Tex. 678; *Griffin v. Reynolds*, 17 How. 609; *Morris v. Harris*, 9 Gill, 19; *Dougherty v. Duvall's Heirs*, 9 B. Mon. 57; *Hunt v. Orwig*, 17 id. 73, 66 Am. Dec. 144; *Boyle v. Edwards*, 114 Mass. 373; *Williams v. Beeman*, 2

Dev. 483; *Major v. Donnovant*, 25 Ill. 262; *Hoot v. Spade*, 20 Ind. 326; *Dimmick v. Lockwood*, 10 Wend. 142; *Blackwell v. McBride*, 14 Ky. L. Rep. 760 (Ky. Super. Ct.). See *King v. Ryle*, 8 S. & R. 166; *Adams v. Conover*, 22 Hun. 424; *Mischke v. Baughn*, 52 Iowa, 528, 3 N. W. Rep. 543; *Long v. Sinclair*, 40 Mich. 569; *Winnipiseogee Paper Co. v. Eaton*, 65 N. H. 13.

³ *Id.*; *Aiken v. McDonald*, 43 S. C. 29, 49 Am. St. 817, 20 S. E. Rep. 796; *Hynes v. Packard*, 92 Tex. 44, 45 S. W. Rep. 562; *Southern Wood Manuf. & C. Co. v. Davenport*, 50 La. Ann. 505, 23 So. Rep. 448; *Hunt v. Nolen*, 46 S. C. 356, 24 S. E. Rep. 310; *Downer v. Smith*, 38 Vt. 464.

is deprived of them.¹ The amount agreed to be paid by the tenant will ordinarily be considered to be such value.² If a partial eviction results from the existence of a public easement the recovery is to be measured by the depreciation in the value of the land, if any, resulting from the burden, with interest from the time of the eviction, and the plaintiff's costs in the action which resulted in the establishment of the public right.³ Where there was an existing right on the part of a city to open a street through a tract of land the purchaser was entitled to such sum as would compensate him for any loss or diminution in the value of the whole lot resulting from the making of the street in a reasonable manner considering the natural conditions. Such damage could not be less than the intrinsic value of the land actually taken; within the price paid for the whole tract no allowance should be made for the enhancement of the value of the land because of the opening of the street, nor for the result of negligence in doing so.⁴ The plaintiff might show that the strip taken had a peculiar value for particular purposes, and also the manner in which the street was opened.⁵ The object of the law being compensation according to the standard which has been indicated, any partial compensation, realized as an occupant, rendering the eviction less than a total loss, may reduce the recovery; as where the plaintiff has recovered from the evictor a sum for betterments, which passed to the covenantee with the land at the time of the sale.⁶

¹ Fritz v. Pusey, 31 Minn. 368, 18 N. W. Rep. 94; Moreland v. Metz, 24 W. Va. 119, 139, 49 Am. Rep. 246.

² Moreland v. Metz, *supra*.

³ Hynes v. Esty, 133 N. Y. 342, 31 N. E. Rep. 105.

⁴ James v. Louisville Public Warehouse Co., 23 Ky. L. Rep. 1216, 64 S. W. Rep. 966.

⁵ Louisville Public Warehouse Co. v. James, 70 S. W. Rep. 1046.

⁶ Booker v. Bell, 3 Bibb. 173, 6 Am. Dec. 641; King v. Kerr, 5 Ohio. 154, 22 Am. Dec. 777; Drury v. Shumway, D. Chip. 111; Mason v. Kellogg, 38 Mich. 132.

In Drew v. Towle, 30 N. H. 531, 64

Am. Dec. 309, it was held that a grantee of land under a deed containing covenants of warranty, who goes into possession, owes no duty to the grantor to remain in possession for the purpose of litigating a question of the increased value of the estate from betterments while in possession of those under whom he claims, but may at once surrender to any one having the paramount title; and no deduction will be made from the damages to which he would otherwise be entitled by reason of any such claim of betterments of which he might have availed himself. This seems to ignore the duty

If the eviction is by some paramount charge or lien which may be discharged by payment of a sum not larger than the damages which would be recoverable if the eviction were under an absolute paramount title, as where a mortgagee enters for the purpose of foreclosure, the measure of damages [290] is the amount of the debt so secured.¹ In *Tufts v. Adams*² land was granted by A. to T. with covenants against incumbrances and of general warranty, but incumbered by a mortgage to C., on which C. subsequently recovered conditional judgment and obtained possession of the land. While the land continued in T.'s possession he mortgaged it for a smaller amount than C.'s mortgage. After C. thus obtained possession T. brought an action against A. for breach of the covenants. And it was held: 1st. That the covenant against incumbrance was broken when the deed was executed, but that T. could recover only nominal damages, as he had paid nothing to remove the incumbrance. 2d. That the covenant of warranty was broken, and that the damages recoverable in the action was the amount of C.'s judgment for debts and costs, deducting the amount of the mortgage which T. had himself made; also, that if T., before judgment, paid off the mortgage made by himself, he could recover the whole amount without such deduction. In such cases the recovery is limited to the sum which would be sufficient to extinguish the adverse claim if the action on the covenant is brought while such claim is defeasible. But it has been held that a covenantee so evicted is not obliged to redeem, and that after the redemption expires and the title under the foreclosure becomes absolute he may recover full damages.³ But it would be otherwise if the covenantee owed purchase-money, presently payable to the covenantor, and sufficient in amount to

of a plaintiff to exert himself to lessen damages. See § 88; *Weed v. Larkin*, 49 Ill. 99; *Franklin v. Smith*, 21 Wend. 624; *Barmon v. Lithauer*, 4 Keyes, 317.

¹*Donohoe v. Emery*, 9 Met. 63; *Tufts v. Adams*, 8 Pick. 547; *White v. Whitney*, 3 Met. 81; *Winslow v. McCall*, 32 Barb. 241; *Holbrook v. Weatherbee*, 12 Me. 502; *Furnas v.*

Durgin, 119 Mass. 500, 20 Am. Rep. 341; *Leet v. Gratz*, 92 Mo. App. 422.

²8 Pick. 550.

³*Elder v. True*, 32 Me. 104; *Lloyd v. Quinby*, 5 Ohio St. 262; *Stewart v. Drake*, 9 N. J. L. 139; *Miller v. Halsey*, 14 id. 48; *Burk v. Clements*, 16 Ind. 132; *Chapel v. Bull*, 17 Mass. 213; *Norton v. Babcock*, 2 Met. 510. See *Smith v. Dixon*, 27 Ohio St. 471.

discharge the incumbrance or redeem the land.¹ So, if the covenantor leave in the hands of the covenantee money sufficient to remove the incumbrance, and the latter undertakes to procure a discharge of it, the covenant of warranty is satisfied.² If the grantee has made improvements on the portion of the property title to which has not failed and the grantor is not financially able to take a reconveyance and place the grantee *in statu quo*, the decree in a suit foreclosing the purchase-money mortgage may allow a deduction from the amount due to the extent of the damages sustained by the grantee because of the partial failure of the title.³ If the grantee of standing timber has cut all that was on the land when his deed was made he can recover only nominal damages on the covenant of warranty.⁴

§ 610. Same subject; where covenantee has extinguished adverse title. Where the grantee purchases the land [291] upon the foreclosure of a mortgage existing prior to the grant, this will give him a right of action on the covenants to the extent of the amount paid by him to relieve the land.⁵ He cannot increase his recovery by assigning his bid to another and permitting him to obtain a deed.⁶ So in other cases; if the covenantee has extinguished the adverse title, his recovery on any of the covenants will be limited to the amount paid by him for that purpose, including the incidental expenses and reasonable compensation for his trouble, not exceeding in all the limit of damages for a total breach.⁷ In *Dale v. Shively*.⁸

¹ *Harper v. Jeffries*, 5 Whart. 26; *McGinnis v. Noble*, 7 W. & S. 454; *Mellon's Appeal*, 32 Pa. 121; *Copeland v. Copeland*, 30 Me. 446; *Pitman v. Connor*, 27 Ind. 337.

² *Blood v. Wilkins*, 43 Iowa. 565.

³ *Rockwell v. Wells*, 101 Mich. 57, 62 N. W. Rep. 165. See *Comegys v. Davidson*, 154 Pa. 534, 26 Atl. Rep. 618.

⁴ *Britton v. Nuffin*, 120 N. C. 87, 26 S. E. Rep. 642.

⁵ *McGinnis v. Noble*, 7 W. & S. 454; *Andrews v. Appel*, 22 Hun. 429; *Cowdrey v. Colt*, 3 Robert. 210, 44

N. Y. 383, 4 Am. Rep. 690; *Burk v. Clements*, 16 Ind. 132. See *Whitney v. Dinsmore*, 6 Cush. 124.

⁶ *Cowdrey v. Colt*, *supra*.

⁷ *James v. Lamb*, 2 Tex. Civ. App. 185, 21 S. W. Rep. 172; *McClelland v. Moore*, 48 Tex. 363; *Craven v. Clary*, 8 Kan. App. 295, 55 Pac. Rep. 679; *Cheney v. Straube*, 35 Neb. 521, 53 N. W. Rep. 479, citing the text; *Roller v. Edinger's Ex'r*, 88 Va. 641, 14 S. E. Rep. 537; *Dillabunt v. Railway Co.*, 59 Ark. 629, 27 S. W. Rep. 1002, 28 id. 657, citing the text; *Lent v. Gratz*, 92 Mo. App. 492, 494; *Blackwell v. Mo-*

the holders of the paramount title were Indians, and had to be searched for in the Indian Territory and their conveyances had to be approved by the secretary of the interior; it was held that the party so procuring the adverse title was entitled to pay for his time and trouble, traveling expenses and the amount paid for the title.

In *Leffingwell v. Elliott*¹ counsel fees paid were disallowed, but the court held that if the plaintiff was put to trouble and expense in extinguishing the paramount title he was entitled to compensation therefor; that he might recover for time thus employed, for expense of horses and carriages, and for board, as well as the expense of preparing for trial and attendance at court. This action was brought on the covenants against incumbrances and of warranty, and the plaintiff presented three [292] classes of claims. The first was for expenses incurred, and money paid to extinguish the outstanding title before the commencement of the action. Of this class the auditor stated an account in which, besides the sums paid to extinguish the adverse titles, with interest from the time of the payments, there were charges for the plaintiff's time employed in extinguishing the titles, with interest from the service of the writ; for incidental expenses for horses and carriages, board and lodgings, while the plaintiffs were from home, and interest

Bride, 14 Ky. L. Rep. 760 (Ky. Super. Ct.); *Leffingwell v. Elliott*, 10 Pick. 204, 8 id. 457, 19 Am. Dec. 343; *Thayer v. Clemence*, 22 Pick. 490; *Estabrook v. Smith*, 6 Gray, 572, 66 Am. Dec. 445; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Lewis v. Harris*, 31 Ala. 689; *Swett v. Patrick*, 12 Me. 9; *Kelly v. Low*, 18 id. 244; *Fawcett v. Woods*, 5 Iowa, 400; *Dale v. Shively*, 8 Kan. 276; *Spring v. Chase*, 22 Me. 505. 39 Am. Dec. 595; *Hurd v. Hall*, 12 Wis. 112; *Claycomb v. Munger*, 51 Ill. 373; *Bailey v. Scott*, 13 Wis. 619; *Loomis v. Bedel*, 11 N. H. 74; *McKee v. Bain*, 11 Kan. 569; *Yokum v. Thomas*, 15 Iowa, 67; *Dickson v. Desire*, 23 Mo. 151, 66 Am. Dec. 661; *Lane v. Fury*, 31 Ohio St. 574; *Allis v. Nininger*, 25 Minn.

525; *Richards v. Iowa Homestead Co.*, 44 Iowa, 304, 24 Am. Rep. 745; *Jones v. Lightfoot*, 10 Ala. 17. See *Brady v. Spureck*, 27 Ill. 478.

A contrary rule is favored in *Thiele v. Axell*, 5 Tex. Civ. App. 548, 556, 24 S. W. Rep. 803. No authorities are referred to, and the view expressed is opposed to that which has been announced in several cases in that state. See *McClelland v. Moore*, 48 Tex. 355; *Denson v. Love*, 58 id. 471; *James v. Lamb*, 21 S. W. Rep. 172, 2 Tex. Civ. App. 185. The Arkansas court has declined to follow the case first cited. *Dillahunt v. Railway Co.*, 59 Ark. 629, 27 S. W. Rep. 1002, 28 id. 657.

¹ 10 Pick. 204.

from the time the same were paid; and for sums paid for advice and services of counsel. The second class was for expenses incurred and payments made, similar to those in the first class, subsequently to the service of the writ, not, however, including counsel fees. The third class was for expenses and charges incurred in preparing this case for trial, including the summoning of witnesses, attendance at court, personal services of the plaintiffs, and counsel fees since the commencement of the suit. The court allowed in full the sums reported by the auditor in the first and second classes, except counsel fees; but not those in the third class.¹ But it has been [293]

¹ In *McKee v. Bain*, 11 Kan. 569, a deed of a vacant lot had been given by defendant to the plaintiff in 1868, containing covenants for title and good right to convey, for the consideration of \$6,500, of which \$2,050 was paid down, the balance being secured by notes and a mortgage of the lot payable in one and two years. McKee took possession of the lot and made permanent and valuable improvements on it. Afterward, Thomas, claiming the paramount title, brought ejectment against McKee, and recovered judgment in 1870. Bain had notice of the pendency of this suit. The defendant obtained the benefit of the occupying claimant law and the lot was valued at \$5,000; and the improvements at \$14,700. Thomas elected to take \$5,000 for the lot, and the court ordered McKee to pay it. This sum being paid, a deed to McKee was made by Thomas in 1872. In the defense of that action McKee incurred \$500 for counsel fee, and the costs recovered in that suit by Thomas were \$196.25. The court trying the action upon the covenants found that the counsel fee was excessive beyond \$400. McKee brought an equitable action against Bain on the covenants of seizin and warranty in the deed, asking judgment for the amount paid down, for the amount paid in costs and counsel fees, and

interest on those several amounts; also that the notes and mortgage be canceled, and that the apparent incumbrance resting upon the title by virtue of the mortgage be removed. Valentine, J., said: "The covenant of seizin is broken as soon as made if the title attempted to be conveyed is bad; and when the vendee afterwards buys in the paramount title, the measure of his damages as against the vendor is, as a rule, the amount, with interest, it necessarily cost to obtain the paramount title up to the amount of the purchase-money and interest. In some cases the vendee may also recover the costs and attorneys' fees necessarily paid by him in prosecuting or defending a suit, with reference to the land attempted to be conveyed. In the present case we think Mrs. McKee is entitled to recover from the Bains just the excess of what she has necessarily and actually paid over and above what she agreed to pay to the Bains. For instance: She agreed to pay as follows: cash down, \$2,050; two notes, \$4,000, interest on the notes to March 19, 1872, \$1,555.55;—total agreed to be paid up to March 19, 1872, \$7,605.55. She actually and properly paid as follows: Cash down, \$2,050; attorneys' fees, \$400; costs, \$196.25; for paramount title March 19, 1872, \$1,000,—total paid March

held¹ that a vendee who is legally evicted, and who thereupon [294] repurchases the property from the evictor, is in under a new title, and the price last paid is no criterion of the damages sustained by the failure of the vendor's title.² If the covenantee is a mortgagee, on a total breach the mortgage debt is the measure of damages.³ And so in every variety of circumstances the recovery will be graduated to the actual injury.⁴ The sums necessarily expended in obtaining possession from a tenant may be recovered from a grantor who agreed to deliver

19, 1872, \$7,646.25. She therefore paid \$40.70 more than she agreed to pay for the lot. The judgment in this case was rendered November 16, 1872, for \$43.50, a little more than \$40.70 and interest. . . . The title of the Bains to said lot was derived through judicial proceedings, and although defective on account of irregularities, . . . yet it cannot be wholly ignored. The title was apparently good. The Bains acted in good faith in selling, and Mrs. McKee acted in good faith in purchasing and defending. Mrs. McKee obtained possession of said lot under and by virtue of Bain's title, and she held possession thereunder for nearly four years without paying anything therefor to the Bains, or to any one else, except what she paid as consideration for the lot; and she still continues to hold such possession, never having been in fact dispossessed. Bain's title, though defective, rested as a cloud upon the paramount title. By virtue of said conveyance from Bain to McKee, this cloud was extinguished, or rather transferred from the Bains to Mrs. McKee. This was something of value. And after the action between Mrs. Thomas and Mrs. McKee was determined, the right of Mrs. McKee to compel Mrs. Thomas to purchase Mrs. McKee's improvements on said lot, and pay therefor \$14,700, or to sell the lot to Mrs. McKee, under the

occupying claimant law, for \$5,000, was founded solely upon the title which Mrs. McKee obtained from the Bains. The title, therefore, which she got from Mrs. Thomas had its origin in the title she got from the Bains. Besides, Mrs. McKee appeals to a court of equity to cancel said notes and mortgage. Said mortgage was a cloud, and an apparent if not a real incumbrance upon the title to said lot. Is the removal of said cloud and said apparent incumbrance of no value? Now, by virtue of the conveyance from the Bains to Mrs. McKee, and the judgment in this case, Mrs. McKee has obtained a good title to her lot, free and clear from all incumbrances or clouds, all she bargained for or expected to get, and all that she had any right to expect, and she has paid to all persons in the aggregate, only what she agreed to pay to the Bains. She has lost nothing by the failure of the Bains' title."

¹ *Martin v. Atkinson*, 7 Ga. 228, 50 Am. Dec. 403.

² Compare *Claycomb v. Munger*, 51 Ill. 373, and *Hunt v. Orwig*, 17 B. Mon. 73, 85, 66 Am. Dec. 144.

³ *Curtis v. Deering*, 12 Me. 499; *Wetmore v. Green*, 11 Pick. 462.

⁴ *Richards v. Iowa Homestead Co.*, 44 Iowa, 304, 24 Am. Rep. 745; *Dillahunty v. Railway Co.*, 59 Ark. 629, 637, 22 S. W. Rep. 1002, quoting the text.

possession.¹ In order that there may be a recovery of money paid in acquisition or extinguishment of a superior title the desired result must be accomplished. If the effort of the covenantee is abortive, resulting in merely securing temporary immunity from disturbance, without assurance that the immunity will be permanent, he cannot be reimbursed, because the holder of the better title may again assert his rights against the present covenantee or some later grantee, thereby subjecting the warrantor to another action on his covenant.²

§ 611. **Mitigation of damages.** The damages for which the vendor is liable may be diminished by any profit which the vendee has recovered for from the owner in the action in which the judgment of eviction was rendered. The covenantor held under a tax deed; the covenantee recovered from the owner of the paramount title all taxes paid by the former with interest to the time of his eviction. It was ruled that the vendor was not merely entitled to the amount which he had paid as taxes, but also to the statutory interest thereon. The benefit of the statutory rate of interest on the money so paid accrued to the evicted party directly as the result of the imperfect title, and he not being bound to account to any other person for it, the vendor should be credited with it.³ Where, after an eviction, possession has been restored, the right of action is not thereby destroyed, but such restoration will go in mitigation.⁴ And so payments on account of such damages may be shown to lessen the vendor's liability.⁵

§ 612. **Where defect is a dower right.** Where there is an eviction by a dowress the measure of damages is the value of the particular right estimated according to the expectation of life of the tenant in dower on the basis of the amount paid being the value of the fee-simple.⁶ The cases show many ways

¹ *Williams v. Frybarger*, 9 Ind. App. 558, 37 N. E. Rep. 302.

² *Leet v. Gratz*, 92 Mo. App. 422, 432.

³ *Stebbins v. Wolf*, 33 Kan. 765, 7 Pac. Rep. 542; *Danforth v. Smith*, 41 Kan. 146, 21 Pac. Rep. 168.

⁴ *Baxter v. Ryerss*, 13 Barb. 267.

⁵ *Ferris v. Mosher*, 27 Vt. 218, 65 Am. Dec. 192.

⁶ *Stewart v. Mathieson*, 24 Up. Can. Q. B. 135; *Western v. Short*, 12 R. Mon. 153; *Davis v. Dogan*, 5 id. 341; *Terry v. Drabenstadt*, 68 Pa. 400; *Hill v. Golden*, 16 B. Mon. 551; *Bender v. Fromberger*, 4 Dull. 436; *Brown v. Dickerson*, 12 Pa. 872; *Patterson v. Stewart*, 6 W. & S. 527, 40 Am. Dec. 286.

of expressing and arriving at this value; as, that it is the amount that the fee-simple interest is diminished in value by carving out the life estate, estimating the value of the fee-simple interest according to the consideration money paid to the covenantor;¹ that is, the present value of an annuity equal to the interest on one-third of the consideration money for the time that the tenant in dower has a probable expectation of life.² The amount reasonably paid for release of the right of dower, or the amount assessed in lieu of it, under statutes which provide for such commutation, will also constitute the basis of recovery for breach of the covenants where the defect of title is thus cured.³ Where the eviction was by paramount, [295] title for a term of years, the plaintiff was held entitled to the annual value of the land of which he was dispossessed, or the interest on the consideration paid for it.⁴

§ 613. By and against whom recovery may be had. As these covenants run with the land they are available to any person succeeding the covenantee by purchase or descent.⁵ It is not necessary that a conveyance be made with warranty in order that the covenants pass; they will pass by release or quitclaim.⁶ Consequently, the action should be brought by him in whose time the breach occurs.⁷ The covenants are divisible, and their benefits will go to each recipient of any part or interest in the lands to which they relate, and may be

¹ Johnson v. Nyce, 17 Ohio, 66, 49 Am. Dec. 444.

² Wager v. Schuyler, 1 Wend. 553. In this case the widow was fifty years of age, healthy and of good habits, and her expectation of life was put at seventeen years.

³ Hodgins v. Hodgins, 13 Up. Can. C. P. 146; Jeter v. Glenn, 9 Rich. 374; Maguire v. Riffin, 44 Mo. 512; Welsh v. Kibler, 5 S. C. 405. See Cuthbert v. Street, 9 Up. Can. C. P. 115.

⁴ Rickert v. Snyder, 9 Wend. 416.

⁵ Roe v. Hayley, 12 East, 464; Rawle on Cov. for Title, 561; Lowrance v. Robertson, 10 S. C. 8; Beasley v. Phillips, 20 Ind. App. 182, 50 N. E. Rep. 488.

⁶ Walton v. Campbell, 51 Neb. 783,

71 N. W. Rep. 737; Ravenal v. Ingram, 131 N. C. 549, 42 S. E. Rep. 967; Beddoe v. Wadsworth, 21 Wend. 120; Wilson v. Widenham, 51 Me. 566; Hunt v. Middlesworth, 44 Mich. 448, 7 N. W. Rep. 57. See Claycomb v. Munger, 51 Ill. 373.

⁷ Kane v. Sanger, 14 Johns. 89; Bickford v. Page, 2 Mass. 455, 460; Keith v. Day, 15 Vt. 660; Booth v. Starr, 1 Conn. 244, 6 Am. Dec. 233; Thompson v. Sanders, 5 T. B. Mon. 358; Cunningham v. Knight, 1 Barb. 399; Claycomb v. Munger, 51 Ill. 373; Crooker v. Jewell, 29 Me. 527; Hunt v. Middlesworth, *supra*; Tillotson v. Prichard, 60 Vt. 94, 6 Am. St. 95, 14 Atl. Rep. 302.

sued on separately in respect of any breach as to the portion taken by him.¹ If the covenantee has sold a portion of the land conveyed to him he can recover only for the failure of the title to the portion from which he was evicted, although the subsequent vendees are barred by the statute of limitations.² The evicted grantee may bring suit against the first or any intermediate covenantor; he may bring separate actions against all, either at the same time or successively, [296] and prosecute them to judgment; he is entitled, however, to but one satisfaction and his costs.³ If the vendors warrant as to a certain proportion of the land, they are liable only to that extent, and the judgment should be against them severally.⁴ A husband who joins his wife in a deed conveying her land for the purpose of releasing his dower is not liable upon the

¹ *Whitzman v. Hirsh*, 87 Tenn. 513, 11 S. W. Rep. 421, quoting the text; *Dart on Vendors & P.* 365; 3 Washb. on R. P. (5th ed.) 503; *Dickinson v. Hoopes*, 8 Gratt. 406; *Brown v. Metz*, 33 Ill. 339, 85 Am. Dec. 277; *Kane v. Sanger*, 14 Johns. 89; *Dougherty v. Duvall*, 9 B. Mon. 57; *Twynam v. Pickard*, 2 B. & Ald. 105; *Midgley v. Lovelace*, Carthew, 289; *Paul v. Witman*, 3 W. & S. 407; *Henniker v. Turner*, 4 B. & C. 157; *Swett v. Patrick*, 12 Me. 9; *Lamb v. Danforth*, 59 id. 322, 8 Am. Rep. 426.

In *Dart on Vendors & P.* 365, it is said: "Where the estate is divided, as where it becomes vested in A. for life, remainder to B. in fee, and the breach of covenant affects the entire inheritance, each can sue for damages proportioned to the extent of his estate." *Noble v. Cass*, 2 Sim. 343. Compare *McClure v. Gamble*, 27 Pa. 288. And on page 780, vol. 2 (5th Eng. ed.), this author says: "Where the estate is merely equitable there can be no assignee at law, and the covenants cannot be enforced at law by an equitable assignee; so, if the conveyance, although so intended to do, do not, in

fact, pass any legal estate, it appears that the assignee cannot sue; but, in either case, the assignee, although unable to sue in his own name, would be entitled to sue in the name of the original covenantee. See *Riddell v. Riddell*, 7 Sim. 529; *Thornton v. Court*, 3 De G., M. & G. 393."

² *Whitzman v. Hirsh*, 87 Tenn. 513, 11 S. W. Rep. 421.

³ *King v. Kerr*, 5 Ohio, 154, 22 Am. Dec. 777; *Wilson v. Taylor*, 9 Ohio St. 595, 75 Am. Dec. 488; *Dougherty v. Duvall*, 9 B. Mon. 57; *Crooker v. Jewell*, 29 Me. 527; *Claycomb v. Munger*, 51 Ill. 373; *Christfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480; *Williams v. Beeman*, 2 Dev. 483; *Hunt v. Orwig*, 17 B. Mon. 73, 66 Am. Dec. 144; *Lot v. Parish*, 1 Litt. 393; *Lowe v. McDonald*, 3 A. K. Marsh. 354, 13 Am. Dec. 181; *Birney v. Hann*, 2 Litt. 262; *Thompson v. Sanders*, 5 T. R. Mon. 358; *Birney v. Hann*, 3 A. K. Marsh. 322, 13 Am. Dec. 167; *Withy v. Mumford*, 5 Cow. 137; *Garlock v. Closs*, id. 143, note; *Snydman v. Jones*, 19 Wend. 180, 25 Am. Dec. 552; *Cummings v. Harrison*, 57 Miss. 275.

⁴ *Bullitt v. Eastern Kentucky Land Co.*, 99 Ky. 324, 36 S. W. Rep. 16.

covenants therein.¹ Although the grantor's wife joins in his deed, she is not liable on the covenant therein, and is not a necessary party in an action thereon.²

§ 614. When covenantee sues remote covenantor. Where the action is brought by a remote grantee there is some diversity as to the criterion of damages. Is it the consideration paid to the original covenantor, who is the defendant, or that paid by the plaintiff to his grantor? In Kentucky the rule is the consideration received by the defendant.³ In one case a suit was brought by a remote grantee, and it was sought to limit his recovery to the amount he paid, and it was insisted in behalf of the defendant that the plaintiff should disclose that amount. In reply the court said: "It does not appear what amount he paid for it, nor was he called upon to state, nor was it shown in any other way. If it were conceded that the plaintiff's recovery ought to be limited to the amount paid by him for the superior title, were that amount manifested, it cannot be so limited, as this amount is not made to appear. Nor do we perceive that it was the duty of the plaintiff to disclose the amount in order to limit his recovery without his being called upon to do so. *Prima facie*, the plaintiff had a right to recover the consideration in the deed of (the covenantor) proportioned to the land lost, and this is the amount decreed by the court."⁴ In North Carolina, Tennessee, Colorado, Minnesota, Indiana and Maryland, the basis of recovery is the consideration paid by the plaintiff to his immediate grantor,⁵ with interest and costs of the ejectment suit, in all not exceeding the consideration received by the defendant.⁶

¹ Center v. Elgin City Banking Co., 185 Ill. 534, 57 N. E. Rep. 439 (one judge dissented).

² Webb v. Holt, 113 Mich. 338, 71 N. W. Rep. 637. See § 593.

³ Dougherty v. Duvall, 9 B. Mon. 57.

⁴ Hunt v. Orwig, 17 B. Mon. 73, 66 Am. Dec. 144.

⁵ Crisfield v. Storr, 36 Md. 129, 11 Am. Rep. 480; Williams v. Beeman, 2 Dev. 483; Mette v. Dow, 9 Lea, 93; Whitzman v. Hirsh, 87 Tenn. 513, 11 S. W. Rep. 421; Taylor v. Wallace, 20

Colo. 211, 37 Pac. Rep. 963; Moore v. Frankenfield, 25 Minn. 540; Beasley v. Phillips, 20 Ind. App. 182, 185, 50 N. E. Rep. 488 (no discussion).

⁶ In Williams v. Beeman, 2 Dev. 483, Henderson, C. J., said: "In actions between the vendee and his immediate vendor upon the covenant for quiet enjoyment, it is the settled law of this state that the value of the lands at the time of the sale shall be the measure of the damages; and in case of actual sales the purchase-money is conclusive evidence of that

In New York, Iowa, South Carolina, Texas and Mississippi the warrantor is liable according to the value of the land at the time of his warranty, which is conclusively fixed at the amount of the consideration of the sale.¹ In Missouri the

value. This is the case where a covenant of warranty is annexed to an estate in fee, and the eviction is from the whole estate. What may be the rule where there is a partial eviction of the estate, as the recovery of a life estate, or other interest less than a fee, or where the covenant is annexed to an estate less than a fee, is, as far as I know, not determined by our court. The interest upon the purchase-money is merely incidental, and depends on the circumstances of each case. It ordinarily runs during the time that the tenant is liable for the profits to the rightful owner. When he is not so liable the profits are set off against it. Had this action therefore been brought against Glasgow. Williams' immediate vendor, it would have presented no difficulties, governing ourselves by former decisions. Is the case varied by being brought against Beeman, a remote vendor, and whose estate, with his covenants annexed thereto, have come to Williams? I think that it is not: for Beeman cannot be bound to pay to Williams more than Williams ought to receive. If he has money in his hands belonging to some other person, there is no reason why it should be paid to Williams. Now it is settled that the purchase-money paid by Williams to Glasgow is the measure of Williams' damages, and the fact that he is substituted to the estate of Sheppard, and to the covenants entered into with Sheppard

for its enjoyment and protection, does not thereby substitute him to Sheppard's claim to damages in case the latter had been evicted. He is only substituted to Sheppard's covenants to redress his own, not Sheppard's injuries, in regard to the estate. But as there is no privity of contract between Williams and Beeman, the injury of the former cannot exceed the liability of the latter upon his covenants. But it may fall short of it. Neither would the case be varied if the action had been brought by Sheppard, as it is said it might be. For Sheppard having sold to Glasgow, and Glasgow to Williams, he, Sheppard, could only claim an indemnity, which is the amount of the consideration money paid by him who is evicted. And on this ground alone, or that he is trustee for the person evicted, can the action be sustained in his name. In either case Williams' injury is the one to be compensated. Should it be asked what is to become of the excess left in the hands of Beeman — for it is certain that he has given nothing for it — it is answered, who can claim it? Not Williams, for under the rule established by our decisions he has no pretense to recover it. Not Sheppard, for he sustains no damage by the bad title, further than he may be compelled to comply with the covenants in his deed. And it would be strange that he should be placed in a better situation by selling a bad title

¹ Jenks v. Quinn, 61 Hun, 427, 16 N. Y. Supp. 240; Petrie v. Folz, 54 N. Y. Super. Ct. 223; Brooks v. Black, 68 Miss. 161, 8 So. Rep. 332, 11 L. R. A. 176; Mischke v. Baughn, 52 Iowa,

528, 3 N. W. Rep. 543; Lawrence v. Robertson, 10 S. C. 8; Hollingsworth v. Mexia, 11 Tex. Civ. App. 363, 37 S. W. Rep. 455.

rule has been thus stated: "If a subsequent purchaser be evicted the damage is the value of the land at the time of [298] the eviction, not exceeding, however, the sum for which the covenantor would have been liable to the first purchaser."¹

Mr. Warvelle thus states the difference in the views of the courts whose decisions have been referred to, and his opinion of the law. In a number of states it has been laid down that a remote vendee can only recover what he has himself paid to his own vendor, with interest and costs. On the other hand, we find the rule asserted by about an equal number of authorities, that such vendee may recover the full consideration received by the remote vendor. While there is much to commend in the reasoning by which the former class of decisions is sustained it would yet seem that the latter class states the true rule and that which more nearly conforms to the general theory of the law which governs all questions of indemnity arising out of an express obligation. The universally received doctrine as between the immediate parties is that the vendor, by his covenant, binds himself to return the purchase-money he receives for the land in the event of a failure of title thereto or eviction of his grantee by reason of a paramount claim. By operation of law this obligation passes with the land and inures to each successive grantee of the same. If the obligation becomes fixed and its full extent measured and determined at the time of acquisition by the first grantee it is difficult to perceive how it can be changed by subsequent transactions with which the original grantor is not connected. Should this view be correct, and it certainly is sustained by analogy to other well-settled principles of law, then we may properly conclude that the obligation of the covenantor remains the

than a good one. For had the title been good, he must have been content with his loss upon his resale. Should it turn out to be bad, could he then regain his whole purchase-money? In fact, the difference between what he gave and what he got for the land is sunk, is extinguished, and there is no person who can receive it by making a resale at a reduction in the price. The first vendee submits to the loss, and it can

therefore form no part of a claim to an indemnity."

¹ *Dickson v. Desire*, 23 Mo. 151.

The general rule that the consideration stated in a deed is open to explanation does not apply in an action on the covenant of warranty brought by a subsequent grantee; the sum named is the measure of his recovery. *Illinois Land & Loan Co. v. Bonner*, 91 Ill. 114; *Greenwault v. Davis*, 4 Hill, 643.

same to the assignee of a covenantee as it was to such covenantee, and such being the case, it will be subject to the same measure of damages.¹

An intermediate grantee may recover against an antecedent covenantor if he has suffered actual injury, though the eviction did not occur while he held the estate. If he conveyed without covenants to the evicted grantee for full value, he suffers no injury and has no right of action.² But if he conveyed with covenants and has satisfied them, they are restored to

¹ Warvelle on Vendors, vol. 2, § 981 (2d ed.). A strong opinion sustaining the author quoted from may be found in *Brooks v. Black*, 68 Miss. 161, 8 So. Rep. 332, 11 L. R. A. 176.

On the other hand, the Tennessee court has said: The covenant is a peculiar one, and not like an ordinary covenant for so much money. It is rather in the nature of a bond with a fixed sum as a penalty, the recovery on which will be satisfied by the payment of the actual damages. Each vendor, subject to this rule, may be treated as the principal obligor to his immediate vendee, and as the surety of any subsequent vendee to hold him harmless by reason of the failure of title, and the ultimate vendee, when evicted, is entitled to be subrogated to the rights of his immediate vendor against a remote vendor to the extent necessary to indemnify him. *Mette v. Dow*, 9 Lea, 93.

The foregoing paragraph has been quoted in a Colorado case, in which the following observations were made: A remote grantee may simultaneously sue his immediate grantor and all previous covenantors, and recover several judgments against each of them, although entitled to but one satisfaction; and the amount of recovery against each can in no event exceed the consideration received by him. Under the rule con-

tended for by counsel for plaintiff in error it would follow that his recovery would be, in such an event, as variable as the various amounts received by each covenantor; and in case the consideration paid by him to his immediate grantee is less than the consideration received by the original covenantor, his recovery would be less against such grantee than it would be in an action against the original covenantor; while, under the rule that the amount of his recovery is the amount of consideration actually paid by him for the land, not exceeding the original purchase price, the recovery in both cases would be the same. The rule limiting the measure of damages in a case like this, where the remote grantee elects to sue the original covenantor, to the actual loss sustained by him, seems to us not only equitable, but is in principle analogous to the doctrine that applies in an action by the original covenantee. Compensation for his loss is all that any evicted grantee can reasonably ask, and when this can be obtained by the recovery of the consideration paid, with interest, the ends of justice are attained. *Taylor v. Wallace*, 20 Colo. 211, 37 Pac. Rep. 963.

² *Booth v. Starr*, 1 Conn. 244, 6 Am. Dec. 233; *Wyman v. Ballard*, 12 Mass. 304; *Niles v. Sawtell*, 7 Id. 444.

him, and he may sue any covenantor from whom he claims for his indemnity.¹

[299] A tenant who has been evicted may sue any prior covenantor, and if he elects any but the first, and obtains satisfaction, such covenantor may, thereby, stand as to any prior covenantor in the place he held before he had parted with the estate, and sue upon his covenant as though the breach had occurred during his ownership.²

Where a grantee has been evicted by virtue of a judgment against him, the judgment is legally admissible to prove the

¹ Claycomb v. Munger, 51 Ill. 373; Baxter v. Ryerss, 13 Barb. 267; Lot v. Parish, 1 Litt. 393; Wheeler v. Sohler, 3 Cush. 219; Thompson v. Sanders, 5 T. B. Mon. 358; Herrin v. McEntyre, 1 Hawks, 410.

In Birney v. Hann, 3 A. K. Marsh. 322, 13 Am. Dec. 167, Mills, J., said: "The question whether an intervening grantee, who had conveyed away the estate, can support the same action against a remote grantor, has never yet been decided. On this question we need not look for any aid from English precedents, where such an action of covenant was not indulged. In this case the plaintiff below has averred that Fields and Dunn, who were evicted from the lot, recovered a judgment against him on his warranty for the value of the land, with interest and costs, which judgment he had fully paid and discharged before the commencement of this suit. If this statement in the declaration can be material to, or aid him in support of, his action, as it is not contradicted by any plea, it must be taken as true, and the plaintiff below is entitled to the benefit of these facts. The question remains, will they affect his case and enable him to support his action? As Hann would have been entitled to the action if he had never conveyed; as he has been subjected to the action because he had

conveyed; as the estate passed by the title has gone into other hands; and his deed to Fields and Dunn can be of no more avail to them because they have once had the benefit of it, and it is now inoperative against Hann because it is merged in the judgment against him and discharged by payment, we see no good reason why Hann should not be adjudged to have the right of action revested in him, and be restored to all he parted with by his deed, as much so as if Field and Dunn had reconveyed. As the indorser of a commercial instrument, who has paid its contents, can sustain his action against his remote indorser without a re-indorsement, because his own indorsement, by the act of payment, *per se*, has become *functus officio* as to him, so ought Hann, who has rendered his own deed inoperative further against him, to be restored to the situation he was in before it was made, without a conveyance formally executed." Hunt v. Middlesworth, 44 Mich. 448. 7 N. W. Rep. 57.

² 3 Wash. R. P. 400; Withy v. Mumford, 5 Cow. 137; Thompson v. Shattuck, 2 Met. 618; Snyder v. Jones, 10 Wend. 184, 25 Am. Dec. 552; Booth v. Starr, 1 Conn. 244, 6 Am. Dec. 233; Markland v. Crump, 1 Dev. & B. 94, 27 Am. Dec. 230; Redwine v. Brown, 10 Ga. 311.

eviction in an action on the covenant in the deed;¹ but not to prove that such eviction was by paramount title unless the covenantor was vouched in to defend.² But if he had notice of that action and an opportunity to appear and defend, the judgment of eviction is evidence, and conclusive of the title.³ The same principle has been applied in cases of judgments against the grantee in actions brought by him to recover the granted property, where the covenantor had been notified to take upon himself the prosecution thereof.⁴

§ 615. Notice of suit to covenantor. One who is sued upon his covenant of warranty may vouch in his warrantor, and he, in turn, may vouch in his; and a judgment in such action, so far as the subject-matters tried are concerned, will be binding upon the rights of any such previous warrantor properly vouched in or summoned to take the defense [300] of the suit whether he does so or not.⁵ The fact that a build-

¹ Hardy v. Nelson, 27 Me. 525; Gaither v. Brooks, 1 A. K. Marsh. 409; Patton v. Kennedy, id. 389, 10 Am. Dec. 744; Middleton v. Thompson, 1 Spear, 67; Crisfield v. Storr, 36 Md. 129, 11 Am. Rep. 480.

² Id.; Harding v. Larkin, 41 Ill. 413; Ryerson v. Chapman, 66 Me. 557; Sheetz v. Longlois, 69 Ind. 491.

³ Id.; Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; Blasdale v. Babcock, 1 Johns. 518; Sanders v. Hamilton, 2 Hayw. 282; Dalton v. Bowker, 8 Nev. 190; Fulweiler v. Baugher, 15 S. & R. 45; Jeter v. Glenn, 9 Rich. 374; Ferrell v. Alder, 8 Humph. 44; Knapp v. Marlboro, 31 Vt. 231; Terry v. Drabenstadt, 68 Pa. 490; Williamson v. Williamson, 71 Me. 442.

⁴ Dalton v. Bowker, 8 Nev. 190; Ryerson v. Chapman, 66 Me. 557. But see Ferrell v. Alder, 8 Humph. 44; Wilder v. Ireland, 8 Jones, 85.

⁵ Tague v. Whaley, 20 Ind. App. 26, 50 N. E. Rep. 41 (written notice preferred); Somers v. Schmidt, 24 Wis. 417, 1 Am. Rep. 191 (notice should be in writing); Davenport v. Muir, 3 J. J. Marsh. 310, 20 Am. Dec.

143 (verbal notice good); Miner v. Clark, 15 Wend. 426 (verbal notice good); Dalton v. Bowker, 8 Nev. 190, 200 (notice must be in writing); Worley v. Hneman, 6 Ind. App. 240, 255, 33 N. E. Rep. 260; Hollingworth v. Mexia, 14 Tex. Civ. App. 363, 37 S. W. Rep. 455; Leet v. Gratz, 92 Mo. App. 422; Mooris v. Petero, 4 Hawaia, 23; Chamberlain v. Preble, 11 Allen, 373; Boston v. Worthington, 10 Gray, 498, 71 Am. Dec. 678; Littleton v. Richardson, 31 N. H. 187, 66 Am. Dec. 759; Andrews v. Dennison, 16 N. H. 469, 17 id. 413, 43 Am. Dec. 606; Mason v. Kellogg, 38 Mich. 132 (notice to the covenantor should be in writing); Williamson v. Williamson, 71 Me. 442; Bever v. North, 107 Ind. 544, 8 N. E. Rep. 576; Cummings v. Harrison, 57 Miss. 275 (verbal notice and opportunity to defend, without demand, concludes the covenantor); McConnell v. Downs, 48 Ill. 271; Walton v. Campbell, 51 Neb. 788, 792, 71 N. W. Rep. 737.

The rule in North Carolina is to the contrary, and is anomalous. Martin v. Cowles, 2 Dev. & Batt. 101;

ing was erected upon a part of two parcels of land, one of which was purchased of a grantor other than the defendant, did not relieve the latter of the duty of defending the title under the covenants in his deed when notified of the bringing of an action against his grantee by a third party, and being asked to come in and defend. Failing to do so, he is liable for the costs and counsel fees reasonably incurred by his grantee in defense of such action.¹ A vendor who has been made a party to the action and who successfully demurred to the complaint on the ground that he was not a proper party, cannot defeat the vendee's action against him because the vendee failed to defend the action in which judgment of eviction was rendered, although he might have done so successfully.²

§ 616. *Interest as an item of damage.* Interest is not recoverable when the premises have been occupied by the warrantee, and he has not accounted and is not accountable for the rents and profits. It would be unjust. He who buys a farm or house and lot agrees to part with the use of the consideration forever for the use of the farm or house and lot forever. As long as he has the use of either, so long should the seller have the use of the consideration.³ In such case the use and occupation are presumed to be equal to the use of the purchase-money.⁴ And if not, the grantee has no ground for

Wilder v. Ireland, 8 Jones, 88. See, as to the requisites of the notice, *Rawle on Cov. Tit.* (5th ed.), § 119; *Richmond v. Ames*, 164 Mass. 467, 44 N. E. Rep. 671. The general subject is discussed in §§ 86, 87.

¹ *Charman v. Tatum*, 54 App. Div. 61, 66 N. Y. Supp. 275.

² *Elliott v. Saufley*, 89 Ky. 52, 11 S. W. Rep. 200.

³ *Walsh v. Harang*, 48 La. Ann. 984, 20 So. Rep. 202; *King v. Kerr*, 5 Ohio, 154, 22 Am. Dec. 777.

⁴ *Walsh v. Harang*, *supra*; *Pence v. Gubbert's Adm'r*, 70 Mo. App. 201; *Collier v. Cowger*, 52 Ark. 322, 12 S. W. Rep. 702; *Stebbins v. Wolf*, 33 Kan. 765, 7 Pac. Rep. 542, quoting the text; *Gunter v. Beard*, 93 Ala. 227, 9 So. Rep. 389, citing the text; *Hutchins v. Roundtree*, 77 Mo. 500;

Wood v. Kingston Coal Co., 48 Ill. 356, 95 Am. Dec. 554; *Harding v. Larkin*, 41 Ill. 413; *Cox v. Henry*, 32 Pa. 18; *Sumner v. Williams*, 8 Mass. 162, 221, 5 Am. Dec. 83.

In the last case *Sedgwick, J.*, said: "Covenants having been broken at the time of the execution of the deed, a cause of action immediately accrued. The real injury was then sustained, and the amount of indemnity for it precisely the money which had been paid for a defective title. In such a case as this, if the grantee cannot enter into possession, he is entitled to demand immediately the money which he has paid; and if he receives it, it must be deemed a satisfaction of the injury. If there is delay, there must be interest on the amount of

complaint while he is undisturbed in the enjoyment of that for which he was content to pay the purchase-money.¹

In case of eviction by the owner of the superior title, the warrantee is liable for *mesne* profits for such period as is allowed by the statutes of limitation. For this period the grantee is treated as not enjoying the granted premises in virtue of the grant; and for the time he is so liable, as [301] well as for the time succeeding actual eviction, or the fact which is treated as equivalent thereto, interest is recoverable on the principal of the damages allowed.² Where payments have been made under an antecedent contract, pursuant to which the deed was executed, the grantee is not concluded as to the damages by the execution of the deed or the recital of the consideration therein; the amount actually paid may be recovered, and interest on payments made before the deed was executed.³

Wherever the circumstances are such as to preclude any recovery for *mesne* profits interest will not be allowed until eviction.⁴ Thus, where the grantee was evicted by a later

the purchase-money commensurate with the delay; and that interest the law deems a satisfaction for the delay. If the grantee enters into possession, the profits of the improvements are deemed equivalent to the interest; but as he may be compelled to account for those profits and pay them over to the owner, he is for that reason entitled to demand the interest, with the purchase-money, in an action upon his covenant." See *Selden v. James*, 6 Rand. 465.

¹*Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 595; *Kyle v. Fauntleroy*, 9 B. Mon. 620.

²*Point Street Iron Works v. Turner*, 14 R. I. 122; *Mette v. Dow*, 9 Lea, 93; *McGuffey v. Humes*, 85 Tenn. 26, 1 S. W. Rep. 506; *Hutchins v. Roundtree*, 77 Mo. 500; *Lambert v. Estes*, 99 id. 601, 13 S. W. Rep. 284; *Brooks v. Black*, 68 Miss. 161, 8 So. Rep. 332, 11 L. R. A. 176; *Gunter v. Beard*, 93 Ala. 227, 9 So. Rep. 389; *Jackson v. Turner*, 5 Leigh, 127; *Rich*

v. Johnson, 2 Pin. 88, 52 Am. Dec. 144; *Morris v. Rowan*, 17 N. J. L. 301; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Stewart v. Drake*, 9 N. J. L. 139; *Backus v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 585; *Cox v. Henry*, 32 Pa. 18; *McAlpine v. Woodruff*, 11 Ohio St. 120; *Clark v. Burr*, 14 Ohio, 118, 45 Am. Dec. 529; *Fernandez v. Dunn*, 19 Ga. 497, 65 Am. Dec. 607; *Cogswell v. Lyon*, 3 J. J. Marsh. 38. See *Booker v. Bell*, 3 Bibb, 173, 6 Am. Dec. 641; *Lai Say v. Knaahu*, 10 Hawaii, 499.

Interest will not be computed from the time the grantee notified the grantor that he had surrendered and abandoned the premises unless he actually did so, there being no assertion of title adverse to the grantee until long thereafter. *Brown v. Allen*, 88 Hun. 401, 51 N. Y. Supp. 805, affirmed without opinion, 142 N. Y. 647.

³*Devine v. Lewis*, 38 Minn. 24, 35 N. W. Rep. 711.

⁴*Wood v. Larkin*, 49 Ill. 99;

patent, as he was not liable to the evictor for profits prior to the patent, there was no right to interest during that prior time.¹ So interest was denied where the right to *mesne* profits was barred by failure to claim them in the time and manner fixed by law.² The purchaser of wild and unoccupied lands who has never derived any rents or profits or other benefits therefrom, is entitled to recover interest from the date of his payment.³

Only simple interest at the legal rate is computed, and neither the interest nor consideration, as principal, is to be increased by the fact that it was payable by instalments at annual or any higher than the legal rate. Nor will the consideration be increased by the payment of taxes.⁴ In a case in Iowa⁵ an action was brought upon a note, a part of the consideration of which was for land conveyed by the payee to the maker with warranty, and to which the title had failed. The failure of title was set up as a defense to so much of the note as was purchase-money. The note stipulated for interest at the rate of ten per cent., the ordinary legal rate being six. The plaintiff contended that the consideration for the land and interest at the ordinary legal rate was the proper measure of deduction; but the court held that it was just to abate the conventional rate as well as the principal. Originally interest was allowed for so long a time as the vendee was required to pay *mesne* profits. The theory was that on eviction the vendee recovered only what was an equivalent to the purchase-money without interest, for he received other lands equal in value to the lands sold at the time of the sale. Kent, C. J., said that such rule would have continued had not the action for *mesne* profits been introduced. In consequence of that action the recovery of interest is co-extensive in point of time with the liability for such profits.⁶ But this rule has not been followed in Massachusetts.⁷

Thompson v. Jones, 11 B. Mon. 365;
Whitlock v. Crew, 28 Ga. 289.

¹ Whitlock v. Crew, *supra*.

² Wead v. Larkin, *supra*.

³ Northern Pacific R. Co. v. Montgomery, 30 C. C. A. 17, 86 Fed. Rep. 251.

⁴ Blake v. Burnham, 29 Vt. 437.

⁵ Zent v. Picken, 54 Iowa, 535, 6 N. W. Rep. 750.

⁶ Staats v. Ten Eyck, 3 Caines. 111, 114, 2 Am. Dec. 254; Kelly v. Dutch Church of Schenectady, 2 Hill. 105; De Long v. Spring Lake, etc. Co., 65 N. J. L. 1, 8, 47 Atl. Rep. 491.

⁷ Whiting v. Dewey, 15 Pick. 428, 435.

§ 617. Expenses, costs and counsel fees as damages. The rule of damages for a total breach of the covenants in a deed of land is often stated in general terms to be the amount of the consideration money and interest. This has been done sometimes in the absence from the case of any item of [302] expense or costs; sometimes in a direct contrast of this basis of recovery with that of the value at the time of eviction, and when, of course, other and incidental items common to both would not be mentioned; and in other instances purposely to exclude any items which would extend the recovery beyond consideration and interest.¹ It is held that the grantee has the right to defend; he is justified in making every fair effort to retain the land which he must be understood to have purchased for his own convenience and advantage, because an equivalent in value may not be equally satisfactory.² It has been declared to be his duty to defend.³ Where, at the date of the deed, the premises are adversely possessed, and the grantee, or his assignee, suffers that adverse possession to ripen into a title by continuance until an action to recover is barred by the statute of limitations, he has no right of action as for a breach of the covenant of warranty; because in such a case the land is not lost by a paramount title existing at the date of the covenant, but by his own laches.⁴ It is therefore well settled by the best authorities that in actions for breach of the covenants, where there has been an eviction by suit, the plaintiff is entitled to recover damages, not only for loss of the land, usually, as we have seen, measured by the consideration paid with interest, but also costs reasonably and in good faith incurred in defending the title and resisting the eviction.⁵

¹ *Cristfield v. Storr*, 36 Md. 129, 11 Am. Rep. 489; *Turner v. Miller*, 42 Tex. 418, 19 Am. Rep. 47; *McGary v. Hastings*, 39 Cal. 369, 2 Am. Rep. 456; *Eaton v. Lyman*, 24 Wis. 438.

² *Swett v. Patrick*, 12 Me. 9.

³ *Staats v. Ten Eyck*, 3 Cal. 111, 2 Am. Dec. 254.

⁴ *Rindskopf v. Farmers' Loan & Trust Co.*, 58 Barb. 36.

⁵ *Mcnervey v. Snell*, 91 Iowa, 222, 58 Am. St. 391, 62 N. W. Rep. 767, citing the text; *Alexander v. Staley*,

110 Iowa, 607, 81 N. W. Rep. 803; *Webb v. Holt*, 113 Mich. 338, 71 N. W. Rep. 637 (taxable costs); *Hazelett v. Woodruff*, 150 Mo. 534, 51 S. W. Rep. 1048; *Walton v. Campbell*, 51 Neb. 788, 74 N. W. Rep. 737; *Dale v. Shively*, 8 Kan. 276; *Jewett v. Fisher*, 9 Kan. App. 630, 68 Pac. Rep. 1024; *Morris v. Pebero*, 4 Hawaia 23; *Warley v. Hineman*, 6 Ind. App. 340, 33 N. E. Rep. 269; *Tongue v. Whaley*, 10 Ind. App. 26, 59 N. E. Rep. 41; *Cushman v. Blanchard*, 2 Me. 269, 11 Am.

[303] And it does not appear to be necessary, on principle or authority, that such costs should be incurred by the grantee as a defendant in actions by the claimant of the superior title. They are equally recoverable if necessarily incurred in proper proceedings taken by him to ascertain and protect the title supposed to be conveyed or to obtain possession of the land.¹

Dec. 76; *Swett v. Patrick*, 12 Me. 9; *Ryerson v. Chapman*, 66 id. 557; *Drew v. Towle*, 30 N. H. 531, 64 Am. Dec. 309; *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 246; *Delavergne v. Norris*, 7 Johns. 358, 5 Am. Dec. 281; *Staats v. Ten Eyck*, 3 Caines, 111, 2 Am. Dec. 254; *Pitcher v. Livingston*, 4 Johns. 1, 4 Am. Dec. 229; *Wuldo v. Long*, 7 Johns. 173; *Bennett v. Jenkins*, 13 id. 50; *Funk v. Voneida*, 11 S. & R. 109; *Stanard v. Eldridge*, 16 Johns. 254; *Taylor v. Holter*, 1 Mont. 688; *Dalton v. Bowker*, 8 Nev. 190; *Morris v. Rowan*, 17 N. J. L. 304; *Cox v. Strode*, 2 Bibb, 273, 5 Am. Dec. 603; *Robertson v. Lemon*, 2 Bush, 301; *Armstrong v. Percy*, 5 Wend. 535; *Rickert v. Snyder*, 9 id. 416; *Leffingwell v. Elliott*, 10 Pick. 204; *Kennison v. Taylor*, 18 N. H. 220; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Stuart v. Matheison*, 23 Up. Can. Q. B. 135; *Harding v. Larkin*, 41 Ill. 413; *Lot v. Parish*, 1 Litt. 393; *Lane v. Fury*, 31 Ohio St. 574; *Williamson v. Williamson*, 71 Me. 442; *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *Stebbins v. Wolf*, 33 Kan. 765, 7 Pac. Rep. 542.

¹ *Pitkin v. Leavitt*, 13 Vt. 379; *Haynes v. Stevens*, 11 N. H. 28; *Kingsbury v. Smith*, 13 id. 109; *Gregg v. Richardson*, 25 Ga. 570, 71 Am. Dec. 190; *White v. Williams*, 13 Tex. 258; *Yokum v. Thomas*, 15 Iowa, 67; *Lane v. Fury*, 31 Ohio St. 574; *Merritt v. Morse*, 108 Mass. 270. See *Ferrell v. Alder*, 8 Humph. 44.

In *Kingsbury v. Smith*, *supra*, the action was brought on an implied warranty of the title in the sale of a

chattel. K. purchased it of C., who previously had purchased and got possession of it from S. by fraud. In an action of trover by K. against S., who had repossessed himself of the chattel, C. was offered as a witness, and he was objected to as incompetent on the ground of interest, being liable to K. on his warranty of title for the costs incurred in that action if the plaintiff should fail. *Woods, J.*, after citing many cases, said: "The principle deducible from the cases cited would seem to be that the grantee, in an action upon a covenant of warranty, express as in a deed, or implied as upon a sale of personal property, is entitled to recover, as part of his damages sustained by reason of the failure of the title conveyed, the reasonable and necessary expenses incurred in a proper course of legal proceedings for the ascertainment and protection of his rights under the purchase, as well as reasonable compensation for his trouble and expenses to which he may have been put in extinguishment of a paramount title. And it seems to us that there can be no sound distinction between the case in which the expenses are incurred in the necessary and proper prosecution of a suit for the ascertainment and protection of the purchaser's rights, and the case of a defense for the same purpose. In the case under consideration it would, in our view, fall little short of absurdity to hold that if the plaintiff had kept possession of the horse, and the defendant had brought suit, the

Where several suits and cross-suits have been brought, [304] involving the title to the property conveyed, and these were properly and in good faith prosecuted or defended by the grantee, the costs and expenses of all have been allowed as proper damages in addition to compensation for loss of the land. This proposition is very clearly declared and maintained in a late case in Maine,¹ in which Peters, J., delivering the opinion, said: "The foundation of a claim for damages under it (the covenant of warranty) must be that an eviction, or something equivalent thereto, has properly taken place. The covenantee, who has been evicted, is entitled to have repaid to him all reasonable outlay which he in good faith expends for the assertion or defense of the title warranted to him. Weston, C. J., says: 'He (the covenantee) was justified in making every fair effort to retain the land.'² If he is assaulted with ever so many suits he must defend them, unless it is clear that a defense would avail nothing. If he defends but one, and lets the others go by default, he might get himself into inextricable trouble. It is as essential that he should defend all the suits as well as any one of them. A defender of a walled city might as well plant all his means of defense at a single gate and leave all the others undefended, to be entered by the enemy. The covenantee becomes the agent of the warrantor in making a defense against suits. He should do for his warrantor what the warrantor should do for himself, if in possession. It is no more expensive for the warrantor to defend suits brought against his agent than suits against himself, and the presumption is that he would have been a party to the same litigations had he remained in pos-

sessor. The plaintiff would be entitled to recover as damages in a suit against Chandler on the implied warranty of title, the expenses of the defense, and at the same time to hold that when the defendant had got possession of the horse, and the only means left the plaintiff for the ascertainment and protection of his rights is the very suit he has brought, he would not be entitled, in an action on the warranty against Chandler, to recover the expenses of the present suit prop-

erly and necessarily incurred, in the event of a failure of success, by reason of the failure of the title conveyed to him by Chandler. Such a doctrine making such a distinction, we think cannot be sustained upon sound reason, or upon well-considered decisions, which go to establish the right of recovery of the costs and expenses, as clearly, we think, in one case as in the other."

¹ *Ryerson v. Chapman*, 60 Me. 557.

² *Sweet v. Patrick*, 12 Me. 9.

session. But the agent must act cautiously and reasonably. He has no right to 'inflame his own account,'¹ nor indulge in mere quarrelsome cases. It follows, therefore, that the plaintiff may recover for the damages and costs and expenses of suits brought against him, and also for the costs and expenses of suits brought by him affecting the title to the estate. Each suit may have been part of the means by which the title was sought to be defeated."² In Kansas costs and attorneys' fees can only be recovered when paid in a suit brought to obtain possession which the grantor did not give, or when, if it was given, the defense is made against the suit of the owner of the land.³

§ 618. *Same subject.* Cases may arise and have arisen [305] where the superior title asserted is so obviously well founded that resistance cannot be made in good faith; then the covenantee cannot defend at the expense of the covenantor.⁴ It is also true that in other cases the grantee is not obliged at his peril to decide upon the title. He may defend without notice to his warrantor, and even exclude him from co-operation in defending the title,⁵ without affecting his liability upon the covenant. And it may be doubted that the covenantor, when notified to defend, can affect his liability in respect to costs, afterwards incurred by the grantee, by silence, or direction not to defend. In a New Jersey case⁶ Horn-

¹ Short v. Kalloway, 11 A. & El. 28.

² In Ryerson v. Chapman, 66 Me. 557, the defendant getting a supposed title to a parcel of land by levy, conveyed it to the plaintiff by a warranty deed. The latter had been in undisturbed possession under the deed for about fifteen years when his possession was invaded by one C., who claimed title to the land upon the ground that the levy under which the defendant acquired the land was defective and void. The plaintiff sued C. and C. sued him in actions of trespass, and several other suits followed between them. While all the suits were pending, one of them was carried up to decide the question of title to the land, and C. prevailed. After this the defendant paid to the

plaintiff all the costs and counsel fees incurred in the defense of that action, and also paid him the value of the land from which he had been evicted, but refused to pay the damages, costs and expenses incurred in the other actions.

³ Dale v. Shively, 8 Kan. 276; Jewett v. Fisher, 9 Kan. App. 630, 58 Pac. Rep. 1023.

⁴ Matheny v. Stewart, 108 Mo. 73, 17 S. W. Rep. 1014; Cushman v. Blanchard, 2 Me. 268, 11 Am. Dec. 76; Hodgins v. Hodgins, 13 Up. Can. C. P. 146; Drew v. Towle, 30 N. H. 531, 64 Am. Dec. 309; Ryerson v. Chapman, 66 Me. 557.

⁵ Matheny v. Stewart, *supra*; Boyle v. Edwards, 114 Mass. 373.

⁶ Morris v. Rowan, 17 N. J. L. 304.

blower, C. J., pointedly said: "Suppose the defendants, conscious of the unsoundness of the title, had not only refused to defend the suit, but had given notice to the tenant that if he made any defense he must do it at his own risk and expense; would that have availed them anything? I think not. It would place a grantee in hazardous circumstances, if, upon such an intimation from his grantor, he must either defend at his own expense, or abandon the title, and look for compensation in damages under his covenants. On the contrary, I am of opinion that, notwithstanding such notice from the covenantor, the grantee would have a right to recover from him the taxable costs he had incurred in honestly and fairly resisting the claim of title set up by the plaintiff in the ejectment." In Pennsylvania the rule seems to be otherwise. In a recent case, where the alleged breach of covenant was the re- [306] covery of a life estate in dower, Sharswood, J., said: "Without undertaking to lay down any general rule, it would seem to be most reasonable to hold that where a covenantor has been notified to appear and defend, and declines or fails to do so, and the covenantee chooses to proceed and incur costs and expenses in what it may be presumed that the covenantor considered to be an unnecessary and hopeless contest, he does so certainly upon his own responsibility."¹ In a Maryland case the court say: "Where such notice is given, and the party notified refuses to defend the title, the covenantee, or his assignee, has the right to employ counsel for that purpose; and may recover in an action on the covenant such reasonable fees as he has been compelled to pay."² This is in accord with the rule in Rhode Island.³ Where there is such conflict of authority no rule can be stated that has general force as law. But recognizing that the grantee has a right to defend the title warranted to him, or to have it defended, if the covenantor declines to intervene for that purpose on request, the grantee ought to be at liberty to defend for himself; and on the principle of allowing full compensation for actual loss, if the title warranted fails, the expense and cost of defending it should fall on the party who covenanted to warrant and de-

¹ *Terry v. Drabenstadt*, 68 Pa. 409.

² *Point Street Iron Works v. Tur-*

³ *Crisfield v. Storr*, 35 Md. 129, 11 *ner*, 14 R. I. 122.

Am. Rep. 450.

fend it and has broken his covenant. After the covenantor has come into court on notice and assumed the defense, the grantee is not entitled also to employ counsel for his own protection, and charge the expense, in the event of failure of title, to the covenantor.¹ If the grantee is liable for the fees they may be recovered, but if they have not been paid he cannot recover interest on the amount due on account of them.² It is otherwise if the fees have been paid.³

As to the necessity and effect of notice to the covenantor to defend there is considerable diversity of opinion in other respects, as will appear by the cases already referred to and others. But as the covenant to defend is as absolute as that to warrant the title, notice would not seem to be more necessary in respect to costs and expenses, reasonably incurred in good faith in the defense of the title, than to confer a right to be compensated for the loss of the land. In a case already mentioned Ford, J., said: "The defendant's counsel supposes [307] the costs on eviction are allowed, because it was the warrantor's duty to defend the suit upon receiving notice of the action; and he objects to them in this case because no notice was given to the warrantor or his representatives of the pendency of the action. But all the cases agree in allowing the costs of eviction, and it is immaterial whether he had notice or not. His covenant to defend is not a conditional one if he has notice; otherwise a want of notice would bar the warranty itself. He covenants to defend as absolutely as he does to warrant. The intent of notice is not to make him liable for costs; it is to make the record of eviction conclude him in respect of the title."⁴ And the language in the recent case in Maine which has already been referred to is equally explicit in response to a like objection: "Notice was not necessary to put him in position to enforce such a liability. Without a notice the plaintiff can recover his damages caused by the failure of the title warranted to him. And in this state

¹ Kennison v. Taylor, 18 N. H. 220;
Long v. Wheeler, 84 Mo. App. 101.
If the covenantor uses, on the trial,
documents procured and paid for by
the covenantee, he is liable therefor.
Id.

² Walton v. Campbell, 51 Neb. 788,
71 N. W. Rep. 737.

³ Charman v. Tatum, *infra*.

⁴ Morris v. Rowan, 17 N. J. L.
304.

the costs of the former action and the expenses of counsel fees attending it, whether in asserting or defending the title, are a portion of the damages recoverable. The want of notice of a suit to the warrantor undoubtedly increases the burden of proof that falls on the warrantee. In such case he would be held to prove that the actions brought against him were reasonably defended, and that the costs were fairly and necessarily incurred. And as to the costs in cases in which the warrantee was plaintiff instead of defendant, and also as respects counsel fees and expenses in cases where he was either plaintiff or defendant, and whether the covenantor was notified or not, from the nature of things the burden is on the covenantee to show such items to be reasonable and proper claims where the grantor does not appear in the suits."¹ The defendant must pay, not what the plaintiff may have paid counsel, but what he could have been legally compelled to pay; what the services were reasonably worth, as determined by the jury from the evidence.²

While these general principles are supported by the best authorities,³ there has been an exception in some jurisdictions of the item of counsel fees. They are not allowed in Massachusetts,⁴ Mississippi, Louisiana, South Carolina, or Texas,⁵ and perhaps in some other states.⁶ It is difficult to perceive, how- [308] ever, any sound reason for this exception; for, as was said in an early case in Maine,⁷ "the plaintiff could not defend without counsel, and if employed they must be paid;" and the same reason that would authorize the recovery of the clerk's, sher-

¹ Ryerson v. Chapman, 66 Me. 557.

⁴ Leffingwell v. Elliott, 10 Pick.

² Charman v. Tatum, 54 App. Div. 204.
61, 66 N. Y. Supp. 275; Armstrong v. Percy, 5 Wend. 535, 539; Head v. Hargrave, 105 U. S. 45.

⁵ Clark v. Mumford, 62 Tex. 531, 535; Brooks v. Black, 68 Miss. 161, 8 So. Rep. 332, 11 L. R. A. 176; Lamerlee v. Barthelmey, 2 McGloin, 106; Walsh v. Haring, 48 La. Ann. 984, 20 So. Rep. 202; Hawkins v. Wood, 60 S. C. 521, 39 S. E. Rep. 9 (ruled under a statute).

³ Staats v. Ten Eyck, 3 Cal. 111, 2 Am. Dec. 254; Pitcher v. Livingston, 4 Johns. 1, 4 Am. Dec. 229; Robertson v. Lemon, 2 Bush, 301; Cox v. Strode, 2 Bibb, 273, 5 Am. Dec. 603; Pitkin v. Leavitt, 13 Vt. 379; Kennison v. Taylor, 18 N. H. 220; Lane v. Fury, 31 Ohio St. 574; Harding v. Larkin, 41 Ill. 413; Keeler v. Wood, 30 Vt. 242.

⁶ White v. Clack, 2 Swan, 230. See Holmes v. Slonickson, 15 N. J. L. 313.

⁷ Swett v. Patrick, 12 Me. 2.

iff's and other costs would justify the recovery of reasonable counsel fees. The character of these expenses is the same; one is just as requisite as the other, and both are essential to a defense.¹ The Missouri court, although recognizing the liability for attorneys' fees, refused to permit their recovery in an action for the breach of the covenant in a deed executed in Mississippi, and covering land there, on the ground that because such damages are not recoverable in that state the parties may be presumed to have contracted with reference to its law.² But if the law of another state is not shown it will be presumed to be like that of the forum.³

§ 619. Same subject. In Illinois the right of recovery is confined to costs incurred in actions in which the warrantee is a party to the record and in which he was evicted. And the rule is said to be limited to the taxable costs and reasonable attorneys' fees in that suit.⁴ The covenantee is not entitled to damages on these covenants for any outlays necessitated by the existence or assertion of an invalid adverse claim. The covenant does not protect him against any but lawful claims, which negative the title that the deed to him purports to convey.⁵ Nor can the covenantee or his assignee recover for any damages resulting from his own wrongful acts;⁶ as where the breach of the covenant consists in a third person having a right of way over a stair-case in the tenement conveyed with warranty, and the plaintiff seeks to recover damages which he has been compelled to pay to such third person for removing the stair-case.⁷ In such a case there was a covenant of warranty and against incumbrances. The plaintiff was held entitled to recover damages for the incumbrance only to the date of the removal of the stair-case, and nothing for the damages which he had been adjudged to pay for tearing it down, though the act extinguished the incumbrance.⁸ Where an equitable title is conveyed with covenants, and the party having the legal title asserts it in such manner as amounts

¹ Taylor v. Holter, 1 Mont. 688.

² Matheny v. Stewart, 108 Mo. 73, 17 S. W. Rep. 1014.

³ Hazelett v. Woodruff, 150 Mo. 534, 51 S. W. Rep. 1048.

⁴ Harding v. Larkin, 41 Ill. 413.

⁵ Christy v. Ogle, 33 Ill. 295; Smith

v. Parsons, 33 W. Va. 644, 11 S. E. Rep. 68, quoting the text,

⁶ Wilcox v. Danforth, 5 Ill. App. 378.

⁷ Id.

⁸ Id.

to an eviction, expenses incurred to procure that title by a suit in equity have been allowed on the same principle as where the title undertaken to be conveyed has no equitable or [309] legal foundation, and the paramount title has been procured by the covenantee by purchase. This was held in a recent case in Ohio.¹ A married woman sold real estate, but the acknowledgment of the deed was so defective that the title did not pass. Her heirs, having set up title and brought suit for possession against one to whom the purchaser had conveyed with the covenants, a proceeding in chancery was successfully prosecuted to a decree for the correction of that defective conveyance, and the suit for possession was defeated by seasonably obtaining that decree. For the expenses incurred in curing that defect an action was brought on the covenant of warranty. The court held that it was not necessary that the paramount title should be established by judgment or decree. And if, under the circumstances existing when the petition to reform was filed, the plaintiff might have bought in the paramount title, and recovered of the covenantor any reasonable amount paid therefor, he might recover from him the costs and expenses, including counsel fees, in both suits; that, looking to the substance as well as to the form of the transaction, it was a mode of getting in the legal title. But in a similar case in Iowa² the costs were denied because the suit in equity was brought without a previous request to the covenantor to obtain the legal title. The reformation of a deed so as to include in it and its covenants land which was not originally described therein will not be given retroactive effect so as to make the grantor liable for the expense of defending an action for trespass, upon the land conveyed and included in the reformed instrument, brought by him against the grantee.³

SECTION 5.

COVENANTS AGAINST INCUMBRANCES.

§ 620. **What are incumbrances.** An incumbrance has been defined to be every right to or interest in the land which may subsist in third persons to the diminution of the value of

¹ *Lane v. Fory*, 31 Ohio St. 574.

² *Yokum v. Thomas*, 1 Iowa, 675.

³ *Butler v. Barnes*, 61 Conn. 328, 24 Atl. Rep. 328.

the land, but consistent with the passing of the fee by the conveyance.¹ The cases reported show a great variety of incumbrances, but they may be grouped or classified for the present purpose as incumbrances which consist: 1. Of a judgment, mortgage or some debt or charge that is a lien on the land conveyed. 2. Some right in a third person which may be absolutely or contingently asserted to the title, possession or use of the land conveyed or some part of it, or some privilege or easement thereon, or which imposes in the future some duty or restriction upon the grantee in respect to it.² A

¹ Clark v. Fisher, 54 Kan. 403, 38 Pac. Rep. 493; Lafferty v. Milligan, 165 Pa. 534, 30 Atl. Rep. 1030; 2 Greenl. Ev., § 242; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Barlow v. McKinley, 24 Iowa, 69; Mitchell v. Warner, 5 Conn. 497; Stambaugh v. Smith, 23 Ohio St. 584; Carter v. Denman, 23 N. J. L. 273; Rawle on Covenants, 94, 95; Fritz v. Pusey, 31 Minn. 368, 18 N. W. Rep. 94.

² It is said in a recent case: "Incumbrances are of two kinds, viz.: 1, such as affect the title, and 2, those which affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former; a public road or right of way, of the latter." *Memmert v. McKeen*, 112 Pa. 315, 4 Atl. Rep. 542; *Penn v. Schmisser*, 77 Ill. App. 526; *Whiteside v. Magruder*, 75 Mo. App. 364.

A beam right in favor of adjoining premises, existing by reason of a valid written agreement, is an incumbrance. *Schaeffler v. Miehling*, 13 N. Y. Misc. 520, 34 N. Y. Supp. 693.

Mr. Rawle, in his work on Covenants for Title (4th ed., pp. 96, 97), thus enumerates what have been held to be incumbrances, the existence of which would be a breach of a covenant that the land conveyed is free therefrom: "Thus there can be no doubt that the covenant is broken by the existence of a judg-

ment, a mortgage or any debt which is a lien upon the land conveyed (*Bean v. Mayo*, 5 Me. 94; *Shearer v. Ranger*, 22 Pick. 447; *Norton v. Babcock*, 2 Met. 510; *Jones v. Davis*, 24 Wis. 229; *Case v. Erwin*, 18 Mich. 434); a right of dower, whether inchoate or consummate by the death of the husband (*Shearer v. Ranger*, 22 Pick. 447; *Bigelow v. Hubbard*, 97 Mass. 195; *Porter v. Noyes*, 2 Me. 26; *Donnell v. Thompson*, 10 Me. 170, 26 Am. Dec. 216; *Smith v. Connell*, 32 Me. 126; *Blanchard v. Blanchard*, 48 Me. 177; *Runnells v. Webber*, 59 Me. 488; *Russell v. Perry*, 49 N. H. 547; *Carter v. Denman*, 23 N. J. L. 273; *Jeter v. Glenn*, 9 Rich. 376; *Henderson v. Henderson*, 13 Mo. 151; *Hatcher v. Andrews*, 5 Bush, 561; *McAlpin v. Woodruff*, 11 Ohio St. 120; [*McCord v. Massey*, 155 Ill. 123, 39 N. E. Rep. 592]; *contra dicta*, *Powell v. Monson Co.*, 6 Mason, 355); or by the existence of taxes, whether presently due (*Almy v. Hunt*, 48 Ill. 45; *Ingalls v. Cooke*, 21 Iowa, 560; *Mitchell v. Pillsbury*, 5 Wis. 407); or which, when thereafter levied, relate back prior to the conveyance (*Hutchins v. Moody*, 30 Vt. 652, 34 id. 433. See *Pierce v. Brew*, 43 Vt. 292; *Rundell v. Lakey*, 40 N. Y. 513; *Overstreet v. Dobson*, 28 Ind. 256; *Blossom v. Van Court*, 34 Mo. 394, 86 Am. Dec. 114; *Peters v. Myers*, 22 Wis. 602; *Long v. Moler*, 5 Ohio St. 271; and see,

special warranty following a general covenant against incumbrances will not limit the latter.¹ The diminution of the value of the thing granted, which is said to be the test of an incumbrance, is not to be limited to cases where the thing granted

also, *Cochran v. Gould*, 106 Mass. 29; *Carr v. Dooley*, 119 Mass. 294, 8 Am. Rep. 296; *Blackie v. Hudson*, 117 Mass. 181; *Langsdale v. Nicklaus*, 38 Ind. 289; but obviously not taxes which, assessed after the execution of the deed, do not so relate back. *Jackson v. Sassaman*, 29 Pa. 106. [The recital in his deed by a tax collector, that the land was sold for an unpaid tax, "assessed agreeably to law," is not proof of that fact, or that the tax was an incumbrance. *Maddocks v. Stevens*, 89 Me. 336, 36 Atl. Rep. 398.] So, where a testator devised to his daughter the right of living in part of a house, of which the whole was afterwards sold by the residuary devisee, such paramount right was held to be a breach of the covenant against incumbrances made by the latter. *Jarvis v. Buttrick*, 1 Met. 480. So when the premises were sold subject to a covenant that no ardent spirits should be sold therefrom (*Hatcher v. Andrews*, 5 Bush, 561), or to a covenant that a certain fence should be erected or maintained (*Burbank v. Pillsbury*, 48 N. H. 475; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550. See *Parish v. Whitney*, 3 Gray, 510; *Blain v. Taylor*, 19 Abb. Pr. 228); or to a restriction against building except in a particular way. *Roberts v. Levy*, 3 Abb. Pr. (N. S.) 311; [*Doctor v. Darling*, 63 Hun. 70, 22 N. Y. Supp. 591.] All these have been held to be breaches of the covenant." And on p. 100 the author says: "Again, it

has been said that the covenant is broken by the existence of any easements or servitudes to which the land is subject. *Mitchell v. Warner*, 5 Conn. 508; [*Wetmore v. Bruce*, 54 N. Y. Super. Ct. 149, 118 N. Y. 319, 23 N. E. Rep. 303; *Teague v. Whaley*, 20 Ind. App. 26, 50 N. E. Rep. 41.] And as a general proposition this may be also true. Thus, the existence of a paramount private right of way. *Wilson v. Cochran*, 46 Pa. 233; *Russ v. Steele*, 40 Vt. 310; *Blake v. Everett*, 1 Allen, 250; *Wetherbee v. Bennett*, 2 Allen, 428; [*Butt v. Riffe*, 78 Ky. 352.] Or, it has been held, of a right of way for a railroad. *Barlow v. McKinley*, 24 Iowa, 70; *Beach v. Miller*, 51 Ill. 206. See, also, *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Purcell v. Hannibal, etc. R. Co.*, 50 Mo. 504. A right to cut and maintain a drain. *Smith v. Sprague*, 40 Vt. 43. Or other artificial water-course. *Prescott v. White*, 21 Pick. 341, 32 Am. Dec. 266. A right to cut timber or 'wood leave,' as it is sometimes called. *Catheart v. Bowman*, 5 Pa. 319; *Spurr v. Andrew*, 6 Allen, 420. And in some cases, it is said, by the right to dam up and use the water of a stream running through the land conveyed. *Morgan v. Smith*, 11 Ill. 194; *Ginn v. Hancock*, 31 Me. 42. All these have been held to be incumbrances within the scope of the covenant."

So is a right of way over a staircase in a tenement conveyed. *Wilcox*

¹ *Duroe v. Stephens*, 101 Iowa, 378, 70 N. W. Rep. 610; *King v. Kilbride*, 58 Conn. 109, 19 Atl. Rep. 519; *Bender v. Fromberger*, 4 Dall. 436; *Al-*

exander v. Schreiber, 10 Mo. 460; *Duvall v. Craig*, 2 Wheat. 44; *Rowe v. Heath*, 23 Tex. 614.

is, by reason of some outstanding right or interest in a third person, of less pecuniary worth, but extends to and embraces cases where the grantee, by reason of such an outstanding right or interest, does not acquire by the grant the complete dominion over the thing granted which the grant apparently gives, but is or may be deprived thereby of the whole or some part of its use or possession.¹

According to the great preponderance of authority the vendee's knowledge of the existence of an incumbrance of the first class does not affect his right to recover damages on the breach of the covenant.² It has, however, been determined that it may be shown in mitigation of damages that the grantee had knowledge, at the time he purchased the property, of the existence of a restriction as to the use which could be made of it.³ In some jurisdictions it is presumed that where a servitude imposed upon land is visible and affects only its physical condition, the purchase is made with knowledge of it and the price is determined upon accordingly.⁴ But this presumption does not include a party-wall which extends but slightly beyond the

v. Danforth, 5 Ill. App. 378; McGowan v. Myers, 60 Iowa, 256, 14 N. W. Rep. 788. An incumbrance exists upon property which is subject to assessment for widening a street or for building a sewer from the date of the order to make the improvement. Blackie v. Hndson, 117 Mass. 181; Carr v. Dooley, 119 id. 294; Cadmus v. Fagan, 47 N. J. L. 549, 4 Atl. Rep. 323, reversing 46 N. J. L. 441; Barnhart v. Hughes, 46 Mo. App. 318. See 2 Warvelle on Vendors, §§ 971 *et seq.* (2d ed.); Barth v. Ward, 63 App. Div. 193, 71 N. Y. Supp. 340.

¹ Demars v. Koehler, 62 N. J. L. 203, 41 Atl. Rep. 720, 72 Am. St. 642.

² Docter v. Darling, 68 Hun, 70, 22 N. Y. Supp. 594; Clark v. Fisher, 54 Kan. 403, 38 Pac. Rep. 493; Barlow v. McKinley, 24 Iowa, 69; McGowen v. Myers, 60 id. 257, 14 N. W. Rep. 788; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; Foster v. Foster, 63 N. H. 532; Lane v. Richardson, 104 N. C. 642, 650, 10 S. E. Rep. 189; Cath-

cart v. Bowman, 5 Pa. 317; Funk v. Voneida, 11 S. & R. 109; Demars v. Koehler, 62 N. J. L. 203, 41 Atl. Rep. 720, 72 Am. St. 642, reversing 60 N. J. L. 319, 38 Atl. Rep. 808; Townsend v. Webb, 8 Mass. 146; Flynn v. Bourneuf, 143 Mass. 277, 58 Am. Rep. 135; Rickert v. Snyder, 9 Wend. 416; Edwards v. Clark, 83 Mich. 246, 47 N. W. Rep. 112, 10 L. R. A. 659; Hubbard v. Norton, 10 Conn. 422; Long v. Moler, 5 Ohio St. 271; Copeland v. McAdory, 100 Ala. 553, 13 So. Rep. 545; Corbett v. Wrenn, 25 Ore. 305, 35 Pac. Rep. 658. *Contra*, Page v. Lashley, 15 Ind. 152; Kellum v. Berkshire L. etc. Ins. Co., 101 Ind. 455; Feurer v. Stewart, 83 Fed. Rep. 793.

³ Charman v. Hibbler, 31 App. Div. 477, 52 N. Y. Supp. 212; Roberts v. Levy, 3 Abb. Pr. (N. S.) 311. Compare Docter v. Darling, 68 Hun, 70, 22 N. Y. Supp. 594.

⁴ Butt v. Riffe, 78 Ky. 352; Memmert v. McKeen, 112 Pa. 315, 4 Atl. Rep. 542; Patterson v. Arthurs, 9

line.¹ In Washington a grantor who conveys by metes and bounds with full covenant of warranty is bound as to the whole tract, although a portion of it was plainly and visibly tide land, claimed by the state.²

§ 621. A covenant in presenti; effect of incumbrance [311] on executory contract. The American covenant against incumbrances in general use is a covenant *in presenti* that the premises conveyed *are* free and clear of all incumbrances. It is generally treated as a personal covenant, not running with the land, and broken, if at all, the moment it is made; it is thereby turned into a chose in action in the covenantee, and therefore incapable of transmission to his grantee by deed of the premises.³ This rule is recognized in Iowa, and it is laid down there that if the grantee extinguishes the incumbrance he may recover the sum paid for that purpose; otherwise his

Watts, 152; Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85; Smith v. Hughes, 50 Wis. 620, 7 N. W. Rep. 653.

It is said in a late Wisconsin case that a highway is the only exception. Bennett v. Keehn, 67 Wis. 154, 162, 29 N. W. Rep. 207, 30 id. 112. See Messer v. Oestrich, 52 Wis. 684, 10 N. W. Rep. 6. That is not admitted to be such in Massachusetts (Kellogg v. Ingersoll, 2 Mass. 101), it seems. This is the rule in Illinois. Wadhams v. Swan, 109 Ill. 46. In New York there is no distinction recognized between incumbrances which affect the title and those simply affecting the physical condition of the land. Huyck v. Andrews, 113 N. Y. 81, 10 Am. St. 432, 30 N. E. Rep. 581, 3 L. R. A. 789. And so in Missouri. Whiteside v. Magruder, 75 Mo. App. 364. See Teague v. Whalley, 20 Ind. App. 26, 50 N. E. Rep. 41. And Indiana. Quick v. Taylor, 113 Ind. 540, 16 N. E. Rep. 588; Sherwood v. Johnson, 28 Ind. App. 277, 62 N. E. Rep. 645.

¹ Estate of King, 18 Phila. 81.

² West Coast Manuf. & I. Co. v. West Coast Imp. Co., 25 Wash. 627, 66 Pac. Rep. 97.

³ Buren v. Hubbell, 51 Mo. App. 617; Copeland v. McAdory, 100 Ala. 553, 18 So. Rep. 545; Harrington v. Bean, 89 Me. 470, 36 Atl. Rep. 986; Duroe v. Stephens, 101 Iowa, 358, 70 N. W. Rep. 610; Seventy-third Street Building Co. v. Jencks, 19 App. Div. 314, 46 N. Y. Supp. 2 (compare Geiszler v. De Graff, 166 N. Y. 339, 59 N. E. Rep. 993); Robinson v. Bierce, 102 Tenn. 428, 52 S. W. Rep. 992, 47 L. R. A. 275; William Farrell Lumber Co. v. Deshon, 65 Ark. 103, 45 S. W. Rep. 1036; Andrews v. Davison, 17 N. H. 413, 43 Am. Dec. 606; Mills v. Saunders, 4 Neb. 190; Bean v. Mayo, 5 Me. 94; Eaton v. Lyman, 30 Wis. 41; Pillsbury v. Mitchell, 5 id. 17; Delavergue v. Norris, 7 Johns. 358, 5 Am. Dec. 284; Hall v. Dean, 13 Johns. 195; De Forrest v. Leet, 16 id. 122; Standard v. Eldridge, id. 254; Prescott v. True-man, 4 Mass. 627, 3 Am. Dec. 246; Wyman v. Ballard, 12 Mass. 304; Garrison v. Sanford, 12 N. J. L. 261; Brooks v. Moody, 25 Ark. 472; Stewart v. Drake, 9 N. J. L. 139; Wadhams v. Swan, 109 Ill. 46. The states in which the rule is otherwise are indicated in § 625.

relief cannot exceed a nominal sum. But the purchase of the grantor's notes and mortgage is not an extinguishment of them, they being assigned to the grantee and held by him at the time of the trial. To consider such a transaction an extinguishment would enable a grantee to buy in an incumbrance before maturity, hold it unsatisfied, and recover for the breach of his covenant, and then dispose of the notes and mortgage to one in good faith without notice before maturity, and for a valuable consideration, and thus profit by the transaction.¹ The mere existence of an incumbrance will not relieve the vendee in an executory contract from the performance of the concurrent acts which it is his duty to do. Before he can maintain an action for the breach of the contract, either by way of damages for its non-performance or for the recovery of money paid, he must demand performance from the vendor, unless that has been obviated by the acts of the latter, as by his express refusal in advance to comply with the contract or by placing himself in a position in which performance is impossible. The mere existence of an incumbrance at the time fixed for mutual performance does not relieve the vendee from the duty of making a tender and demand.²

§ 622. **The rule of damages.** Being regarded as a covenant of indemnity,³ the mere existence of an incumbrance of the first class above mentioned is not ordinarily an actual injury, in the absence of anything done to enforce, or of anything paid by the covenantee to satisfy or extinguish it. In such cases, for the mere technical breach, nominal damages [312] may be recovered, and no more. This was decided at an early day in New York,⁴ the court saying: "If he (the covenantee) has not extinguished it, but it is still an outstanding incumbrance, his damages are but nominal, for he ought not to recover the value of the incumbrance, on a contingency, where he may never be disturbed by it. This is the reason-

¹ Harwood v. Lee, 85 Iowa, 622, 52 N. W. Rep. 521.

² Ziehen v. Smith, 148 N. Y. 558, 42 N. E. Rep. 1080, reversing 73 Hun, 571, 26 N. Y. Supp. 419.

³ A vendee cannot recover damages if he and the vendor's agent were secret partners in purchasing

the land and realized a profit in excess of the sum sought to be recovered because of the existence of an incumbrance. Vonderhite v. Walton, 7 Ky. L. Rep. 766.

⁴ Delavergne v. Norris, 7 Johns. 358, 5 Am. Dec. 281.

able rule; for if he was to recover the value of an outstanding mortgage, the mortgagee might still resort to the mortgagor on his personal obligation, and compel him to pay it; and if the purchaser feels the inconvenience of the existing incumbrance, and the hazard until he is evicted, he may go and satisfy the mortgage, and then resort to his covenant." This is the settled American rule.¹ It has been applied in Illinois where the incumbrance was a railway across a farm, and was a benefit to the property.² But in Missouri it has been held that the damages cannot be reduced by evidence of the enhanced value of the land on account of the road, or of privileges accorded to the land-owner by the railway company; such value not being peculiar to the land in controversy.³

Nominal damages may be recovered though the covenantee has not satisfied the incumbrance before action is brought on the covenant.⁴ There may be actual injury from the mere

¹ Seventy-third Street Building Co. v. Jencks, 19 App. Div. 314, 46 N. Y. Supp. 2; McCord v. Massey, 155 Ill. 123, 39 N. E. Rep. 592; Buren v. Hubbell, 54 Mo. App. 617; McGuckin v. Milbank, 152 N. Y. 297, 46 N. E. Rep. 490; William Farrell Lumber Co. v. Deshon, 65 Ark. 103, 44 S. W. Rep. 1036; Tufts v. Adams, 8 Pick. 547; Harlow v. Thomas, 15 id. 66; Wyman v. Ballard, 12 Mass. 304; Prescott v. Trueman, 4 id. 627, 3 Am. Dec. 246; Johnson v. Collins, 16 Mass. 392; Clark v. Swift, 3 Met. 390; Brooks v. Moody, 20 Pick. 474; Thayer v. Clemence, 22 id. 490; Jenkins v. Hopkins, 8 id. 346; Richardson v. Dorr, 5 Vt. 9; Andrews v. Davison, 17 N. H. 413, 43 Am. Dec. 606; Osgood v. Osgood, 39 N. H. 209; Willson v. Willson, 25 id. 235, 57 Am. Dec. 320; Smith v. Jefts, 44 N. H. 482; Eaton v. Lyman, 30 Wis. 41; Pillsbury v. Mitchell, 5 id. 17; Eddington v. Nix, 49 Mo. 134; St. Louis v. Bissell, 46 id. 157; Bean v. Mayo, 5 Me. 94; Randell v. Mallett, 14 id. 51; Herrick v. Moore, 19 id. 313; Clark v. Perry, 30 id. 151; Reed v. Pierce, 56 id. 455, 55 Am. Dec. 761; Runnells v.

Webber, 59 Me. 488; Mills v. Saunders, 4 Neb. 190; Garrison v. Sandford, 12 N. J. L. 261; Stewart v. Drake, 9 id. 141; Funk v. Voneida, 11 S. & R. 109; Patterson v. Stewart, 6 W. & S. 528; Pitcher v. Livingston, 4 Johns. 1, 4 Am. Dec. 229; Hall v. Dean, 13 Johns. 105; Stanard v. Eldridge, 16 id. 251; Baldwin v. Munn, 2 Wend. 405, 20 Am. Dec. 627; Braman v. Bingham, 26 N. Y. 483; Foote v. Burnet, 10 Ohio. 317, 36 Am. Dec. 90; Whisler v. Hicks, 5 Blackf. 102, 33 Am. Dec. 454; Smith v. Ackerman, 5 Blackf. 541; Pomeroy v. Burnett, 8 id. 142; Brady v. Spurek, 27 Ill. 478; Willets v. Burgess, 34 id. 500; Richard v. Bent, 59 id. 38, 14 Am. Rep. 1; Cheney v. City Nat. Bank, 77 Ill. 562; Davis v. Lyman, 6 Conn. 255; Funk v. Creswell, 5 Iowa. 62; Beecher v. Baldwin, 55 Conn. 419, 3 Am. St. 57, 12 Atl. Rep. 401; Pradshaw v. Crosby, 151 Mass. 237, 24 N. E. Rep. 47.

² Wadhams v. Swan, 109 Ill. 46.

³ Kellogg v. Malin, 62 Mo. 429, 432.

⁴ Smith v. Jefts, 44 N. H. 482; Beecher v. Baldwin, *supra*.

existence of a mortgage; and whenever it is actually injurious the covenant affords an indemnity. In a Pennsylvania case the existence of a paramount mortgage having ten years to run gave cause to the creditors of the covenantee to press their demands; he made an assignment, and on the supposition of a sale of the premises to which the covenant related, Duncan, J., said: "The grantee ought to recover all the actual damages he has sustained by the grantor's violation of his [313] covenant because the very sale is the consequence of the incumbrance. If there is a judgment against him for the smallest sum, insufficient to condemn his land, by taking in the mortgage, which is a reprisal, if due within seven years, his land is condemned, and sold by means of this very incumbrance; sold for less, *minus* the mortgage money. Is not this an actual damnification to this amount, occasioned by the breach of covenant? If it was a judgment with a stay of execution, and the land sold on a judgment against the grantee, and the judgment against the grantor paid out of the proceeds of the sale, this is a damnification. So here, by the operation of law, a consequential damage arises from the delinquency of the grantor; in reality the plaintiff has sustained every possible damage he can sustain — he can never suffer more. It is the same thing to him as if the land had been sold on the mortgage given by the grantor. The equity of this case is to award to the plaintiff the fair present value of the mortgage."¹ The heirs of a grantor who has conveyed land to some of them as an advancement may recover from his estate the amount of a mortgage on the land conveyed; but they must share with their co-heirs the loss to the estate.² Where the covenantee was not bound to indemnify his grantees because of incumbrances he could not recover from his grantor anything more than nominal damages because of the existence of an outstanding mortgage on a portion of the land which he had conveyed for its full value prior to the foreclosure of a mortgage executed by himself. He could, however, recover substantial damages in respect to the portion of the land owned by him at the time of such foreclosure, and of

¹ Funk v. Voneida, 11 S. & R. 109.

² Polley's Ex'rs v. Polley, 5 Ky. L. Rep. 801, 82 Ky. 64.

the title to which he was thereby divested, by showing that the sum obtained therefor on the foreclosure sale was affected by the outstanding mortgage to his detriment.¹

In *Braman v. Bingham*² the grantor covenanted that the premises were subject to no incumbrances except mortgages to the amount of \$12,400; in fact there were mortgages to the amount of \$12,800. The grantee, having paid one of them exceeding \$400, was held entitled to recover that sum with interest, without paying off those remaining; he was not confined to nominal damages. The court say, by Selden, J., that "the existence of \$400 of incumbrances in excess of the amount named in the covenant constituted a breach of the covenant, and entitled the plaintiff to nominal damages without having made any payment. Such covenant is broken as soon as made, if ever. When the plaintiff paid the excess of \$400 he became entitled to recover that amount as damages for the breach. By the terms of the covenant it appears to have been contemplated that the lands were to remain, for a time at least, subject to the lien of \$12,400. And it would not be reasonable to require the grantee to pay that sum, as well as the excess, to entitle him to a substantial indemnity for the conceded breach of the defendant's covenant."

§ 623. Same subject. If the covenantee pays off or procures a discharge of the incumbrance, the amount he [314] fairly and necessarily pays for that purpose, not exceeding, however, the purchase-money and interest from the time of payment, will be the measure of damages, and may be recovered though such payments may have been made after suit brought on the covenant.³ The legal ground of action is not

¹ *McGurkin v. Milbank*, 152 N. Y. 297, 46 N. E. Rep. 490.

² 26 N. Y. 483.

³ *Richmond v. Ames*, 164 Mass. 467, 44 N. E. Rep. 671; *Corbett v. Wrenn*, 25 Ore. 305, 35 Pac. Rep. 658; *Johnson v. Brice*, 102 Wis. 575, 580, 78 N. W. Rep. 1086, citing the text; *Amos v. Cosby*, 74 Ga. 793 (a wife who joins with her husband in conveying a homestead is liable on the covenant against incumbrances;

Johnson v. Collins, 116 Mass. 392; *Smith v. Carney*, 127 id. 179; *Bradshaw v. Crosby*, 151 id. 267, 24 N. E. Rep. 47; *Collier v. Cowger*, 52 Ark. 322, 12 S. W. Rep. 702, 6 L. R. A. 107; *Ward v. Ashbrook*, 78 Mo. 515; *Walker v. Deaver*, 79 id. 664; *Lano v. Richardson*, 104 N. C. 642, 10 S. E. Rep. 189; *Barnhardt v. Hughes*, 46 Mo. App. 318; *Kent v. Contrall*, 14 Ind. 452; *Rardin v. Walpole*, 58 id. 146; *Larnum v. Peterson*, 111 Mass.

a debt or obligation to pay money, but the breach of the covenant. There being such a breach before the action is commenced, it is maintainable for some damages, and any actual loss which results from that breach down to the assessment of damages may be included.¹ But if the action is brought before the covenant is broken, there cannot be a recovery of damages subsequently sustained in the removal of an invalid title, a right of action for which is given by statute. The right does not relate back to the institution of a suit brought before the breach.² No recovery can be had because of the extinguish-

148; *Foote v. Burnet*, 10 Ohio, 317, 36 Am. Dec. 90; *Stambaugh v. Smith*, 23 Ohio St. 584; *Hall v. Dean*, 13 Johns. 105; *Comings v. Little*, 24 Pick. 266; *Norton v. Babcock*, 2 Met. 516; *Garrison v. Sandford*, 12 N. J. L. 261; *Stoddard v. Gage*, 41 Me. 287; *Brooks v. Moody*, 20 Pick. 474; *Harlow v. Thomas*, 15 id. 66; *Thayer v. Clemence*, 22 id. 490; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Grant v. Tallman*, 20 N. Y. 191, 75 Am. Dec. 384; *Chapel v. Bull*, 17 Mass. 213; *Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 595; *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761; *Davis v. Lyman*, 6 Conn. 255; *Wyman v. Bridgen*, 4 Mass. 150; *Wyman v. Ballard*, 12 id. 304; *Tufts v. Adams*, 8 Pick. 547; *Batchelder v. Sturgis*, 3 Cush. 205; *Waldo v. Long*, 7 Johns. 173; *Delavergne v. Norris*, id. 358, 5 Am. Dec. 281; *Stanard v. Eldridge*, 16 Johns. 254; *Baldwin v. Munn*, 2 Wend. 405, 20 Am. Dec. 627; *Stewart v. Drake*, 9 N. J. L. 139; *Funk v. Voneida*, 11 S. & R. 112; *Brown v. Brodhead*, 3 Whart. 124; *Henderson v. Henderson*, 13 Mo. 151; *St. Louis v. Bissell*, 46 id. 160; *Snyder v. Lane*, 10 Ind. 424; *Hurd v. Hall*, 12 Wis. 112; *Bailey v. Scott*, 13 id. 618; *Eaton v. Tallmage*, 22 id. 502; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Burk v. Clements*, 16 Ind. 132; *Brandt v. Foster*, 5 Iowa, 287; *Baker v. Corbett*, 28 id. 320. See *Connell v. Boulton*, 25 Up. Can. Q. B. 444.

If the incumbrance is discharged by the grantor expenses claimed by the grantee on account of it will be closely scanned. *Bradshaw v. Crosby*, 151 Mass. 237, 24 N. E. Rep. 47.

It is not a defense to an action to recover the reasonable expense incurred in discharging an assessment upon property that it was invalid, if the power to re-assess exists. The grantee is not bound to enter into a useless litigation to avoid an assessment. *Coburn v. Litchfield*, 132 Mass. 449.

¹ *Corbett v. Wrenn*, 25 Ore. 305, 35 Pac. Rep. 658; *Brooks v. Moody*, 20 Pick. 474; *Leffingwell v. Elliott*, 10 id. 204; *Wetmore v. Green*, 11 id. 462; *Morrison v. Underwood*, 20 N. H. 369; *Miller v. Hartford, etc. Ore Co.*, 41 Conn. 112; *Moseley v. Hunter*, 15 Mo. 322; *Kelly v. Low*, 18 Me. 244; *Stambaugh v. Smith*, 23 Ohio St. 584.

² *Tibbetts v. Leeson*, 148 Mass. 102, 18 N. E. Rep. 679. Sec. 18, ch. 126, Pub. Stats. of Massachusetts, provides that "whoever conveys real estate by deed or mortgage containing a covenant that it is free from all incumbrances when an incumbrance of record appears to exist thereon, whether known or unknown to him, shall be liable in an action of contract to the grantee," etc., for all damages sustained in removing the same. This does not change the rule that the covenant does not run

ment of an *alleged* incumbrance.¹ A vendee who pays a judgment which is a lien on the land when the action which resulted in the judgment was being defended by his grantor who, after its rendition, undertook to protect the title of his grantee and had obtained an injunction restraining further proceedings under the judgment, does so at his peril, it not being shown that the proceedings instituted by the grantor must necessarily have failed.² In equity damages sustained since the commencement of the action may be recovered.³

The covenantee is not obliged to pay off the incumbrance,⁴ and if it is suffered to ripen into a title adverse and indefeasible the measure of damages, on eviction, will be the same as upon a covenant of warranty,⁵ and perhaps without actual eviction.⁶ It has been held in Iowa that a purchaser who receives a deed containing a covenant against incum- [315]

with the land, and is broken, if at all, upon the delivery of the deed. *Kramer v. Carter*, 136 Mass. 504. Nor does it affect the measure of damages. *Bradshaw v. Crosby*, 151 id. 237, 24 N. E. Rep. 47. It is limited to incumbrances appearing of record in the registry of deeds. *Carter v. Peak*, 138 Mass. 439.

A similar statute in Minnesota has been held to apply only to incumbrances appearing of record, but not existing in fact. *Hawthorne v. City Bank*, 34 Minn. 382, 26 N. W. Rep. 4.

¹ *Robinson v. Bierce*, 102 Tenn. 428, 52 S. W. Rep. 992.

² *Tuggle v. Hamilton*, 100 Ga. 292, 27 S. E. Rep. 987.

³ *Duroe v. Stephens*, 101 Iowa, 358, 70 N. W. Rep. 610; *Moseley v. Hunter*, 15 Mo. 329; *Kelly v. Low*, 18 Me. 214; *Brooks v. Mooly*, 20 Pick. 474.

⁴ *McGurkin v. Milbank*, 152 N. Y. 297, 46 N. E. Rep. 490; *William Farrell Lumber Co. v. Deshon*, 65 Ark. 103, 44 S. W. Rep. 1036.

The existence of an incumbrance warranted against absolves the purchaser, who may recover a payment

made the auctioneer and the expense of examining the title. *Wetmore v. Bruce*, 54 N. Y. Super. Ct. 149, 118 N. Y. 319, 23 N. E. Rep. 303.

⁵ *Stewart v. Drake*, 9 N. J. L. 139; *Jenkins v. Hopkins*, 8 Pick. 346; *Norton v. Babcock*, 2 Met. 510; *Dimmick v. Lockwood*, 10 Wend. 142; *Patterson v. Stewart*, 6 W. & S. 527, 40 Am. Dec. 586; *Chapel v. Bull*, 17 Mass. 213; *Monahan v. Smith*, 19 Ohio St. 384; *Smith v. Dixon*, 27 id. 471.

Where the rule prevails that the measure of damages on the breach of the covenant of warranty is the value of the land at the time of eviction, it applies to the breach of the covenant against incumbrances. *Beecher v. Baldwin*, 55 Conn. 419, 3 Am. St. 57, 12 Atl. Rep. 401. If the land has depreciated in value equal to the unpaid purchase-money the notes taken to secure the payment thereof may be set off against the damages claimed, although they are barred as independent causes of action. *Id.*

⁶ *Alexander v. Bridgford*, 59 Ark. 195, 27 S. W. Rep. 69; *Nichol v. Alexander*, 28 Wis. 118.

branches from one who derived title by foreclosure of a senior mortgage, but without the junior mortgagee having been made a party to the foreclosure proceedings, may buy in the junior mortgage, if the premises are of such value that he can better afford to pay the amount which it costs and retain them than suffer a redemption and eviction, and should be allowed to recover on the covenant against incumbrances the amount so fairly paid, notwithstanding he received and retained an interest paramount to the incumbrance of greater value than the amount which he paid for that interest,¹ for purchasers have a right to the benefit of their purchases, and not simply to a return of their money and interest.² Referring to the case in which this doctrine was announced,³ the court, in *Guthrie v. Russell*, says: "This court ignored the doctrine that the consideration paid is to be taken as the value of the property as between the parties. In that case the court aimed to give full compensation, thus following, to some extent, the rule adopted in Massachusetts and some other states, where the limit of recovery in an action for the breach of the covenant is the actual value of the property at the time of the eviction or at the time of extinguishing the incumbrance. Yet we cannot think that the court designed to depart altogether from the other rule above set forth, which is in accordance with the decided weight of authority, and which is expressly held by this court in *Brandt v. Foster*.⁴ We have no doubt that if . . . the incumbrance paid off had exceeded the purchase-money and interest, the plaintiff would have been limited in his recovery to that amount."

One of the appellate divisions of the New York supreme court has interpreted the rulings of the court of appeals of that state to the effect that when the covenant against incumbrances is breached by the existence of an easement the measure of damages is the difference in value of the land with and without the easement,⁵ as favoring a larger measure of liability against the vendor than the value of the land at the time it

¹ *Guthrie v. Russell*, 46 Iowa, 269,
26 Am. Rep. 135.

² *Knadler v. Sharp*, 36 Iowa, 232.

³ *Id.*

⁴ 5 Iowa, 295.

⁵ *Huyck v. Andrews*, 113 N. Y. 81,
20 N. E. Rep. 876, 10 Am. St. 432, 3
L. R. A. 789. See *Hymes v. Esty*, 133
Y. 342, 346, 31 N. E. Rep. 105.

was conveyed where the vendee has put improvements on the land and accepted the conveyance without knowledge of the existence of the incumbrance. The opinion of Judge Parker on this point, favoring the liability of the grantor, where the grantee pays the incumbrance, to the amount of the payment made, *not exceeding the value of the property when payment was made*, has much force. He said: "Treating, then, the covenant against incumbrances as an indemnity, which it very clearly seems to be, nothing less than payment of the loss actually sustained by reason of the incumbrance can satisfy it. If the grantee has put valuable improvements upon the premises and thereby enhanced their value, and the enforcement of an existing incumbrance upon them is about to deprive him of his property in them, evidently the loss which he sustains by reason of such incumbrance is the sum which he must pay to prevent such enforcement, not to exceed, however, the then value of the premises. The payment is made for the purpose of retaining to himself the use and ownership of such premises, and, of course, if not made he could lose no more than their value. But in very many cases, as in the one at bar, it is plain that the grantee will have to expend, in relieving the premises from the burden of the incumbrance, more than he originally paid for the premises, and if he may not recover upon the covenant a greater sum than such purchase price, he has been by no means indemnified for the loss he sustains. In other words, complete indemnity cannot be made to the grantee by restoring to him only the purchase-money and interest, when he has been deprived of property which far exceeds that amount in value. It is a fair presumption that, in all cases where lands are sold and conveyed, the parties understood that the purchaser will put such improvements on them as he deems necessary for their profitable use and enjoyment, and that in such manner the value of the premises may be greatly increased; and when a grantor covenants to indemnify the purchaser against an outstanding incumbrance he must be deemed to have contracted with a full understanding of the possibility of such increase and of the effect it would have upon the grantee's loss in the event that the incumbrance was enforced. I am not indifferent to the logic of the argument that if the value of improvements may not be consid-

ered in an action upon a covenant of seizin or for quiet enjoyment when the enforcement of the incumbrance has resulted in an eviction and the loss of the entire estate, they should not be allowed in estimating damages for a breach of the covenant against incumbrances, when payment has been made instead of an eviction suffered; but my answer is that, however proper the rule may be in the actions in which it was promulgated, it falls too far short of adequate indemnity to be extended to the class of actions now being considered. . . . My conclusion is that, in an action similar to the one at the bar, the amount paid by the covenantee to protect himself against the enforcement of the incumbrance, not to exceed the value of the premises, is the measure of his damages. One of the controlling reasons which influenced the adoption of the existing rule in actions on covenants for quiet enjoyment was that it was a covenant running with the land, and that it could not be presumed that the grantor intended to covenant to pay for extensive improvements or for advances in value, of the extent of which he could make no calculation, and for which he received no consideration, and when that payment, in the years to come, might suddenly overwhelm him or his descendants in unexpected ruin. It is to be noticed that in a covenant against incumbrances the grantor is not contracting under any such uncertainty. He knows, particularly if he has, as in this case, himself created it, the exact amount of the incumbrance and the utmost extent of the liability he incurs; and when he enters into a personal covenant to indemnify the grantee against such incumbrances there is no reason apparent why he should not be held to the performance of his obligation.¹

If lands are conveyed by a single deed for an entire consideration actually paid and expressed therein, it cannot be shown that there was a prior parol agreement to the effect that a part of the land conveyed, upon which there was an incumbrance, was granted without consideration.² If the estate bargained for is entirely defeated, the purchaser's recovery

¹ *Utica, etc. R. Co. v. Gates*, 8 App. Div. 181, 40 N. Y. Supp. 316, affirming 21 N. Y. Misc. 205, 47 N. Y. Supp.

231. *Contra*, *Copeland v. McAdory*, 100 Ala. 552, 13 So. Rep. 545.

² *Bruns v. Schreiber*, 43 Minn. 468, 45 N. W. Rep. 861.

cannot exceed the purchase-money and interest on it for six years; taxes paid by him cannot be added thereto¹ Where a portion of the land is lost the vendee may recover so much of the consideration as is proportioned thereto.² If the covenant in a deed excepts from the warranty against incumbrances a mortgage for a sum named, which sum was one-third of the amount of a mortgage covering the land conveyed and two other tracts of the same size, it will be presumed that each tract should bear one-third of the incumbrance; hence no action for the breach of the covenant lies until, upon the foreclosure of the mortgage, the land conveyed was made liable for the payment of more than one-third the mortgage debt.³

In a recent case⁴ in which the grantee had been sued by a third person who claimed a right of way in the land upon which the grantee had encroached with a building, the question of the grantor's liability for the expenses and attorneys' fees incurred by the grantee in defense of that action was considered. The pronouncement of the court is not positive because the facts were somewhat uncertain. It was said: If it was a question reasonably doubtful whether the plaintiff in that suit was right in his contention as to the right of way, the present plaintiff had the right to defend that suit, and it may be that he had the right to ask the present defendant to defend it, and that any expenses reasonably incurred in defending against the claim of a right of way made in that suit he may recover of the present defendant.⁵ Whether such expenses should include reasonable fees paid for counsel, in addition to the taxable costs, is, on the authorities, a question of some difficulty. If it was the duty of the present defendant to defend the suit, and she had an opportunity of defending it and declined to do so, then, if the present plaintiff in good faith defended such suit, it would seem reasonable that counsel fees should be recovered.⁶ If no opportunity was given to the

¹ *Daggett v. Reas*, 79 Wis. 60, 48 N. W. Rep. 127; *Pearson v. Ford*, 1 Kan. App. 580, 42 Pac. Rep. 257; *Dimmick v. Lockwood*, 10 Wend. 142; *Foote v. Burnet*, 10 Ohio, 317, 335, 36 Am. Dec. 90.

² *Alexander v. Bridgford*, 59 Ark. 195, 27 S. W. Rep. 69.

³ *Hurwood v. Lee*, 85 Iowa, 622, 52 N. W. Rep. 521.

⁴ *Richmond v. Ames*, 164 Mass. 467, 475, 44 N. E. Rep. 671.

⁵ *Bradshaw v. Crosby*, 151 Mass. 237, 24 N. E. Rep. 47; *Furnum v. Peterson*, 111 Mass. 148.

⁶ *Westfield v. Mayo*, 122 Mass. 100,

present defendant to defend the former suit, the law, perhaps, is more doubtful.¹ The grantee has the burden of showing the amount paid, and that it was the reasonable and fair value of the interest acquired.² Where the breach of the covenant results from a mortgage, judgment, attachment or other incumbrance that the grantor may remove, but little difficulty can exist in complying with this rule. But where the incumbrance is of such character that it is not removable as a matter of right, such as dower and the like, the damage is not to be fixed by the action of the covenantee, but must be established by him if he seeks to recover more than a nominal sum.³

§ 624. **The English and Canadian rule of damages.** In Canada the covenant against incumbrances has been construed and enforced to give substantial damages for the mere existence of incumbrances, as the covenant of seizin is generally in the United States, except that instead of following the analogy of allowing the consideration and interest for want of title, the amount of the incumbrance was held in the court of queen's bench to be the measure of damages without regard [316] to whether it is more or less than the purchase-money.⁴ The rule of the case cited is based on *Lethbridge v. Mytton*,⁵ and has been applied where the vendee had mortgaged the land, and the mortgage given by his grantor covered other lands as well as those owned by the plaintiff, and was for a sum much greater than the value of the land at the time the action was brought. It was impossible to apportion the damages, and the measure was held to be the whole amount due on the mortgage, which was required to be paid into court to insure that the money reached its proper destination.⁶ A strong dissenting opinion by Meredith, J., sets forth the view

23 Am. Rep. 392. See *Leffingwell v. Elliott*, 10 Pick. 204.

¹ See *Lindsey v. Parker*, 142 Mass. 582, 8 N. E. Rep. 745; *Boston & A. R. v. Charlton*, 161 Mass. 32, 36 N. E. Rep. 688.

² *Grant v. Tallman*, 20 N. Y. 141; *Guthrie v. Russell*, 40 Iowa, 269; *Farnum v. Peterson*, 111 Mass. 148; *St. Louis v. Bissell*, 46 Mo. 157; *Anderson v. Knox*, 20 Ala. 156; *Pate v.*

Mitchell, 23 Ark. 590; 79 Am. Dec. 114; *Gilbert v. Rushmer*, 49 Kan. 632, 31 Pac. Rep. 123.

³ *McCord v. Massey*, 155 Ill. 123, 39 N. E. Rep. 592.

⁴ *Connell v. Boulton*, 25 Up. Can. Q. B. 444.

⁵ 2 B. & Ad. 772.

⁶ *McGillivray v. Mimico Real Estate Security Co.*, 28 Ont. 265 (1898).

that the English case only determines that at common law a plaintiff in an action for damages for breach of a covenant to pay off a specific mortgage on a specified day is not limited to nominal damages where he has sustained no actual loss; but in a case where the value of the land is greater than the amount of the mortgage may have judgment for that amount, and that the defendant must look to equity to compel the proper application of the money when recovered so that he may not run any risk of having to pay the amount more than once. The opinion points out that of three eminent writers upon the subject no two of them agree as to the effect of *Lethbridge v. Mytton*. Mr. Mayne's opinion is that it was rightly decided, and the principle applies to covenants against incumbrances, where the land is greater in value than the amount of the mortgage. Mr. Sedgwick's opinion was that the case was wrongly decided, and that the plaintiff was entitled only to nominal damages until actual damage was sustained or expense was incurred; while Mr. Rawle's opinion is that the case was rightly decided because the covenant was to pay a certain amount on a certain day, but that it is not applicable to the case of a covenant against incumbrances. The writer hereof agrees with the dissenting judge that there is much to be said in support of Mr. Rawle's view. A covenant to pay off a certain sum due on a certain mortgage at a specified time very materially differs from a covenant that no incumbrance exists. The one asserts, the other denies, the existence of incumbrances. In the one the covenant would, if Mr. Mayne's opinion is right, be broken as soon as made; in the other there would be no breach until the time fixed for payment, a difference which may very seriously affect the plaintiff's right of action, as the judge pointed out, and if Mr. Mayne's opinion is right the covenant against incumbrances would be an exception to the general rule as to covenants for title both in Canada and in England in this, that they are continuing covenants running with the land, which may be sued upon from time to time as fresh damages arise. Upon first principles, the damages in such a case as this ought to be measured by the loss the plaintiff sustains; if it be substantially the land entirely, then he should have its value, but that

is, under ordinary circumstances, the most. Therefore if there were no subsequent incumbrances the measure of the plaintiff's damages here should be the amount by which the value of the land is depreciated by reason of the existence of the incumbrance in question. By bringing his action he fixes the time at which that value is to be ascertained. There was not a complete failure of consideration, for under the deed he has had possession, and has raised \$600 on the security of the land. It may be that a release of this small portion of the mortgaged lands can be had for less than the value of the land, and if that be so that sum should be paid in so as to relieve the mortgagors to that extent from the mortgage. In no case can the plaintiff's damages exceed the value of all he can lose by reason of the existence of this mortgage, in respect to which he is in no way personally liable. But throughout the case the existence of the subsequent incumbrances seems to have been overlooked; they were created by the plaintiff or his vendor and subsist, and would seem to prevent the plaintiff recovering anything in this action until they are released. If he is liable to pay these mortgages they may, after payment, be an element in the damages of the plaintiff. Again, if the plaintiff's contention is right, if *Lethbridge v. Mytton* governs this case, then this covenant was broken as soon as made, and broken once for all, and the right of action never passed to the plaintiff. And apart from either of these considerations the inconsistency of judgment in favor of the plaintiff for more than fifty times the value of the land which is the subject-matter of this action is increased by the fact that the same land was mortgaged back to the defendants, and is yet incumbered in their favor for more than eight times its value, as well as by the fact that a like claim may be made by the first of the subsequent incumbrancers, whose rights are prior to those of the plaintiff, who took expressly subject to them.

In Canada the covenant is held to run with the land, although the grantor was in fact seized only of an equity of redemption; that it can be sued upon as such by the grantee; and the court of common pleas held that the measure of damages was the difference between the value of the equity of redemption and the indefeasible estate of inheritance con-

tracted and paid for, that difference being represented by the amount for which the mortgage stands as security.¹

§ 625. In some states covenant runs with land. In [317] several of the states this covenant is held to run with the land

¹ *Empire Gold Mining Co. v. Jones*, 19 Up. Can. C. P. 245. A very interesting and instructive opinion on this point was given in this case. The court says: "Upon the question of damages, *Hackett v. Boulton*, 3 C. P. 407, is an express authority that substantial damages are recoverable. *Carlisle v. Orde*, 7 C. P. 456, although there was a bond of indemnity sued upon as well as a covenant, shows, I think, the opinion of Draper, C. J., to have been that substantial damages are recoverable upon the covenant under the circumstances appearing here. The only difference between *Connell v. Boulton*, 25 U. C. 444, and this case, is that there the mortgage was due. It is an authority, also, that substantial damages are recoverable. *Raymond v. Cooper*, 8 C. P. 388, and *Carr v. Roberts*, 5 B. & Ad. 78, were cases of bonds of indemnity. *Lethbridge v. Mytton*, 2 B. & Ad. 772, was a case of a covenant of indemnity, and to pay off a mortgage within a year. Ten years elapsed without its having been paid, and although the mortgage never was enforced, on an action being brought on the covenant, the covenantee was held entitled to recover the full amount of the mortgage, although no damages whatever, further than what consisted in its mere existence, had been sustained by him. In *Graham v. Baker*, 10 C. P. 426, and *Snyder v. Snyder*, 14 C. P. 156, the breaches consisted in a simple naked negation of title, and the parties had possession, and no damage by reason of the existence of any incumbrance was stated or suggested. It was treated that the defect of title might have been cured

by lapse of time, so that these cases cannot affect the present. There are, however, observations in *Kennedy v. Solomon*, 14 Q. B. at p. 628, in the judgment of the late Chief Justice Sir John Robinson, which give some countenance to the contention of the defendant, that nominal damages only are recoverable here. The observations alluded to are not upon a point upon which the judgment was given, for the judgment was upon the covenant for quiet enjoyment. They related to the covenants for seisin and for good title. There is also a difference between the covenant for right to convey there and here; for here the covenant is specially directed to a right to convey free from incumbrance, so as to assimilate it to a covenant that the premises are free from incumbrances. Moreover, the learned chief justice does not express a decided opinion, but a doubt only. . . . He says, 'a mortgage or payment is treated in equity not as a matter affecting the title or right to convey, because they hold that the mortgagor or the judgment debtor is, nevertheless, the owner of the estate, and entitled to convey subject, of course, to the incumbrance.' In *Townsend v. Champenown*, 1 Y. & J. 449, the court said that in practice, in the master's office a mortgage, even though it may be to secure a sum larger than the value of the property, is always treated and considered as matter of conveyance, and not of objection to the title; and I find no authority for holding that it is otherwise regarded at law, though I do not feel confident that when a mortgage in fee has been given by the vendor, before

for the protection of the owner who suffers actual injury from [318] the incumbrance. It is there held that the covenantee may recover nominal damages for the technical breach which

giving the conveyance in which he covenants for title, and where the mortgage money has not been paid, an action might not lie on the covenant for title, and nominal damages be recovered, though the vendee had never been molested by any claim under the mortgage while it was unsatisfied.' Now, on a bill for specific performance in equity, the reference to the master is to inquire and report whether a good title *can be* made, and when first shown. It is shown by an abstract which must show all the incumbrances; and the abstract is held to be complete, and a good title shown whenever it appears that upon certain acts being done the legal and equitable estates will be in the purchaser; consequently, the appearance of incumbrances on the abstract is no reason why the master should report that a good title cannot be made: nor do they afford sufficient grounds of exception to his report that a good title can be made; for, the court being in possession of what the incumbrances are, before the conveyances come to be made, can and does cause them to be removed, and gives the purchaser ample protection against them. This is the extent of the rule in equity, and the like rule prevails at law in executory contracts, where the contract points to the showing the title and not to the perfecting it in the purchaser, by conveyance. *Savory v. Underwood*, 23 L. T. (Q. B.) 141. But the rule, I apprehend, does not, and indeed cannot, have any application to executed contracts. The court of chancery treats the mortgage as an incumbrance, and causes it to be removed, or makes ample provision for the protection of the purchaser

against it; acting upon the principle that the court will not — inasmuch as everything it does is done with a view of perfection — cause conveyances to be executed containing a covenant, which when executed would, *eo instanti*, give to the purchaser an action at law to recover damages in respect of these same incumbrances. True it is that in equity the mortgagor is in a sense deemed to be the owner of the estate, and the mortgage only a pledge and an incumbrance. Treating it as an incumbrance presently existing is sufficient for the purpose of this action; but it is to be added that at law, the mortgagee in fee is regarded in quite a different light. He is seized of the estate; and that being so, the mortgagor *cannot* be. When he then assumes to convey in fee simple or absolute, and covenants for seizin or for good title simply, the rule prevailing in equity, upon references to the master on bills for specific performance, can furnish no rule for fixing the measure of damages sustained by reason of the breach of that covenant, short of the protection given by the court of chancery itself, when the conveyance comes to be executed; namely, full protection and indemnity against the incumbrances.

"In *Howell v. Richards*, 11 East, 642, Lord Ellenborough says: 'The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey, viz.: in this case an indefeasible estate in the fee-simple.' Now, if he executes a deed purporting to convey such an estate, when he in fact has only an equity of redemption, the legal es-

happens at the moment of executing the deed containing the covenant in consequence of the mere existence of the [319] incumbrance; yet, that this does not arrest the covenant and

late being in a mortgagee in fee, and covenants that he has such an estate, how can it be said that this covenant is not substantially broken? And if substantially broken, that is, not merely technically, but in substance, how can it be said that the purchaser should be restricted to the recovery of nominal damages only? *Vane v. Lord Barnard*, Gilb. Eq. 7, before Lord Chancellor Cowper, has been referred to; but that, in my judgment, rightly understood, is a strong case in support of the recovery of substantial damages in this case. Lord Barnard, on the marriage of his son, entered into articles with trustees, whereby he covenanted to settle certain lands to the usual limitations of marriage settlements; and he covenanted 'that, in such settlement, there shall be covenants that he is seized in fee, has good right to convey, and that the trustees shall enjoy free from incumbrances.' It happened that these lands were charged by Lord Barnard's own marriage settlement with £6,500, to be paid to such 'daughter, or daughters, as should be living at his death, and not provided for.' A bill was filed against Lord B. for a specific performance of the covenant in his son's articles by Lord B.'s paying off or otherwise giving collateral security against the contingent portion of £6,500. All parties had notice of this charge when Lord B.'s covenant was given. The lord chancellor refused this relief, saying: 'Lord B. has not covenanted that the lands are free from incumbrances, but only that in the settlement he would give specific covenants. Notice or no notice was very material in this case; for, where a covenant is in this manner,

if any incumbrance is discovered between the executing the articles and the sealing the deed of settlement, whereof the party had no notice, that incumbrance shall be discharged even before the sealing of the deed of settlement, because it would be needless to enter into a covenant which, before entering into, is already known to be broken. Now, when you have notice of an incumbrance before executing the articles, you consent with your eyes open to accept the party's covenant against incumbrances you were aware of; and when you have chosen your own security this court will give no other security than by the articles is agreed to, and the rather in this case for that the portion is not a certain incumbrance but a contingent one. It was strongly urged by Mr. Vernon that, supposing these articles were but a covenant *to covenant*, yet as soon as the articles were performed by sealing the deed of settlement, then they might on that day file a bill to enforce specific performance of the covenant.' The lord chancellor said in this case they could not, 'for the incumbrance was not necessary but contingent; and if you brought an action at law upon such a covenant you would not recover two pence until *breach*, which possibly *may never happen*; so relief was refused against this contingent covenant, but was granted in respect of another charge which was present and not contingent.' The reporter adds: 'It seems the portion being *contingent*, and *not certain*, was the reason of this part of the decree, because it is plain by the latter part of the decree where the incumbrance was certain, viz., the payment of a yearly

merge it in a chose in action; that a judgment for such nominal damages does not operate as a bar to a fresh suit in favor of the covenantee, or even a remote grantee, when, in

sum, and Lord B. was decreed immediately to discharge it, though by the articles he did but covenant to covenant; and the report concludes: 'Note the difference between a present covenant that the lands are free from incumbrance and that a man shall execute a deed with covenant that the lands are free, and between a covenant that lands are free and that the trustee shall enjoy the lands free.'

"The portion in this case, it is to be observed, in respect of which the relief was refused, and to which the lord chancellor referred when he said an action at law would not lie, was not a present incumbrance. It had nothing of the character of a *'debitum in presenti solvendum in futuro.'* It depended upon two contingencies whether it would ever become an incumbrance; namely, Lord B. leaving a daughter him surviving, and her not being provided for. The contingency referred to was not whether, admitting the charge to be a present incumbrance, it might or not ever be enforced to the damage of the covenantee, but whether it ever should become a present incumbrance. That this was the view of the lord chancellor is apparent from his decreeing indemnity against the charge which was payable annually, and which was not therefore as yet payable, although by possibility it might never be enforced, to the damage of the covenantee. That was a present incumbrance, *'debitum in presenti solvendum in futuro'*; and therefore it was decreed to be discharged. The portion, on the contrary, was somewhat of the character of an inchoate right to dower which is not a pres-

ent charge on the estate, and for which no action lies [see *ante*, § 619, note]. Here the mortgage is a present incumbrance, and the covenant is a present covenant, so that Vane v. Lord Barnard is an authority that substantial damages are recoverable here. But the case of Lock v. Furze, 19 C. B. (N. S.) 119; and in the exchequer chamber, L. R. 1 C. P. 441, conclusively places the principle for estimating the measure of damages upon a sound, firm and rational basis, namely, that there is no difference in this respect between a contract entered into on the sale of real property and on the sale of a chattel. The true measure of damages in both cases is the difference between the value of the thing as it is and as it was warranted to be. The old case of Gray v. Briscoe, Noy, 142, is reaffirmed, where the covenant was that the covenantor was seized of Blackacre in fee-simple, when in truth it was copyhold land. The court held the covenant to be broken, and that the plaintiff should recover damages according to the rate that the country values fee-simple more than copyhold. The rule as now settled by Lock v. Furze, after a review of all the cases, I take to be this: that as affecting contracts relating to realty, in the case of executory contracts, upon the vendor failing to establish a good title, the vendee shall recover his deposit, if any, and interest, and such reasonable expenses as he has incurred in investigating the title; and in case he has entered into possession, in pursuance of the contract, then perhaps such further sum as he may have reasonably expended on the property in the expectation of

the time, or during the ownership of either, a substantial injury is sustained; and that for such injury recovery may be had, limited *in maximum* only as is the recovery upon the

the contract being fulfilled. In case the contract has been executed, but no title has passed at all, then, on a covenant for seizin or good right to convey, he shall recover back his principal and interest and expenses; but in case some estate has passed by the deed, but not the whole estate contracted for, then he is entitled to recover the difference in money between the value of that estate which has passed and that which the deed purported to convey, and which the grantor covenanted that he had a right to convey. Now to apply this rule to the present case. The deed purported to convey an indefeasible estate of inheritance in fee-simple, free from incumbrances done or knowingly suffered by the grantor. All that the grantees have in truth obtained is an equity of redemption which is subject to a mortgage which constitutes a present incumbrance, although the moneys secured thereby are payable at future periods. The covenant is broken; the plaintiffs, therefore, have a right to recover in damages the difference between the value of the equity of redemption which they have got, and the indefeasible estate of inheritance which they contracted for and paid for. That difference is represented by the amount for which the mortgage stands as a security, and neither more nor less. A case might no doubt arise, as where the amount secured by the mortgage is made payable at a remote period, and either without interest or at a low rate of interest, in which it might be necessary to make a deduction equivalent to the difference between the value of a present payment of the principal, and pay-

ment at the deferred period; but in this case there arises no question of that kind."

See Mayne on Damages (6th Eng. ed.), p. 224. This author favors the same view: "There seems to be no difference in principle between a covenant against incumbrances and a covenant to pay them off. If so, the point is decided in England," referring to *Lethbridge v. Mytton*, 2 B. & Ad. 772. He continues: "I conceive that the rule laid down by the court of king's bench is the true one. The damages are not, as Mr. Sedgwick seems to suppose, given in respect to a future contingent loss. They are the proper compensation for an actual and existing loss. The question is: How much is the value of the estate diminished at the moment by the existence of the incumbrances? If interest has to be paid upon them there is a clear loss of annual profit; but suppose the interest is provided for elsewhere, and the estate is merely an ultimate security, still the owner is damaged to the full amount of the incumbrances, if he should wish to sell the estate, or mortgage it, or to charge portions upon it. True, he may not want to do any of these things at present, but as soon as he does want to do them he will undoubtedly fail. It is no satisfaction to a man who has to break off a match, for instance, because he cannot effect a settlement, to be told that he may bring an action and obtain substantial damages. Nor is it any answer to say that he may himself pay off the incumbrance, and then sue, because very likely he may have no ready money, and be unable to borrow any on account of the incumbered con-

other covenants.¹ This is substantially the rule in Ohio, Indiana,² Illinois, Wisconsin, South Carolina, New York, Michigan, Texas and Missouri, except that in the latter no right of action accrues until the vendee has been ousted or has been obliged to extinguish the incumbrance.³ In most of these states the rule in respect to this covenant is the same that is applied in actions for breach of the covenant of seizin. They are treated as covenants of indemnity against actual damage, arising in the one case from the want of lawful title, and in the other from the assertion of a paramount incumbrance; they run with the land until such damage has actually been

dition of his estate; in short, the American doctrine converts a covenant to pay off incumbrances into a covenant of indemnity against incumbrances, which it is apprehended is a very different thing."

¹ Eaton v. Lyman, 30 Wis. 41, 33 id. 34; Mecklem v. Blake, 22 id. 495; Pillsbury v. Mitchell, 5 id. 17; Dickson v. Desire, 23 Mo. 151; Foote v. Burnet, 10 Ohio. 317, 36 Am. Dec. 90; Backus v. McCoy, 3 Ohio. 211, 17 Am. Dec. 585; Devore v. Sunderland, 17 Ohio, 60; Overhiser v. McCollister, 10 Ind. 41; McCready v. Brisbane, 1 N. & McC. 104, 9 Am. Dec. 676; Jeter v. Glenn, 9 Rich. 376; Richard v. Bent, 59 Ill. 38, 14 Am. Rep. 1; Gardner v. Letson, 8 Ohio Dec. 256, quoting the text (court of common pleas); Lescalet v. Rickner, 16 Ohio Ct. Ct. 461; Geiszler v. De Graaf, 166 N. Y. 339, 59 N. E. Rep. 993; Post v. Campau, 42 Mich. 90; Wyatt v. Dunn, 93 Mo. 459; Seibert v. Bergman, 91 Tex. 411, 44 S. W. Rep. 63.

²The covenant included in the general warranty in the statutory form of deeds runs with the land and is not *in presenti* unless the deed was ineffectual as a conveyance, in which case the covenant would be *in presenti*, being broken as soon as made. Worley v. Hineman, 6 Ind. App. 240, 33 N. E. Rep. 260.

The common-law rule that an ac-

tion on a covenant running with the land is a local one has been changed by statute in Indiana, and whether or not a deed executed there and conveying lands in another state contains a covenant that runs with the land is to be decided by the local law. *Id.*

It is further said in the case cited: Usually, it is true, a special covenant against incumbrances is *in presenti*, and does not run with the land, as such covenant is broken as soon as made, and vests the right of action at once in the immediate covenantee, and in him alone, or, in case of his death, in his legal representatives; but it is otherwise where the covenant against incumbrances is embraced in the general warranty. In that case any breach calculated to disturb the grantee in the enjoyment of his property is covered by his covenant, embracing as it does a guaranty for future as well as present enjoyment. He may wait until he is evicted and then sue, or he may pay off the incumbrance and bring his action, provided he finds it necessary to extinguish the incumbrance in order to ward off an eviction if the land is legally bound.

³Langenberg v. Heer Dry Goods Co., 74 Mo. App. 12; Hunt v. Marsh, 80 Mo. 396.

sustained.¹ The covenant may be sued upon by the subsequent grantee notwithstanding it was broken while the title was in the prior grantee, if the latter did not sue before he conveyed, and the subsequent grantee has been damaged by the breach.² Where land conveyed by a deed containing a covenant against a local assessment, which is an incumbrance, is subsequently conveyed subject to the assessment, the continuity of the covenant is broken, and a subsequent grantee who acquires title under a deed containing such a covenant cannot recover upon it in an action against the original grantor.³

The court of last resort in New York has recently settled the conflict of decisions in that state⁴ in favor of the rule that covenants against incumbrances run with the land. It is said in the opinion that in England the law became so uncertain in this respect, as the result of conflicting decisions,⁵ that the controversy was set at rest by the enactment of a statute which provided that the covenants should run with the land unless otherwise restricted in the conveyance. . . . "The covenant is for the protection of the title, and there is no good reason why it should not be held to run with the land, like the covenant of warranty or quiet enjoyment. The principle which was at the foundation of the common-law rule, that choses in action were not assignable, having become obsolete, there is no reason that I can perceive why the rule should survive the reason upon which it was founded."⁶

In *Post v. Campau*⁷ Cooley, J., said: "If all incumbrances were of the same nature, and might be got rid of at the pleasure of the owner of the property incumbered, there would be no difficulty and no wrong in applying to all the same rule.

¹ *Walker v. Deaver*, 79 Mo. 664; *Mecklem v. Blake*, 22 Wis. 495; *Langenberg v. Heer Dry Goods Co.*, 74 Mo. App. 12; *Buren v. Hubbell*, 54 Mo. App. 617.

² *Langenberg v. Heer Dry Goods Co.*, 74 Mo. App. 12.

³ *Geiszler v. De Graaf*, 166 N. Y. 339, 59 N. E. Rep. 993.

⁴ *Coleman v. Bresnahan*, 54 Hun, 619, 8 N. Y. Supp. 159; *Clarke v. Priest*, 21 App. Div. 314, 47 N. Y.

Supp. 489 (holding that the covenant runs with the land). *Seventy-third Street Building Co. v. Jencks*, 19 App. Div. 314, 46 N. Y. Supp. 2, and *Geiszler v. De Graaf*, 44 App. Div. 178, 60 N. Y. Supp. 651, hold otherwise.

⁵ *Kingdon v. Nottle*, 1 M. & S. 353, 4 id. 53; *Spoor v. Green*, 12 R. 9 Ex. 59.

⁶ *Geiszler v. De Graaf*, 166 N. Y. 339, 59 N. E. Rep. 993.

⁷ 12 Mich. 90, 3 N. W. Rep. 272.

But anything is an incumbrance which constitutes a burden upon the title: a right of way,¹ a condition which may work a forfeiture of the estate;² a right to take off timber;³ a right [222] of dower, whether assigned or unassigned.⁴ In short, every right or interest in the land, to the diminution of the land, but consistent with the passage of the fee by the conveyance.⁵ Some of these are permanent in their nature, and incapable of being removed at the option of the covenantee. They permanently reduce the value of the title conveyed, and this as much at the time of the conveyance as at any future time; and it is therefore reasonable to hold that the covenant against them is broken at once and finally. The covenantee may at once proceed to recover full damages. But when the covenant consists of a money charge, capable of being removed at some time, but which has yet caused no loss to the covenantee, the doctrine that because the promise of the covenant is technically broken by the existence of the incumbrances [substantial damages may be recovered], must often in its application prove a denial of justice. A covenant may be said to run with the land when its purpose is to give future protection to the title which the deed containing the covenant undertook to convey, and it does not run with the land when its whole force is given assurance against something which immediately affects the title and causes present damage. Tested by this rule, a covenant against an incumbrance which consists in a right of way would not run with the land; but a covenant against a money charge must attach itself to the title conveyed, and accompany it, not only for the protection of the covenantee, but for the protection of any of his assigns whom the incumbrance may eventually damnify.⁶ It is only by thus distinguishing between incumbrances that the covenant can have reasonable effect in all cases, and, when the courts thus discriminate, there is no difficulty in giving substantial redress under definite and inflex-

¹ Clark v. Swift, 3 Met. 390.

² Jenks v. Ward, 4 Met. 412.

³ Cathcart v. Bowman, 5 Pa. 317.

⁴ Runnells v. Webber, 69 Me. 483.

⁵ Prescott v. Trueman, 4 Mass. 627.

³ Am. Dec. 246.

⁶ Foote v. Burnet, 10 Ohio, 332, 36 Am. Dec. 90; Knadler v. Sharp, 36 Iowa, 232; Richard v. Bent, 59 Ill. 38, 14 Am. Rep. 1.

ible rules of law. When the law can be just and also certain, there is no reason why an unjust certainty should be perpetuated. . . . I am of the opinion that the better and only just rule is that a right of action accrues when substantial damage is suffered, and that there may be successive breaches when, by successive acts or occurrences, damage is from [323] time to time suffered as a consequence of the incumbrance."

In Ohio an action is not maintainable for a mere technical breach of the covenant of seizin.¹ But it is there held that the covenant against incumbrances is broken as soon as made, if an incumbrance in fact exists; and a right of action thereon immediately accrues to the covenantee at least for nominal damages. In such action, however, more than such damages cannot be recovered, unless the covenantee has removed the incumbrance, or it be shown that his possession has been disturbed, or his use or enjoyment of the land has in some way been interfered with by reason of it.²

In Illinois the covenants of seizin and against incumbrances are differently expounded. They are thus compared in a late case:³ "Where the covenant of seizin is broken, and there is an entire failure of title, the breach is final and complete, the covenant is broken once for all; actual damages, and all the damages that can result from the breach, have accrued; the measure of damages is the purchase-money and interest, which are at once recoverable. In such case the right of action is substantial, and its transfer may well be held to come within the rule prohibiting the assignment of choses in action. But as the covenant against incumbrances is one of indemnity, the covenantee can recover only nominal damages for a breach thereof unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the incumbrance. And where there is the barren right of recovery of only nominal damages, the right of action is one only in name, and is essentially no right of action. It is distinguishable from an ordinary chose in action." And the court further say: "As the doctrine of covenants running with land is an exception to the common-law rule that choses in action are not assignable,

¹ See Ohio cases just cited, and *Buren v. Habbel*, 54 Mo. App. 607, *Slambaugh v. Smith*, 23 Ohio St. 581. *Blundeau v. Sheridan*, 81 Mo. 545.

² *Slambaugh v. Smith*, *supra*; ³ *Richard v. Dent*, *supra*.

why limit its sphere of usefulness and confine it to those covenants which may be broken in the future? May it not as well extend to such as have been only nominally broken at the time of the assignment, and the substantial breach occurs [324] afterwards, and the whole damages are sustained by the assignee? It does not appear to be a sufficient answer that the rule denying the action to the assignee creates only a formal difficulty, as the assignee may maintain an action in the name of the assignor for his use. This is a cumbrous form of a remedy, and the remedy is liable to be embarrassed. In the case in hand such rule would require this suit, as we understand, to be brought in the name of the assignee in bankruptcy, . . . and to establish the right of action in such assignee might be a serious inconvenience. If it be held that the real cause of action on such a covenant accrues immediately upon the making of the deed, it would seem that the statute of limitations would then commence to run when the breach was only formal and no actual damage suffered or recoverable, and when, perhaps, the incumbrance was not even discovered; and afterwards, when the incumbrance comes to be discovered, or when the actual loss on account of the incumbrance arises and the substantial breach takes place, the statute of limitations may have run against the action. In the state of the authorities, not feeling embarrassed by any former decision of our own upon that point, we feel free to adopt the rule which we regard as the more reasonable and just. That is obviously the one which sustains this action in the present form [in the name of the assignee of the covenant] for the breach of the covenant against incumbrances, and admittedly so by courts which have felt constrained to lay down the contrary rule only in supposed obedience to the strict common-law rule." The law of the state wherein the land is situated determines whether the covenant runs with the land.¹

§ 626. **Criticism of the rule of damages.** It appears to be assumed very generally in this country that the mere existence of a money incumbrance upon land is no injury to a purchaser; that unless the incumbrance has been asserted, or the covenantee has paid something to extinguish it, there is a mere

¹ Riley v. Burroughs, 41 Neb. 296, 59 N. W. Rep. 929.

technical breach for which only nominal damages should be allowed, and only grudgingly conceded to be a right of action;¹ that it would be unjust to allow the covenantee, who may never be disturbed by the incumbrance, to recover the amount for which it is security from the covenantor, for the lien is only collateral to a personal obligation which might still be enforced against the covenantor; and to permit such a [325] recovery would not only expose him to the danger of being called upon to pay the debt a second time, but would give the covenantee a certain compensation for an uncertain and contingent loss. To avoid this supposed injustice the general course of decision in this country has been to deny the covenantee more than nominal damages for the mere existence of a money incumbrance covenanted against, or to oblige him to extinguish it; or else to treat the covenant as a continuing one in favor of the owner, who may pay it or be foreclosed by it—even by a remote grantee who has been denominated “the last purchaser and the first sufferer.” This view is so firmly fixed in our jurisprudence that it is probably idle to question or criticise it; but it may be remarked that the rules on this subject are not modified when the mortgage or other incumbrance is not collateral to any personal obligation of the covenantor. No exception is made where there is no such obligation, or where the incumbrance is created by some former owner. Where it is actually security for the covenantor’s personal obligation, as payment pending the suit entitles the covenantee, as plaintiff, to increase his damages by the amount paid, there is no sound reason for requiring him to advance the money for that purpose, since a payment of the incumbrance by the party whose covenant is broken after suit brought on the covenant against him would certainly go in mitigation and avert the danger of a second recovery. Nor is it true that the recovery of substantial damages for the mere existence of an incumbrance on premises sold and warranted to be unincumbered is obnoxious to the objection of allowing a certain compensation for a contingent loss. This is affirmed by a preponderance of authority in respect to the covenant of seizin which is of the same nature. The existence in a third person of a paramount title justifies a full recovery as for

¹ See *Richard v. Bell*, 59 Ill. 38, 14 Am. Rep. 4.

want of that title. But it is said the covenant against incumbrances is one of indemnity. True; but it is so as a consequence of this rule of damages. Why should it be deemed more a covenant of that description than any other in a deed? It is designed for the same general purpose, to assure to a purchaser the full benefit of his purchase. While the incumbrance [326] exists the granted premises are diminished in market value to the amount of it. The purchaser to that extent fails to obtain the fruits of his purchase; to that extent the seller has purchase-money for which he has not fulfilled, as contemplated, the contract of sale. An incumbrance is deemed in other cases to produce real injury if its existence impairs the market value of the land; for, universally, incumbered land is estimated at a value reduced by the amount of the incumbrance for all the purposes of ownership. The right of recovery on this covenant for the existence of an easement or any permanent incumbrance is commensurate with this reduction of value. The fact that an estate can be sold is one of its elements of value, and is not to be excluded from consideration.¹

If this covenant is held to run with the land it will pass by a deed without covenants — by even an execution sale. On what hypothesis is the last purchaser the first sufferer? Only on the supposition that he has bought the premises as unincumbered and paid full value. Then, if he has purchased without covenants, it may be just to allow him the benefit of the covenant to his grantor, who would, in the case supposed, have no occasion to avail himself of it; but the first sufferer would then be saved from loss only by the provident caution of his grantor. But if, as is presumably the case more frequently, the land is sold with a knowledge of the incumbrance, and without any covenant against it, the purchaser buys at a price reduced on account of the incumbrance, and the reduction of the price is equal to or greater than the amount which must be paid to disincumber the title. In that case, if the purchaser has the benefit of the covenant, he may discharge the incumbrance and reimburse himself by a suit on the covenant against the original grantor, and thus obtain a clear title for a price reduced by reason of an incumbrance which costs him nothing to remove.

¹ *Wetherbee v. Bennett*, 2 Allen, 428.

§ 627. **Damages where incumbrance permanent.** Incumbrances of the second class are not removable at the will of the seller or purchaser; and when the covenant is broken by the existence of such an incumbrance, recovery, proportioned to the actual injury, may be had in an action brought at once; and if no actual injury can be inferred, or is not proved, nominal damages only can be recovered. The inquiry in such cases, adapted to the particular circumstances, is, what is the injury naturally and proximately resulting from the existence of the incumbrance to the purchaser.¹ For the existence of a mere inchoate right of dower only nominal damages can be given, for during the life of the husband it is uncertain that any loss will ever occur; and so, if the right is consummated by the death of the husband, so long as the dower has not been assigned; for the widow may never procure an assignment of it.² It was held in an early Massachusetts case³ that the existence of a paramount right to the premises was an incumbrance; that if the plaintiff had not extinguished the right, and it still remained against the title, he could only recover nominal damages; but if he had, at a just and reasonable price, extinguished such paramount title, so that it could never afterward prejudice the grantor, the price so paid would be the measure of damages.⁴ Where the incumbrance was a right of way over the granted land for the purpose of taking water from a spring situated on it, the covenantee was held entitled to just compensation for the real injury resulting from the continuance of the easement.⁵ Just compensation in such case has generally been estimated by the amount which the

¹ *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Myers v. Munson*, 65 Iowa, 423, 21 N. W. Rep. 759; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426, 62 Mo. 429; *Barlow v. McKinley*, 24 Iowa, 69; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Butler v. Gale*, 27 Vt. 730; *Van Wagner v. Van Norstrand*, 19 Iowa, 427; *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 246; *Batchelder v. Sturgis*, 3 Cush. 205; *Hubbard v. Norton*, 10 Conn. 422; *Harlow v. Thomas*, 15 Pick. 66; *Giles v. Dugro*, 1 Duer, 335; *Willson v.*

Willson, 25 N. H. 229, 57 Am. Dec. 320; *Chapel v. Bull*, 17 Mass. 212; *Greene v. Creighton*, 7 R. I. 1.

² *Hazelrig v. Hutson*, 18 Ind. 481; *Sheafe v. O'Neil*, 9 Mass. 13; *Runnells v. Webber*, 59 Mo. 488.

³ *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 246, approved in *Richmond v. Ames*, 164 Mass. 467, 41 N. E. Rep. 671.

⁴ *Ward v. Ashbrook*, 78 Mo. 515.

⁵ *Harlow v. Thomas*, 15 Pick. 66; *Harrington v. Benn*, 89 Me. 470, 30 Atl. Rep. 986, citing the text.

existence of the easement reduces the market value of the land.¹

The damages resulting from the existence of a right of way are usually assessed as of the date of the trial. If there have been special damages theretofore suffered by reason of the exercise of the right of way these may be shown up to the date of the trial.² In the absence of other proof as to the extent of the damages resulting from the existence of an easement, the sum which the plaintiff's grantor accepted for it may be taken to be a fair measure of the plaintiff's loss.³ Where the plaintiff had never been disturbed in the enjoyment of his estate by any user of the way, and the right had been extinguished without any expense, the court refused to instruct the jury to return a verdict for nominal damages only. It was held not [328] to follow from these facts that there was no actual damage. While the right of way lasted the plaintiff was precluded from using the part of the land covered by the way as fully as he otherwise might have done. He could not set a tree, or a post, or a building upon it; or inclose or cultivate it; or sell or lease it to any person to whom such an incumbrance would be objectionable. It was an apparently permanent subtraction from the substance of the estate. The court approved of an instruction to the effect that the plaintiff was entitled to just compensation for the real injury resulting to the estate in its market value from the incumbrance.⁴ And this measure of compensation cannot be modified by showing that, notwithstanding the incumbrance, the premises are susceptible of some of the beneficial uses incident to ownership; nor can it be enhanced by showing special injury from the incumbrance by reason of some special use the purchaser intended to make of the premises, but which was not communicated to the seller

¹ *Streeper v. Abeln*, 59 Mo. App. 485; *Copeland v. McAdory*, 100 Ala. 553, 13 So. Rep. 545; *Whiteside v. Magruder*, 75 Mo. App. 364; *Richmond v. Ames*, 164 Mass. 467, 41 N. E. Rep. 671; *Vonderhite v. Walton*, 7 Ky. L. Rep. 766; *Giles v. Dugro*, 1 Duer, 331; *Kellogg v. Malin*, 62 Mo. 429; *Williamson v. Hall*, *id.* 405; *Mitchell v. Stanley*, 44 Conn. 312.

² *Richmond v. Ames*, 164 Mass. 467, 41 N. E. Rep. 671.

³ *Estate of King*, 18 Phila. 81, said in a note to have been affirmed by the supreme court of Pennsylvania.

⁴ *Wetherbee v. Bennett*, 2 Allen, 428; *Foster v. Foster*, 62 N. H. 46; *Smith v. Davis*, 44 Kan. 362, 24 Pac. Rep. 423.

and did not form the basis of the contract of purchase.¹ The probability that a restriction concerning the use to which land may be put will not be enforced has been held competent evidence on the question of the warrantee's damage.² Where the owner of property, the use of which was restricted, contracted to sell it unrestricted for a certain price, but the vendee refused to complete the purchase because of the existence in the owner's chain of title of a deed creating restrictions as to the character of buildings to be erected, and the owner thereafter sold the property as restricted, and sued his grantor for damages, it was ruled that these were measured by the difference in the value of the property unrestricted and restricted, and that as bearing upon this difference in value evidence of the amount expended by the plaintiff upon the property in necessary improvements, between the dates of the two sales, was admissible, but there could not be a recovery of interest upon the amount of such damages because the incumbrance was permanent.³

Where a hotel was erected upon two parcels of land purchased from different persons, each of which was subject to a covenant forbidding its use for the sale of liquor, one of such grantors, whose deed covenanted against incumbrances, was not relieved from the duty of defending, upon the request of the grantee, an action brought against the latter for the violation of the restrictive covenant, and failing to do so became liable for the costs and counsel fees reasonably incurred by his grantee in defending the action, that having resulted in an injunction restraining the violation of such restrictive covenant.⁴

"While the question as to the measure of damages has usually arisen in cases brought for damages for breach of covenants against incumbrances, and the incumbrance has been paid by the covenantee, yet in all cases the doctrine seems to be recognized that where the incumbrance has resulted in an adverse and indefeasible title, under which the covenantee has been evicted from all or a part of the premises, he may recover

¹ *Wetherbee v. Bennett, Foster v. Foster, Smith v. Davis, supra; Batchelder v. Sturgis*, 3 Cush. 201; *Kellogg v. Malin*, 62 Mo. 429.

² *Foster v. Foster*, 62 N. H. 532.

³ *Docter v. Darling*, 68 Hun. 70, 22 N. Y. Supp. 594.

⁴ *Charman v. Tatum*, 54 App. Div. 61, 66 N. Y. Supp. 275. See § 82 *et seq.*

all or a proportionate part of the consideration paid. This seems to be a fair and equitable doctrine. The covenantee may not in all cases be able or willing to pay off the incumbrance, and when he does not choose to do so he should have the right to recover of the covenantor the damages he may sustain by reason of being evicted from all or a part of the premises conveyed to him, limited, of course, to the amount of the consideration actually paid for the property, with interest thereon for not exceeding six years."¹

§ 628. *Same subject.* In a case where the incumbrance consisted of a prior grant of timber growing on a farm, with the privilege of entering to cut it during a future term, it was held that the covenant was broken as soon as made, and that the measure of just compensation was the value of the timber for the purposes of the farm at the time of the grant.² In another case the incumbrance was an existing contract running with the land to fence a railroad passing through the premises, and it was held that the inquiry in respect to damages was how

¹Per Corson, J., in *Loiseau v. Threlstad*, 14 S. D. 257, 85 N. W. Rep. 189; *Dimmick v. Lockwood*, 10 Wend. 142; *Jenkins v. Hopkins*, 8 Pick. 346; *De Long v. Spring Lake, etc. Co.*, 65 N. J. L. 1, 47 Atl. Rep. 491. See § 616 as to interest.

²*Cathcart v. Bowman*, 5 Pa. 217, 47 Am. Dec. 408.

In a recent case there was an incumbrance on an eighth fractional part of the land conveyed, consisting of the grant of the right to enter and cut all the "saw-timber." The damage was measured by the diminished value of the whole tract — the difference between its value if the title were good and its value as depreciated by the incumbrance. The writer of the opinion observed: "We readily perceive that a strong argument can be made in favor of the view that the recovery ought to be limited to the amount which would have been recovered if the entire title of the incumbered portion had failed; for it would seem in this case

that the plaintiff ought not to recover more damages for the sale by the defendant of the timber on the forty acres than he would for the sale of the fee-simple interest in it. So, on the other hand, it could be urged with equal force that the damages would be the same, ordinarily, whether the trees were cut from a part of the land or miscellaneously from all parts, provided the number and kind of trees cut were in each case the same. Making choice between two difficulties, we prefer to adopt the simpler and more convenient rule, which, as we have said, is to compensate the plaintiff for the estimated diminution in value of his entire tract of land by reason of the incumbrance from the time of the breach of the covenant with interest and costs of suit, not, however, to exceed the purchase-money paid for the whole tract with interest." *Clark v. Zeigler*, 79 Ala. 346, 350, 85 id. 154, 4 So. Rep. 669.

much the land charged with the obligation of maintaining the fence was affected by that obligation; in other words, how far the existence of that incumbrance impaired the value of the estate to the owner, and what would be the difference in its fair market value by reason of its existence.¹ All the damages resulting from an incumbrance giving a stranger to the title a paramount right of flowage as to a portion of the land conveyed are suffered by the grantee on the day the conveyance is made, and he is entitled to recover such sum as will place him in as good condition as if the covenant had not been broken—the difference between the value of the land as it was in fact and its value as it would have been without the incumbrance, with interest thereon from the date of the conveyance.² An outstanding lease may be an incumbrance, and when it is and there is a suspension of the covenantee's enjoyment during its continuance, the annual value or the interest on the purchase-money has been allowed for that time as damages;³ and in other cases the fair rental value of the land to the expiration of the term.⁴ If there is a crop on the land to harvest after the delivery of the deed the value of the crop, less the cost and expense of caring for and harvesting it, may be considered in estimating the injury to the grantee from being deprived of the possession of the premises. The conveyance does not substitute the vendee in place of the vendor and make the former the landlord so as to limit his recovery to such sum as the tenant is liable for.⁵ The grantor's liability is not enlarged beyond the rental value because he knew of the use for which the property was purchased.⁶ This rule applies regardless of the nature of the incumbrance. The value of the land is to be fixed as of the date of the convey-

¹ *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335, 115 Mass. 156; *Burbanks v. Pilsbury*, 48 N. H. 475, 97 Am. Dec. 633.

² *Harrington v. Bean*, 89 Me. 470, 36 Atl. Rep. 986.

³ *Rickert v. Snyder*, 9 Wend. 416.

⁴ *Porter v. Bradley*, 7 R. I. 512; *Fritz v. Pusey*, 31 Minn. 368, 18 N. W. Rep. 94; *Wragg v. Mead*, — Iowa, —, 91 N. W. Rep. 856; *Clark v. Fisher*, 54 Kan. 403, 38 Pac. Rep. 433; *Ed-*

ward v. Clark, 83 Mich. 246, 47 N. W. Rep. 112, 10 L. R. A. 659; *Moreland v. Metz*, 24 W. Va. 119, 49 Am. Rep. 246; *Rickert v. Snyder*, 9 Wend. 416; *Christy v. Ogde*, 33 Ill. 205; *Weatherbee v. Bennett*, 2 Allen, 128. Compare *Batchelder v. Sturgis*, 3 Cush. 201. See *Van Wagner v. Van Nostrand*, 19 Iowa 422; *Grace v. Scarborough*, 2 Speer, 649.

⁵ *Clark v. Fisher*, *supra*.

⁶ *Wragg v. Mead*, *supra*.

ance.¹ Where the incumbrance is a life estate its value for the time the purchaser is kept out of its enjoyment is the rule of damages;² and, as has already been said, the duration of a life may be determined by life tables.³ The grantee of land on which is a party-wall built by the mutual agreement of his grantor and the latter's co-owner and at their joint cost must have his damage assessed with reference to his rights in the easement on the land of such co-owner, and in view of the whole of the original agreement.⁴

If the covenantee extinguishes an incumbrance of this class, the amount which he fairly and reasonably pays for that purpose will be the measure of damages.⁵ He must show that the sum paid was reasonable, and otherwise than by proving the fact that he paid it.⁵

§ 629. Liability of remote covenantor. Where the property conveyed is incumbered with a perpetual easement the liability of a remote covenantor is not necessarily the same as that of a subsequent one. The original vendee had a right of action before he conveyed.⁷ His rights as against his grantor depended upon the effect of the easement on the market value of the property at the time of the breach and interest on the amount of the depreciation resulting.⁸ The rights of the second grantee as against his grantor would be affected by the conditions existing when his right of action accrued. The first grantor is not liable for attorneys' fees paid by a subsequent grantor in defense of an action against him on his covenant.⁹ A vendee who admits that the market value of his land is enhanced by reason of the dedication by his vendor of part of it for streets cannot recover damages therefor merely be-

¹ *Sherwood v. Johnson*, 28 Ind. App. 277, 62 N. E. Rep. 645; *Phillips v. Reichert*, 17 Ind. 120, 79 Am. Dec. 463.

² *Tierney v. Whiting*, 2 Colo. 620; *Christy v. Ogle*, 33 Ill. 295.

³ *Mills v. Catlin*, 22 Vt. 106; § 455.

⁴ *Mackey v. Harmon*, 34 Minn. 168, 24 N. W. Rep. 702.

⁵ *Chapel v. Bull*, 17 Mass. 213; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169. See n. 1, p. 1810.

⁶ *Anderson v. Knox*, 20 Ala. 156; *St. Louis v. Bissell*, 46 Mo. 157; *Dickson v. Desire*, 23 Mo. 151, 167, 66 Am. Dec. 661.

⁷ *Myers v. Munson*, 65 Iowa, 423, 21 N. W. Rep. 759.

⁸ *Id.*; *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. 432, 20 N. E. Rep. 581. 3 L. R. A. 789, approved in *Hymes v. Esty*, 133 N. Y. 342, 31 N. E. Rep. 105.

⁹ *Myers v. Munson*, *supra*.

cause his vendee, to whom he sold the land for a particular purpose, has recovered damages of him.¹

§ 630. Where covenant is connected with that for quiet enjoyment. The covenant against incumbrances in use in England, and to some extent also in this country, is connected with the covenant for quiet enjoyment, and is to the effect that the grantee shall enjoy the premises free of incumbrances. It is not broken by the mere existence of an incumbrance, and hence there can be no recovery of nominal damages based upon that fact. It assures the purchaser against disturbance in the future by means of any incumbrance, and hence runs with the land.² The covenant to warrant and defend the premises against the lawful claims of all persons is, so far as the question of eviction is concerned, equivalent to the covenant for quiet enjoyment.³ Such covenant is broken by the existence of an outstanding paramount right to an easement which naturally impairs the value of the estate conveyed and interferes with the use and possession of some portion of it, although there is not a technical, physical ouster from the actual possession of any portion of it. There is, in such a case, an eviction *pro tanto*.⁴

§ 631. Covenant to pay incumbrances. Another form of covenant relating to incumbrances is that to pay and discharge them. This form usually relates to some pecuniary lien or charge on the land which the covenantor has the right to remove by payment. If he neglects to perform within the time fixed therefor, or within a reasonable time if none [330] is fixed, the covenantee, without having paid anything to extinguish the lien, is entitled to recover, by the almost uniform course of decision, the present amount of the incumbrance.⁵

¹ *Vonderhite v. Walton*, 7 Ky. L. 89 Me. 470, 36 Atl. Rep. 986; *Shot-tuck v. Lamb*, 65 N. Y. 503.

² See *Martin v. Barber*, 5 Blackf. 232; *Hutchins v. Moody*, 30 Vt. 658; *Carter v. Denman*, 23 N. J. L. 260; *Grace v. Scarborough*, 2 Spear, 652, 42 Am. Dec. 391; *Greene v. Creighton*, 7 R. I. 1; *Jeter v. Glenn*, 9 Rich. 374; *Rawle on Cov.* (4th ed.) 89, 90.

³ *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426; *Harrington v. Bean*,

Harrington v. Bean, *Lamb v. Danforth*, *supra*; *Clarke v. Estate of Conroe*, 38 Vt. 469; *Russ v. Steele*, 40 Vt. 310; *Sriver v. Smith*, 100 N. Y. 471, 3 N. E. Rep. 676, 53 Am. Rep. 224.

⁵ *Haas v. Dudley*, 30 Oia. 355, 48 Pac. Rep. 168; *Stichter v. Cox*, 62 Neb. 512, 72 N. W. Rep. 848, *Stout v.*

The rule as stated has been varied in Oregon, in a case where a part of the mortgaged land was conveyed and the grantees covenanted to pay the mortgage debt and save the mortgagor harmless therefrom. On the sale of the entire tract under foreclosure the measure of recovery was what the reserved part of the tract was worth at the time of the foreclosure. The rule requiring the party entitled to the benefit of the covenant to protect himself from loss and limiting his recovery because of his failure to do so was regarded as inapplicable because the promise to pay was absolute.¹ The plaintiff might have bought the land at the sale, and if it did not sell for enough to satisfy the mortgage, he could have paid the balance, and, under the rule referred to, that would have measured his recovery. The defendant, however, was the principal debtor, and as between him and the plaintiff, when the former assumed the payment of the mortgage, the plaintiff was a mere surety. The land conveyed was primarily liable for the payment of the amount assumed, and that retained by the plaintiff was liable for a deficiency only. Under these circumstances the plaintiff was not bound to discharge the obligation of the defendant, nor to take any steps in the foreclosure proceedings. It was by the default of the defendant that the plaintiff was deprived of his property, and he was damaged to the extent of its value.² If the mortgage has been paid out of the land or extinguished by the act of the mortgagee only nominal damages can be recovered.³ If the grantor in a warranty deed gives his grantee a bond conditioned for the satisfaction of a

Folger, 34 Iowa, 71, 11 Am. Rep. 138; Gage v. Lewis, 68 Ill. 604; Jones v. Parks, 78 Ind. 537; McAbee v. Cribbs, 194 Pa. 94, 44 Atl. Rep. 1066; Williams v. Fowle, 132 Mass. 385; Locke v. Homer, 131 id. 93, 41 Am. Rep. 199; Reed v. Paul, 131 Mass. 129; Shannah v. Perry, 130 id. 460; Lethbridge v. Mytton, 2 B. & Ad. 772; Carr v. Roberts, 5 id. 78; Gardner v. Niles, 16 Me. 279; Gennings v. Norton, 35 id. 308; Booth v. Starr, 1 Conn. 249, 6 Am. Dec. 233; Lathrop v. Atwood, 21 Conn. 123; Dorsey v. Dashiell, 6 Md. 204, 61 Am. Dec. 300; Hogan v. Cal-

vert, 21 Ala. 199; Ardesco Oil Co. v. North American O. & M. Co., 66 Pa. 381; Scobey v. Finton, 39 Ind. 275; Manahan v. Smith, 19 Ohio St. 384; Gilbert v. Wiman, 1 N. Y. 550; Ex parte Negus, 7 Wend. 499; Webb v. Pond, 19 id. 423. See Wetmore v. Greene, 11 Pick. 462; Young v. Stone 4 W. & S. 45, and § 624.

¹ Wicker v. Hoppock, 6 Wall. 94.

² Haas v. Dudley, 30 Ore. 355, 363, 48 Pac. Rep. 168. The opinion specially refers to Wilcox v. Campbell, 106 N. Y. 325, 12 N. E. Rep. 823.

³ Muhlig v. Fiske, 131 Mass. 110.

mortgage on the land conveyed the bond is a security independent of the deed. If the title is lost by foreclosure the damage will be the consideration paid and interest on it from the time of eviction.¹ The grantee may have his obligations for the unpaid purchase-money canceled.² The damage resulting from the breach of such a covenant may be liquidated in advance.³

There is a difference between a contract to discharge or acquit from a debt and one to discharge or acquit from the damage by reason of it. Where the condition of the contract is to discharge or acquit the plaintiff from a bond or other particular thing, then, unless this be done, the defendant is liable from the nature of the contract, though the plaintiff has not paid it. But if it be to discharge or acquit the plaintiff from any damage by reason of such bond or particular thing, then it is a condition to indemnify and save harmless.⁴ If, however, it affirmatively appears that the promisees were not liable, and had no personal debit relations with the creditor, if such promisees can recover at all they can only recover what they have lost by the default. This is the general rule of damages, to which the cases giving the debtor damages to the amount of his debt, against one who agrees to pay it, are exceptions, resting on special reasons.⁵ When the instrument deviates the least from a simple contract to indemnify against damages, even where indemnity is its sole object, and where, in consequence of the prior liability of other persons, no actual loss may be sustained, the decisions, though not heretofore altogether harmonious, have gradually inclined to the allowance of actual compensation measured by the full amount of the liability which the defendant undertook to pay.⁶ If the deed excepts incumbrances to a specified amount,

¹ Howell v. Moores, 127 Ill. 167, 19 N. E. Rep. 863; Chinn v. Wagoner, 6 Mo. App. 678; Bohlcke v. Buchanan, 94 id. 320, 327.

² Chinn v. Wagoner, *supra*.

³ Fessler v. Beard, 39 Minn. 32, 38 N. W. Rep. 755.

⁴ 1 Saunders, 117, note 1; Booth v. Starr, 1 Conn. 244, 250, 6 Am. Dec. 233; Munn v. Eckford, 15 Wend. 507;

Keep v. Brigham, 6 John. 158; Thomas v. Allen, 1 Hill 115; Packfeller v. Donnelly, 8 Cow. 62; Chace v. Humm, 8 Wend. 452.

⁵ Pratt v. Bates, 40 Mich. 87.

⁶ Id.; Hodgson v. Bell, 7 T. R. 37; Devol v. McIntosh, 33 Ind. 379; Johnson v. Britton, id. 106; Sealey v. Finton, 39 id. 279; Warwick v. Richardson, 10 M. & W. 284; Sparrow v.

and these are assumed by the grantee, the grantor is bound to discharge any existing incumbrance in excess of such sum.¹

The purchaser of land who assumes the payment of a mortgage upon it out of the proceeds of the sale of the land occupies a different position from one who buys subject to the mortgage; while, in either case, he would take the land charged with the debt, he would, in the latter instance, not be personally liable; in the former that liability would attach as soon as the money to pay had been realized from the sale of the land. If the purchase was made subject to the mortgage he is entitled to contest its validity in an action to establish his liability for the debt.²

SECTION 6.

DEFENSES AND CROSS-CLAIMS AGAINST PURCHASE-MONEY.

[331] § 632. **Diversity of decisions.** Independently of the provisions of the modern codes regulating counter-claims, there has not been much uniformity of practice in respect to defenses which may be made in actions for purchase-money. In some states this defense, in actions upon contract, has been permitted, to some extent, under the name of failure of consideration, and in others under the name of discount or recoupment. This general subject has been considered as a separate topic;³ now we will briefly refer to the practice relative to allowing the damages for breach of these covenants as a full or partial defense in actions at law and suits in equity for the purchase-money. Where there is a right to substantial damages for the breach of any covenant in a deed, and these are presently recoverable from the party to whom unpaid purchase-money is payable, it prevents circuity and multiplicity of actions to permit both claims to be proved and to compensate each other in one action.

Martindale, 8 East, 593; Ross v. Pye, 11 Gray, 234; Stewart v. Clark, 11 Yelv. 207; Wood v. Wade, 2 Stark. Met. 384. See Stephens v. Boulton, 167; Thomas v. Allen, 1 Hill, 145; 23 Up. Can. Q. B. 16.
Holmes v. Rhodes, 1 B. & P. 638; Post ¹ Baring v. Bohn, 64 Ill. App. 196.
v. Jackson, 17 Johns. 239; Churchill ² Worley v. Hineman, 6 Ind. App. 240, 33 N. E. Rep. 260.
v. Hunt, 3 Denio, 331; Farquhar v. ³ § 168 *et seq.*
Morris, 7 T. R. 124; Smith v. Pond,

§ 633. **The New York rule.** In an early case in New York¹ the defense of a defect of title, without eviction, was allowed, although the essential conditions did not exist for the recovery of damages on the covenants in the deed. For this reason the case, upon this point, was afterwards overruled² and has been generally disapproved. In the later case of *Tallmadge v. Wallis*³ there was a breach of the covenant of seizin, and based upon it was a plea of a total want of consideration in bar of an action upon a bond for the purchase-money. The plea was held bad on demurrer because there was no allegation that the defendant "obtained no estate or interest whatever under the conveyance;" for in the absence of an allegation to the [332] contrary it would be presumed that he obtained possession of the premises, and therefore that there was not an entire want of consideration. There can be no inference that possession delivered by a seller having no title is a benefit conferred by the conveyance, if so recent that the superior owner can recover *mesne* profits for the whole time it was enjoyed; hence the judgment on the demurrer in that case indicates that in New York recovery of full damages, measured by the consideration money, cannot be had for breach of the covenant of seizin if the covenantor received possession and has not been evicted. It is true, however, that if possession for which the party receiving and enjoying it will be liable to a third person as superior owner is of any value, there is not in fact an entire want of consideration. But in a legal sense, in view of the rules for measuring damages for breach of the covenants for title, such a possession is of no appreciable value as a benefit moving from the grantor, because for all that it is deemed to be legally worth he is held liable to the superior owner, and during the period of such liability he is not treated as receiving any benefit under the conveyance from the covenantor, nor is he charged with any such benefit in reduction of damages, otherwise recoverable, in any action for the breach of those covenants. The opinion in this case favors the allowance against purchase-money upon proper pleading of all dam-

¹ *Frisbie v. Hoffnagle*, 11 Johns. 59. v. *Wallis*, 25 id. 107; *Lamerson v.*

² *Vibbard v. Johnson*, 19 Johns. 77; *Marvin*, 8 Barb. 14.

Lartin v. Vail, 17 Wend. 188, *Whitney v. Lewis*, 21 id. 131; *Tallmadge*

³ 25 Wend. 107.

ages which are recoverable for breaches of the covenants in the deed.¹ The chancellor referred to the cases which had established in that state the right of recoupment for partial failure of consideration, and said, as there was a total failure, the defendants, *therefore*, instead of pleading in bar of the action, should have pleaded the general issue *non est factum*, and given notice with such plea of the *partial* failure of title for the purpose of reducing the amount to be recovered upon the bond. In more recent cases in that state, to actions to foreclose purchase-money mortgages the defense of a partial failure of title was attempted, the deeds containing the covenants of seizin and warranty. The court held the defense inadmissible because there had been no eviction or disturbance of the defendant's possession; that as to the right of such a defense there was no difference between a breach of the covenant of seizin and one of the covenant of warranty.² It is now settled that if, at the time when the plaintiff is bound to execute a deed, the title is unmarketable the purchaser may rescind the contract, recover the money paid or recoup or recover damages as the nature of the case may require.³

§ 634. *Alabama rule.* In Alabama there would seem to be no right of recoupment of damages at law for breach of the covenants in actions for purchase-money. The reason assigned is that a court of law cannot do complete justice between the parties.⁴ Goldthwaite, J., said: "Such a defense, whatever be its merits, cannot be called a failure of consideration for which the notes were given; because, if there were no warranty whatever, the defendant would be without any remedy. It follows that if he is now entitled to any remedy, it must be in consequence of the warranty and the subsequent insolvency of the warrantor, by which the covenant intended for the purchaser's security has become unavailable. Without stopping now to inquire whether these circumstances af-

¹ See, also, *Bush v. Marshall*, 6 How. Pr. 284; *Curtiss v. Bush*, 39 Barb. 661.

² *Farnham v. Hotchkiss*, 2 Keyes, 9; *Parkinson v. Sherman*, 74 N. Y. 88, 30 Am. Rep. 268; *Ryerson v. Willis*, 81 N. Y. 277. See *Parkinson v. Jacobson*, 13 Hun, 317.

³ *Moore v. Williams*, 115 N. Y. 586, 22 N. E. Rep. 233, 12 Am. St. 844, 5 L. R. A. 654. See § 640.

⁴ *Bliss v. Smith*, 1 Ala. 273; *Cul-lum v. Branch Bank*, 4 Ala. 21, 37 Am. Dec. 725.

ford a reason for equitable interposition and relief, we think it clear that they do not make out a *legal* defense, even in a case where the recovery on the covenant of warranty ought to be equal or larger than the sum sued for. The reasons which induce this conclusion are these: In the first place, the damages to be recovered on the covenant of warranty are in their nature unliquidated, and therefore are not the subject of a set-off, according to our judgment in the case of *Dunn v. White*;¹ secondly, the covenant of warranty would not be extinguished by this defense; thirdly, the covenant itself operates as an estoppel to the grantor, and would have the effect to transfer to the purchaser or his assigns any subsequently acquired title which should be vested in the grantor; fourthly, by the conveyance, all the covenants running with the land are *ipso facto* assigned to the purchaser." If the purchaser accept a deed with warranty, he cannot set up either fraud or failure of consideration at law as a defense to an action upon notes given for purchase-money.² If, how- [334] ever, the deed of a trustee is void because the authority given him by the statute has not been pursued, the vendee may resist the recovery of the purchase-money, although he has not been evicted.³

§ 635. **Mississippi rule.** In *Mississippi Yerger, J.*, said in a case decided in 1852:⁴ "Upon examining the various cases decided in that state in relation to the relief which a vendee

¹ 1 Ala. 645.

² *Starke v. Hill*, 6 Ala. 785; *Tankersly v. Graham*, 8 id. 247; *Cole v. Justices*, id. 793; *Knight v. Turner*, 11 id. 636; *McLemore v. Mabson*, 20 id. 139; *Patton v. England*, 15 id. 69; *Peden v. Moore*, 1 Stew. & P. 81, 21 Am. Dec. 649; *Homer v. Purser*, 20 Ala. 573; *Thompson v. Christian*, 28 id. 399; *Helvenstein v. Higgason*, 35 id. 259; *Andrews v. McCoy*, 8 id. 920, 42 Am. Dec. 669.

³ *Wiley v. White*, 3 Stew. & P. 355.

It is said in *Hickson v. Lincolnd*, 47 Ala. 449, an action by an executor on a note given for the purchase-money of land sold by him, that the

principle to be extracted from the cases then ruled in that state "is that where the vendee is in the possession of the property purchased, he cannot successfully resist and defeat an action for the purchase-money on the ground that the vendor's title is defective, or that he had no legal authority to make the sale, or that the sale was void. In other words, that it is inequitable to permit the vendee to retain the property purchased and not pay for it." The case of *Wiley v. White*, *supra*, is not noticed by the court.

⁴ *Wales v. Cooper*, 24 Miss. 208.

of lands is entitled to receive on account of the failure or defect of title the following rules are clearly established: First, where a contract for the sale of real estate has been executed, and the vendee has received a deed with covenants of warranty, and taken possession of the land, he cannot in a case free from fraud or misrepresentation avoid a judgment for purchase-money, either at law or in equity, on account of a defect or a failure of title, unless he has been evicted. Second, if there has been fraud or misrepresentation in relation to the validity of the title, or the absence of incumbrance upon it, a court of law or equity, if the title be defective or incumbered, will relieve from payment of the purchase-money without eviction, notwithstanding a party may have received a deed with covenants of general warranty and gone into possession of the land.¹ Third, where the vendee, at the time of his purchase, knew of the defect of title, or the existence of incumbrances on the estate, and took a deed with covenants of warranty, he cannot at law avoid a recovery even after eviction, but must rely upon the covenant. Nor will a court of chancery, in such a case, as a general rule, grant any relief, but will remit the party to his covenants, such being the remedy provided for himself." In a later case² the court say: "It has been repeatedly decided by learned and able judges in this country, not in virtue of any statutory provision, but upon principles of justice and convenience, and with a view of preventing litigation and expense, that where fraud has occurred in obtaining, or in the performance of, contracts, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defense, when sued upon such contract, in all cases where the title to real estate is not involved; and that he shall not be driven to assert them [335] either for protection or as a ground for compensation in a cross-action. And although there is some diversity of judicial opinion upon the subject, it is believed to be the better opinion that this defense cannot, in general, be made where the partial failure relates to title to real estate merely; and

¹ This rule is applied in a Tennessee case involving the law of Mississippi. *Brady v. McGehee*, 1 Tenn. Cas. 154 (1860).

² *Myers v. Estell*, 47 Miss. 4.

this is predicated upon the exclusive and peculiar jurisdiction of equity over the title to real estate in causing it to be perfected, and upon the further consideration that the vendee in general sustains no injury by the partial defect of title, so long as he retains possession, as also because it would be without the principle upon which recoupment is allowed in the common-law courts, inasmuch as, for want of that peculiar jurisdiction of the equity courts to cause defective titles to be perfected, they could not do final and complete justice in the premises, and terminate all further litigation touching the contract."¹

§ 636. **Rule in various other states.** In Tennessee, Arkansas, Michigan, Virginia and Illinois a purchaser may avail himself of eviction or other breach of the covenants for which he is entitled to substantial damages as a full or partial defense to an action for purchase-money.² In Florida³ it has been held that in an action upon a note for purchase-money of land an equity existing in a third person is not sufficient to sustain a plea of failure of consideration. A mere equity in another person is no defense at law; there must be fraud or eviction,

¹ See *Laughman v. Thompson*, 6 Sm. & M. 259; *Chaplain v. Briscoe*, 5 id. 198; *Kilpatrick v. Dye*, 4 id. 289; *Willey v. Hightower*, 6 id. 345; *Hoy v. Taliaferro*, 8 id. 727; *Vick v. Percy*, 7 id. 256, 45 Am. Dec. 303; *Stone v. Buckner*, 12 Sm. & M. 73; *Duncan v. Lane*, 8 id. 744; *Anderson v. Lincoln*, 5 How. (Miss.) 279; *Puckett v. McDonald*, 6 id. 269; *Winstead v. Davis*, 40 Miss. 785; *Heath v. Newman*, 11 Sm. & M. 201; *Glenn v. Thistle*, 23 Miss. 42; *Miller v. Lamar*, 43 id. 383; *Wofford v. Ashcraft*, 47 id. 641; *Ware v. Houghton*, 41 id. 382, 93 Am. Dec. 258; *Peemster v. May*, 13 Sm. & M. 275.

In *Turner v. McAdory*, 58 Miss. 27, there was a breach of the warranty by the establishment of a paramount title, which the warrantee purchased. It was held that a court of law could not order the judgment obtained by the warrantor on the

purchase-money notes to be credited with the amount paid by the warrantee for such purpose, the claim not being reduced to judgment against the warrantor.

² *Coffman v. Seoville*, 86 Ill. 300; *Penn v. Schmisser*, 77 Ill. App. 526; *Virginia Mining Co. v. Wilkinson*, 92 Va. 98, 22 S. E. Rep. 859; *William Farrell Lumber Co. v. Deshon*, 65 Ark. 103, 44 S. W. Rep. 1036; *Edmunds v. Porter*, 2 Cold. 42; *Walker v. Johnson*, 13 Ark. 522; *Greggs v. D. & M. R. Co.*, 10 Mich. 117; *Rebling v. Lamb*, 81 id. 318, 331, 45 N. W. Rep. 997; *McDaniel v. Grace*, 15 Ark. 480; *Shack v. McLagan*, 15 Ill. 212; *Knapp v. Leg*, 3 Pick. 450; *Rice v. Goldard*, 14 Pick. 293; *Pence v. Houston*, 6 Gratt. 304; *Derrimus v. Bond*, 8 Blackf. 368; *Morgan v. Smith*, 11 Ill. 191, 200; *Schmitten v. Kasebel*, 27 Ill. 175.

³ *Long v. Allen*, 2 Fla. 402.

or something equivalent thereto, or admitted or unquestionable paramount title. In Maine it appears to be settled that there can be no defense at law against the collection of a purchase-money note on the ground of a partial failure of title;¹ but it is otherwise if there is a total failure of title,² or a partial failure other than of title.³ And it has been so held also in Massachusetts.⁴ In Missouri a vendee in possession under covenants of warranty cannot set up a want or failure of consideration. But if the deed conveys an unknown, uncertain and undetermined interest, a total failure of consideration may be shown.⁵ In Wisconsin the grantee in a deed with full covenants, whose possession has not been disturbed, cannot defend an action to foreclose his mortgage to secure the payment of the unpaid portion of the purchase-money on the ground that his grantor had no title.⁶ In Minnesota the fact that lands are incumbered or the title is otherwise imperfect when the contract is made, or at any time before the date fixed for its completion, will not constitute a defense to an action for the recovery of an instalment of the purchase price falling due at any earlier date, because the incumbrance or other defect may be removed within the time fixed for the completion of the purchase.⁷ The rule that a vendee in possession may resist the payment of his purchase-money note when the title fails or is defective and the vendor is insolvent, has no application when such purchaser has bought in the outstanding title or removed the incumbrance; the measure of relief in such a case is the outlay, not exceeding the value of the land.⁸

In Georgia the purchaser of land who enters into possession

¹ Lloyd v. Jewell, 1 Me. 352, 10 Am. Dec. 73; Wentworth v. Goodwin, 21 Me. 154; Jenness v. Parker, 24 id. 294; Herbert v. Ford, 29 id. 551; Morrison v. Jewell, 34 id. 146; Thompson v. Mansfield, 43 id. 490; Bean v. Harrington, 83 Me. 460, 34 Atl. Rep. 268.

² Jenness v. Parker, 24 Me. 289; Bean v. Harrington, *supra*.

³ Ladd v. Putnam, 79 Me. 568, 12 Atl. Rep. 628.

⁴ Bowley v. Holway, 124 Mass. 395.

⁵ Lewis v. West, 23 Mo. App. 503.

⁶ Falkner v. Woodard, 104 Wis. 608, 80 N. W. Rep. 940, and cases cited; Bardeen v. Markstrum, 64 Wis. 613, 25 N. W. Rep. 565.

⁷ Townshend v. Goodfellow, 40 Minn. 314, 12 Am. St. 736. 3 L. R. A. 739, 41 N. W. Rep. 1056; Duluth Land & Loan Co. v. Klov Dahl, 55 Minn. 341, 56 N. W. Rep. 1119.

⁸ Bank v. Johnston, 105 Tenn. 521, 59 S. W. Rep. 131.

under a warranty deed or a bond for title cannot, before eviction, defeat an action for the purchase-money unless there has been fraud on the part of the vendor, or he is insolvent, or there is some other ground which would in equity entitle the purchaser to relief.¹ But if the obligee in such a bond is not in default, although in possession of the land, he may recoup the damages resulting from the breach of it, the surrender of the possession being tendered, and a willingness shown to account for rents during the time possession was held. The obligee may also waive the obligor's tort in wrongfully entering upon the land and appropriating wood thereon and set off in an action to recover the purchase-money the value of the wood taken. But he cannot set off the profits he would have made on a sale of the land but for the wrong done by the obligor, the latter not having notice of the contract of resale when his bond was executed, or before the breach occurred.²

§ 637. **South Carolina and Virginia rule.** In South Carolina the covenant of warranty includes the covenant [339] of seizin, and therefore a breach does not depend on an eviction.³ Formerly there were three classes of cases in which a purchaser could be relieved in part or in whole from the payment of the purchase-money.⁴ First, if there was a partial failure of consideration, as where part of the land sold and conveyed was covered by a paramount title, which might, and in the opinion of the jury would, so far deprive the party of the benefit of his purchase. This has been essentially matter of discount,⁵ and could be given in evidence only under a notice of discount. In such case the measure of damages to be allowed to the party on his covenant of seizin was the *pro rata* value of the land covered by the paramount title, estimated by the purchase-money and interest, and the relative

¹ *McGehee v. Jones*, 10 Ga. 127; *Watson v. Kemp*, 41 Ga. 586; *McCauley v. Moses*, 43 Ga. 577; *Smith v. Hudson*, 45 Ga. 208; *Booth v. Saf-fold*, 46 Ga. 278.

² *Sanderlin v. Willis*, 94 Ga. 171, 21 S. E. Rep. 291, followed, as to the first

proposition, in *Preston v. Walker*, 109 Ga. 290, 31 S. E. Rep. 571.

³ *Johnson v. Purvis*, 1 Hall, 822; *Sumter v. Welch*, 1 Brev. 539; *Johnson v. Nixon*, 2 id. 472.

⁴ See *Van Lew v. Parr*, 2 Rich. Eq. 347.

⁵ *Farrow v. Mays*, 1 N. & McC. 312.

value of the land lost to the land remaining.¹ The second [340] class was where the grantor, when he sold and at the trial, had no title to the land. In such case, the vendee having acquired no title, had, of course, no consideration for his promise; and so, when the action was on a parol contract, it was a *nudum pactum*, and the vendee might be relieved at law. The defense could be made under the general issue.² But in an action upon a specialty, before the act of 1831, the defense had to be specially pleaded or set up by way of discount.³ That act merely let the party into his defense under a notice instead of a plea. In a suit on a specialty, therefore, it was deemed proper for the defendant to consider his covenant of seizin as broken to the whole extent of the purchase-money and interest, and to claim damages accordingly by way of discount. In such case, if the jury was satisfied that in fact as well as law the purchaser took nothing by his title, and that he would be ousted by the paramount title, they might find a verdict for the defendant, not on the ground that the failure of title is a rescission of the contract, but that the damages on the covenant of seizin were exactly equal to the purchase-money and interest. It was held not necessary to appeal to equity to put the parties in *statu quo*; because the vendor's deed conveyed no title to the vendee; and the vendor could claim no rents and profits, for his vendee was liable to the owner of the paramount title for the rent of the land during the time he might be in possession.⁴ Both of these classes have always been regarded as constituting legal defenses, examinable and relievable in courts of law. In the third class, where there was a good title in part or in whole conveyed by the vendor to the vendee, and the object of the vendee's purchase was defeated either by a part failure of the title or the failure of some incident to the purchase represented by the vendor, or shown by the title as resulting from the purchase, the purchaser was formerly held to be relievable at law, although he might be in possession by a rescission of the contract.⁵ Subsequently, however, the court retraced their steps

¹ *Furman v. Elmore*, 2 N. & McC. 199, 10 Am. Dec. 586.

² *Farrow v. Mays*, *supra*.

³ *Hunter v. Graham*, 1 Hill, 370.

⁴ *Taylor v. Fulmore*, 1 Rich. 52.

⁵ *Gray v. Handkinson*, 1 Bay, 278; *State v. Gaillard*, 2 id. 11, 1 Am. Dec. 623.

in respect to this class, and established the doctrine that if the purchaser had not been evicted the contract could not be rescinded in a court of law, and that the party must seek relief in a court of equity, because a court of law could not do full and adequate justice between the parties.¹ But at the [341] present day it is held that in actions brought for the purchase-money the purchaser may make a clear, subsisting, outstanding title the ground of abatement for the contract value of such part of the premises as it may cover.² And so if the warranty of quantity is broken.³

¹ *Carter v. Carter*, 1 Bailey, 217; *Bordeaux v. Cave*, id. 250; *Westbrook v. McMillan*, id. 259; *Johnson v. Purvis*, 1 Hill, 322.

² *Van Lew v. Parr*, 2 Rich. Eq. 347. See *Means v. Brickell*, 2 Hill, 657; *Abercombie v. Owings*, 2 Rich. 127; *Jeter v. Glenn*, 9 id. 378.

³ *Crawford v. Crawford*, 1 Bailey, 128; *Ellis v. Hill*, 6 Rich. 37. In this case the court say: "The rule, in our courts, long established, is, that in an action upon a security executed for the purchase-money of land, bought at a fixed rate per acre, the purchaser may abate the price by proof of deficiency in quantity; and that proof of the sale of so many acres, at a certain rate per acre, may be adduced by parol, and a verdict thereupon shall be reduced, *pro tanto*, according to the deficiency. The doctrine is not obnoxious to anything contained in the statute of frauds; nor to that rule of evidence which excludes anything by parol to vary, contradict, add to, or subtract from, written evidence of contract. It proceeds upon the footing of failure of consideration, and has been also adjudged to belong to the rights of a defendant under our discount law (*vide* *Abercombie v. Owings*, 2 Rich. 127, which is a case full to the point of the one before us). The case cited, and that of *Bauskett v. Jones*,

² *Spear*, 68, contain a reference to a multitude of instances in which the rule has been administered as was done on circuit in the present instance. The distinction is where a gross sum has in point of fact been given for a body of land, described by metes and bounds, with quantity mentioned as additional matter of description (which intent may be the more manifest from reference to very specific boundaries, illustrated by plat annexed), and the purchaser obtains the parcel of land accordingly; and where the purchaser has bought by the acre, and stipulated to pay according to the quantity, in point of fact. Another question, dependent upon the position of a purchaser, as plaintiff in an action on the warranty, does not present itself. It is manifest the description contained in the deed of conveyance is not conclusive upon the point under consideration. It was much more specific in the case of *Abercombie v. Owings* than in this case; in that a survey had been previously made, though of doubtful accuracy, and the conveyance expressed a gross sum as the consideration, and the quantity was stated at eighty-five acres, 'more or less,' bounded by lines beginning at a corner, and running thence etc., according to the plat made by the surveyor, Gilbert. The conveyance

The rule is the same in Virginia.¹ In one case a deed of bargain and sale conveyed a tract of land described as "containing by survey seven hundred and eighty-five acres," giving metes and bounds; the price stated in the deed was \$11,755, which is the product of seven hundred and eighty-five acres at \$15 per acre, there being no other evidence of the terms of the contract. It turning out that there was less than seven hundred and eighty-five acres, the vendee recovered compensation for the deficiency. He enjoined a judgment recovered against him for the balance of the purchase-money, alleging a defect in the title to the land, which he failed to prove; whereupon the injunction was dissolved and the bill dismissed. Afterwards he brought another suit in which he established his right to compensation for a deficiency in the quantity of the land to an amount equal to the unpaid balance of the purchase-money. He was awarded the damages which accrued on the dissolution of the first injunction as well as against the judgment at law.² In a later case³ it is laid down that the use of the words "more or less," or "supposed to contain so many acres, more or less," in a deed or contract for land will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency beyond what may reasonably be attributed to small errors from variations of instruments or otherwise, unless a contract of hazard was intended, which is not to be presumed where the vendor represented the tract of land as "con-

here was for one-ninth part of a tract, whereon a certain person then lived, containing six hundred and forty acres, more or less, situate in Union district, on the west side of Broad river, adjoining lands belonging to J. H., F. S., W. D., and J. B. T. Such was the whole specification and without plat. The defense here resisted was allowed in the case cited: *a fortiori*, it was properly allowed in the case before us. No sensible difference arises from the circumstance that in *Abercombie v. Owings* it was stipulated, by parol, before the execution of the

deed and the notes under seal, that a mistake in the quantity should be rectified when afterwards ascertained. The nature of the contract in this case implied the same. The same objection would exist in either case, the same has been urged, as to the evidence disclosing the nature and terms of the contract. Now, as heretofore, it must be held unavailing."

¹ *Crawford v. McDaniel*, 1 Rob. 448.

² *Keyton v. Brawford*, 5 Leigh. 39.

³ *Grayson v. Buchanan*, 88 Va. 251, 13 S. E. Rep. 457.

taining one hundred and forty acres more or less and known as the K. tract," the price being \$6,000; it was presumed that the quantity influenced the price, and that the sale was by the acre, there being but one hundred and twenty-six acres, and one-half of a certain spring, represented to be on the land, not being on it, the vendee was entitled to an abatement of the price for the loss of the deficiency in area and the loss of one-half the spring, the abatement for deficiency to be on the basis of the average value of the entire acreage, and for the loss of the spring to the extent the tract, on a valuation of \$6,000, was damaged thereby.

In South Carolina where the equitable title is conveyed, with a right to call for the legal title, the existence of the latter in a third person will not entitle the grantee to a discount.¹

§ 638. **Texas and Kentucky rule.** In Texas the purchaser with covenants of warranty may defend against a demand of purchase-money without eviction. Where he, by competent and sufficient evidence, established the existence and validity of an outstanding title, it was early held that there is no reason why his remedy should be delayed until he is [343] disturbed in the enjoyment of the land, and this when the defendant was in possession.² But in such a case, whether the failure of title be partial or total, the vendee should offer to reconvey the land as to which it had failed.³ If, however, the purchaser goes into possession under a deed of warranty, having notice of the defects in the title, he is not entitled to withhold the purchase-money, for the transaction still remains as the vendee understood it at the time of the purchase; and in that case he will be obliged to await eviction and rely on his covenant for the damages which result from a breach of it.⁴ It is necessary to the defense of the failure of title, without eviction, in an action upon a purchase-money note, that the vendee should have made the purchase without notice of the

¹ *Hodges v. Connor*, 1 Spear, 120; *Brown*, 85 Tex. 51, 19 S. W. Rep. 768; *Johnson v. Purvis*, 1 Hill, 322. *Ogburn v. Whitlow*, 80 Tex. 239, 15

² *Tarpley v. Poage*, 2 Tex. 139; *Peck* S. W. Rep. 807.

v. Hensley, 20 id. 673; *Cooper v. Singleton*, 19 id. 260, 70 Am. Dec. 333; ³ *Id.* See *Demarett v. Bennett*, 29 Tex. 202.

Woodward v. Rodgers, 20 Tex. 176; ⁴ *Demarett v. Bennett*, *supra*; *Cook v. Jackson*, id. 209; *Twohig v. Bryan v. Johnson*, 39 Tex. 31.

defect.¹ This rule does not apply where the vendor expressly agrees to obtain the outstanding title for the vendee.²

In Kentucky, unless the vendor is insolvent or a non-resident, the vendee cannot set up a defect in his title, but must look to the covenants in his deed and wait for an eviction. If the vendor has not put the vendee in possession that will be deemed equivalent to a breach of warranty and may be a defense to an action for the purchase-money in whole or *pro tanto*.³ If one of the vendors is solvent, and they all acted in good faith, and the vendee is in possession under his deed, the purchase price may be recovered notwithstanding a breach of the warranty.⁴ Where the sale was in gross of between three hundred and fifty and four hundred acres, and the tract contained but two hundred and sixty-seven acres, the vendee was entitled to an abatement of the price. But this was not allowed at the average price agreed to be paid for the whole farm, which was supposed to be about half bottom and half hill land, the deficit being altogether in the latter, which was about one-third as valuable as the bottom land; such relative value was adopted as the basis on which to abate the recovery.⁵ On the failure of the title because the land was owned by the state the abatement was governed by the cost of obtaining a patent from the state.⁶

§ 639. **Pennsylvania rule.** In Pennsylvania the doctrines held on the subject under consideration are peculiar, owing in

¹ *Herron v. De Bard*, 24 Tex. 181; *May v. Ivie*, 68 id. 379, 4 S. W. Rep. 641; *Carson v. Kelley*, 57 Tex. 379; *Crouch v. Johnson*, 7 Tex. Civ. App. 435, 27 S. W. Rep. 9; *Ogburn v. Whitlow*, *supra*; *Fagan v. McWhirter*, 71 Tex. 567, 9 S. W. Rep. 677; *Earle v. Mark*, 80 Tex. 39, 15 S. W. Rep. 595.

² *Doughty v. Cottraux*, 8 Tex. Civ. App. 125, 27 S. W. Rep. 914.

³ *Pryse v. McGuire*, 81 Ky. 608; *English v. Thomason*, 82 Ky. 280; *Laevison v. Bain*, 91 Ky. 204, 57 S. W. Rep. 252; *Little v. Bishop*, 22 Ky. L. Rep. 1747, 61 S. W. Rep. 464.

In *Hall v. Campbell*, 5 Ky. L. Rep. 246 (an unreported court of appeals case), the rule, as stated in the ab-

stract, is thus: Where there is a breach of warranty and the vendor is insolvent, the vendee may set off against the purchase-money the damages resulting from the breach; but unless the vendor is insolvent or has practiced fraud in procuring the vendee to accept the conveyance, the latter must look to the warranty. To the same effect is *Hoertz v. Marrett*, id. 698, and *Abner v. York*, 19 id. 643, 41 S. W. Rep. 309.

⁴ *Smith v. Jones*, 97 Ky. 670, 31 S. W. Rep. 475.

⁵ *Heaton v. Timmons*, 15 Ky. L. Rep. 62 (Ky. Super. Ct.).

⁶ *Little v. Bishop*, 22 Ky. L. Rep. 1747, 61 S. W. Rep. 464.

part to the blending of legal and equitable remedies in the jurisprudence of that state. If the purchase is made with notice of a defect in the title, or of an outstanding incumbrance, there is a presumption that the covenant was expressly taken for protection against it, and if it has been broken the purchaser has a right to have his damages deducted from the purchase-money.¹ The defense on the ground of right to detain the purchase-money is then treated as in the nature of an action on the covenants, and is allowed to prevent circuity of action.² Where the purchaser bought without notice of an existing adverse title or incumbrance, and the consideration money has not been paid, he may defend himself in an action for it by showing that the title is defective or incumbered in whole or in part, and may do so whether there are cov- [344] enants or not.³ The rule in such case is the same after as before the execution of the deed.⁴

The general principle is that a purchaser may defend himself from payment of the purchase-money by reason of a clear defect or outstanding incumbrance unless the intention was to run the risk of it; and of course there can be no such intention if the defect or incumbrance was unknown.⁵ Where one party intended to convey, and the other expected to receive, a good title, it is but equity that the purchaser should have relief in case of any defect of title, although there was no express agreement for that purpose; but where the intent was that the purchaser should run the risk of title, there is not a word to be said for him.⁶ Where, therefore, there is a known

¹ *Youngman v. Linn*, 52 Pa. 413; *Wilson v. Cochran*, 46 id. 229; *Swayne v. Lyon*, 67 Pa. 436.

² *Id.*; *Morris v. Buckley*, 11 S. & R. 168; *Christy v. Reynolds*, 16 id. 258; *Tod v. Gallagher*, id. 261, 16 Am. Dec. 571; *Ives v. Niles*, 5 Watts, 323; *Poyntell v. Spencer*, 6 Pa. 254.

³ *Cross v. Noble*, 67 Pa. 74. Mr. Warvelle disapproves this view, saying that it is manifestly opposed to the current of authority and in direct contradiction of the rule that a purchaser who neglects to obtain satisfactory assurances of the title he

buys takes it subject to all its defects and infirmities; and it is quite certain that a purchaser by quiet claim, who takes with notice of a defect, actual or constructive, does so at his peril, and cannot afterwards be heard to dispute the vendor's right to recover whatever balance may be due. 2 *Vendors* (2d ed.), § 904.

⁴ *Youngman v. Linn*, 52 Pa. 413.

⁵ *Rawle on Cov. for Tit.* (11th ed.), 622, 623; *Steinhauer v. Witman*, 1 S. & R. 448; *Hart v. Porter*, 5 id. 201.

⁶ *Hart v. Porter*, *supra*.

defect, but no covenant or fraud, the vendee can avail himself of nothing, being presumed to have been compensated for the risk in the collateral advantages of the bargain.¹ The defect being known, and not provided for, the presumption is said to be irresistible, in the absence of an express stipulation, that the vendee relied on his own judgment as to the soundness of the title.²

In *Wilson v. Cochran*³ Woodward, J., thus summarizes the Pennsylvania doctrine: "The detention of the purchase-money on account of breaches of the vendor's covenant is a mode of defense that is peculiar to our Pennsylvania jurisprudence; but the principle is well settled with us that where a vendor has conveyed with covenants on which he would be liable to the vendee in damages for a defect of title, the vendee may detain the purchase-money to the extent to which he would be entitled to recover damages upon the covenant, and he is not obliged to restore possession to his vendor before or at the time of availing himself of such defense. Where there is a known defect, but no covenant or fraud, the vendee can avail himself of nothing, being presumed to have been compensated for the risk in the collateral advantages of the bargain. But where there is a covenant against a known defect, he shall not detain purchase-money unless the covenant has been broken. If the covenant be for seizin or against incumbrances it is broken as soon as made, if a defect of title or an incumbrance exists; but if it be a covenant of warranty it binds the grantor to defend the *possession* against every claimant of it by right, and is consequently a covenant against rightful eviction. To maintain an action for the breach of it, an eviction must be laid and proved, not necessarily by judicial process, or the application of physical force, but by the legal force of an irresistible title. There must be proof at the least of an involuntary loss of possession. And as the right to detain purchase-money is in the nature of an action on the covenant, and is allowed to prevent circuitry, the vendee who seeks to detain by virtue of a covenant of warranty is as much bound to prove an eviction as if he were plaintiff in an action of

¹ *Lighty v. Shorb*, 3 P. & W. 447, 24 Am. Dec. 334; *Wilson v. Cochran*, 46 Pa. 129; *Youngman v. Linn*, *supra*.

² *Smith v. Sillyman*, 3 Whart. 589; *Ross' Appeal*, 9 Pa. 497.

³ 46 Pa. 231.

covenant. Until eviction the covenant is part of the consideration of the purchase-money he agreed to pay, and holding the covenant he may not withhold the purchase-money. But after eviction he has the right to have his damages deducted from the purchase-money."¹

If the defense is made on the ground of covenant broken, surrender of possession is not necessary;² but when, upon the equitable doctrine of this state, a purchaser seeks to resist the payment of the purchase-money, where the covenant is not broken and such money is secured by mortgage on the premises and no personal demand is made on him, but it is merely asked, in default of payment of the purchase price, that the property conveyed be restored, the purchaser must either pay the purchase-money or restore the possession to the person from whom he received it.³ In such cases relief in this form is granted on the ground that eviction may take place; but say the court in one case:⁴ "This is very delicate ground on which to administer justice to vendors and vendees, [346] for in determining the possibility of an eviction we have not before us the paramount claimant on whose will and rights the liability to eviction depends. Possibly, he has no rights, as would appear the moment he attempted to assert them, or if he have rights it is possible he may never attempt to assert them; and in either case it would be against conscience and equity to allow the purchaser to keep the land on which so unsubstantial a cloud rests, and the price also which he agreed to pay the party who put him into possession."

§ 640. *Defenses under the code.* The code has been adopted in many states and territories, and defines very uniformly what counter-claims may be set up in the answer; it may contain a statement of any new matter constituting a defense or counter-claim. The latter is defined to be, first, a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; second, in

¹ *Murphy v. Richardson*, 28 Pa. 288; 622, 643, note 3; *Hersey v. Turbett*, *Rowland v. Miller*, 3 W. & S. 393. 27 Pa. 424.

² *Poyntell v. Spencer*, 6 Pa. 257; ⁴ *Bennetland v. McKean*, 28 Pa. 130, 70 Am. Dec. 115.

³ *Rawle on Cov. for Tit.* 4th ed.,

an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. Under these provisions, of course, any claim of damages for which an action could be maintained for breach of the covenants, or for equitable relief in respect to them, would be available in the form of a counter-claim.¹

[347] § 641. **Defenses in equity.** In those jurisdictions which have entertained the defense of an entire or partial failure of title in actions on securities for purchase-money the conflict of opinion has been chiefly in respect to the allowance of damages for breach of the covenant of seizin when the facts would not justify recovery on the other covenants. There has been greater reluctance to permit a recovery in such cases where the amount is sought to be deducted from unpaid purchase-money, especially in suits for foreclosure of liens in

¹ Walker v. Wilson, 13 Wis. 522; Hale v. Gale, 14 id. 54; Akerly v. Vilas, 21 id. 109, id. 377; Eaton v. Tallmadge, 22 id. 526; Lowry v. Hurd, 7 Minn. 362; Small v. Reeves, 14 Ind. 163. See Ludlow v. Gilman, 18 Wis. 552; Taft v. Kessell, 16 id. 273; Dorr v. Streichen, 18 Minn. 26; Kingsland v. Haines, 62 App. Div. 146, 70 N. Y. Supp. 873; Krumm v. Beach, 96 N. Y. 398.

In Akerly v. Vilas, 21 Wis. 109, Downer, J., said: "Before the code, it was well settled that in suits brought to foreclose mortgages for the purchase-money, in which the mortgagor, being in possession of the lands, set up a partial failure of title as a defense, without averring an actual eviction, or an action of ejectment brought, or that he was in any way disturbed in his possession, the court would not interfere, but leave him to his action at law. Van Waggoner v. McEwen, 1 Green's Ch. 422; Abbott v. Allen, 2 Johns. Ch. 519; Platt v. Gilchrist, 3 Sandf. 118; Simpson v. Hawkins, 1 Dana, 303; Rawle on Cov. for Tit. (3d ed.) 676, 686. Courts of equity declined to go into such defenses, because title to

lands could better be tried in actions at law, and the damages were often unliquidated and not the subject of set-off; and also because the possession of the defendant, being undisturbed, might ripen into a perfect title. But the code allows a counter-claim to be set up in an answer to a foreclosure action, as well as in others. It is no objection to such counter-claim or claims that the damages are unliquidated, or that the claims are legal or equitable, or both; for claims legal or equitable, for liquidated and unliquidated damages on contracts, may all be set up in the same answer. The defendant who sets up by way of counter-claim a cause of action based upon the covenants in a deed is entitled to recover the same damages as he would have recovered if he had brought a separate action on these covenants. If he declares upon the covenant of seizin and alleges breaches, it is no defense to his claim that he is in undisturbed possession of the premises. He is entitled to recover his actual damages whatever they may be, the same as in a suit at law before the code."

equity, than in actions by the covenantee at law on the covenant.¹ In courts of equity the protection of purchasers against the collection of purchase-money, where there are defects of title covered by covenants, is more ample, and the jurisdiction is more generally and uniformly exercised than at law. It is available, first, where the seller comes into equity to enforce the payment of the purchase-money by marshaling or administering assets, foreclosure of securities, or the like, and there is such a defect of title, or such expenses or payments [348] to extinguish a paramount title or incumbrance, as would sustain an action at law on the covenants for substantial damages. The court will apply these damages, ascertained according to its practice, *pro tanto* to the satisfaction of the plaintiff's claim, and only decree for the plaintiff the balance.²

¹ Mr. Rawle (in Cov. Tit. 590, 4th ed.) says: "In suing upon this covenant, cases may occur in which, although the purchaser may have paid nothing to buy in the paramount title, and may be still in possession, yet the failure of title is so complete as to authorize the assessment of damages by the consideration money, or a proportionate part of it; and in such cases it might be proper and even necessary for the plaintiff to offer to reconvey the interest or title actually vested in him, and that, although it would be no bar to his recovery that he had not done so, yet that the court might stay the execution, or reserve the actual entry of the judgment, till such conveyance were made. It is difficult to say how far this doctrine can be made to apply to actions where the defendant seeks to detain the purchase-money under similar circumstances. On the one hand, there are reasons growing from the desire to prevent circuity of action, and the injustice that may often arise by reason of the delay, expense and risk of the vendor's insolvency, to which the purchaser may be put by turning him round to his action on the covenant. On the

other, the temptation offered to purchasers, when pressed for the contract price, to ferret out defects in the title of their vendor, is such as may induce a leaning in favor of the rule that unless there has been a *bona fide* eviction, actual or constructive, the parties must be left to pursue the remedies originally provided for themselves."

² *Detroit & M. R. Co. v. Griggs*, 12 Mich. 45; *Coster v. Monroe Manuf. Co.*, 2 N. J. Eq. 467; *Glenn v. Whipple*, 12 id. 50; *Van Waggoner v. McEwen*, 2 id. 412; *Earl of Bath v. Earl of Bedford*, 2 Ves. Sr. 587; *Fergus v. Gore*, 1 Sch. & Lef. 107; *Lovell v. Sherwin*, 2 Eq. R. 329, 23 Eng. L. & Eq. 534; *Parker v. Harvey*, 2 Eq. Cas. Abr. 460; *In re Dickson*, L. R. 12 Eq. 154; *Van Riper v. Williams*, 2 N. J. Eq. 407; *Dayton v. Dusenbury*, 25 id. 110; *White v. Stretch*, 22 id. 79; *Fowler v. Boling*, 6 Barb. 165; *Noonan v. Lee*, 2 Black. 439; *York v. Allen*, 30 N. Y. 104; *Norton v. Jackson*, 5 Cal. 262; *Pickett v. McDonald*, 6 How. (Mass.) 269; *Kilpatrick v. Dye's Heirs*, 4 Sm. & M. 239; *Prichard v. Evans*, 31 W. Va. 137, 5 S. E. Rep. 461.

Second, in the exercise of its *quia timet* jurisdiction, as where there is already an actionable breach of the covenants, and the damages therefor are not a defense in a suit for purchase-money, or there has been no opportunity to make it, or loss of the estate, from the pendency of actions to enforce a paramount title or incumbrance, is imminent, and by reason of the absence or insolvency of the covenantor the remedy by action at law on the covenants will be unavailing.¹ Where the only covenants in the deed are those for quiet enjoyment and of warranty, and there has been no eviction, actual or constructive, equity will not, as a general rule, interfere to prevent the collection of purchase-money.² As between the original mort-

¹ Crenshaw v. Smith, 5 Munf. 415; Stockton v. Cook, 3 id. 68; Clark v. Hardgrove, 7 Gratt. 399; Yancy v. Lewis, 4 Hen. & Munf. 390; Jones v. Waggoner, 7 J. J. Marsh. 144; Trumbo v. Lockridge, 4 Bush, 417; Andrews v. McCoy, 8 Ala. 920, 42 Am. Dec. 669; McLemore v. Mabson, 20 Ala. 139; Wyatt v. Greer, 4 Stew. & P. 318; Kelly v. Allen, 34 Ala. 663; Smith v. Pettus, 1 Stew. & P. 107; Beebe v. Swartwout, 8 Ill. 177; Vick v. Percy, 7 Sm. & M. 268; McGehee v. Jones, 10 Ga. 135; Hoppes v. Cheek, 21 Ark. 588; Vance v. House, 5 B. Mon. 540; Young v. Butler, 1 Head, 640; Perciful v. Hurd, 5 J. J. Marsh. 672; Ingram v. Morgan, 4 Humph. 66, 40 Am. Dec. 626; Luckett v. Triplett, 2 B. Mon. 39; Champlin v. Dotson, 13 Sm. & M. 553; Wofford v. Ashcraft, 47 Miss. 641; Atwood v. Vincent, 17 Conn. 575; Davis v. Logan, 5 B. Mon. 341; Jones v. Stanton, 11 Mo. 433; Denny v. Wickliffe, 1 Met. (Ky.) 226; Green v. Campbell, 2 Jones' Eq. 446; Shannon v. Marselis, 1 N. J. Eq. 413; Hatcher v. Andrews, 5 Bush, 561; Simpson v. Hawkins, 1 Dana, 303; Willy v. Fitzpatrick, 3 J. J. Marsh. 582; Morrison v. Beckwith, 4 T. B. Mon. 73.

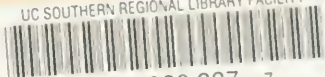
² Hunt v. Marsh, 80 Mo. 396; Cartwright v. Culver, 74 id. 179; Pershing v. Canfield, 70 id. 140; Platt v.

Gilchrist, 3 Sandf. 118; Patton v. Taylor, 7 How. 132; Refeld v. Woodfolk, 22 id. 318; Noonan v. Lee, 2 Black, 499; Bumpus v. Platner, 1 Johns. Ch. 213; Abbott v. Allen, 2 id. 519; Gouverneur v. Elmendorf, 5 id. 79; James v. McKernan, 6 Johns. 543; Prevost v. Gratz, 3 Wash. C. C. 434; Beach v. Waddill, 8 N. J. Eq. 299; Leggett v. McCarty, 3 Edw. Ch. 124; Woodruff v. Bunce, 9 Paige, 443, 38 Am. Dec. 559; Greenleaf v. Queen, 1 Pet. 138; Whitworth v. Stuckey, 1 Rich. Eq. 409; Van Lew v. Parr, 2 id. 321; Maner v. Washington, 3 Strobb. Eq. 171; Young v. McClung, 9 Gratt. 336; Long v. Israel, 9 Leigh, 556; Young v. Butler, 1 Head, 640; Buchanan v. Alwell, 8 Humph. 516; Elliott v. Thompson, 4 id. 99, 40 Am. Dec. 630; Lewis v. Morton, 5 T. B. Mon. 1; Vance v. House, 5 B. Mon. 537; Casey v. Lucas, 2 Bush, 55; Obling v. Luitjens, 32 Ill. 23; Beck v. Simmons, 7 Ala. 76; Wilty v. Hightower, 6 Sm. & M. 345; McDonald v. Green, 9 id. 138; Beebe v. Swartwout, 8 Ill. 162; Eddington v. Nix, 49 Mo. 134; Cooley v. Rankin, 11 Mo. 647; Middlekauff v. Barrick, 4 Gill. 290; Hall v. Priest, 6 Bush, 12; Busby v. Treadwell, 24 Ark. 456; Hile v. Davison, 20 N. J. Eq. 228; Hulfish v. O'Brien, id. 230; Ludlow v. Gilman, 18 Wis. 552; Akerly v. Vilas, 21 id.

gagor and mortgagee, notwithstanding the court has determined in a foreclosure suit that, in order to save the property, the mortgagor must pay the entire original purchase-money and interest without any deduction on account of the partial failure of title to the land, a judgment for damages for the breach of the covenant of warranty will be allowed in reduction of the mortgage debt arising out of the conveyance, such judgment being rendered before the judgment of foreclosure was completed.¹

88; *Timms v. Shannon*, 19 Md. 296, 608; *Stone v. Buckner*, 12 Sm. & 81 Am. Dec. 632; *Merritt v. Hunt*, 4 M. 73; *Maxfield v. Bierbauer*, 8 Ired. Eq. 406; *Wilkins v. Hogue*, 2 Minn. 480; *Glenn v. Whipple*, 12 N. Jones' Eq. 479; *Henry v. Elliot*, 6 id. J. Eq. 50.
175; *Clanton v. Burges*, 2 Dev. Eq. ¹ *Harrington v. Bean*, 94 Me. 208.
13; *Beale v. Seiveley*, 8 Leigh, 653; 47 Atl. Rep. 147, citing *Van Riper v. Perciful v. Hurd*, 5 J. J. Marsh. 670; *Williams*, 2 N. J. Eq. 407; *Union Miller v. Long*, 3 A. K. Marsh. 334; *Bank v. Pinner*, 25 N. J. Eq. 495; *Anderson v. Lincoln*, 5 How. (Miss.) *Holbrook v. Bliss*, 9 Allen, 69; *Davis v. Bean*, 114 Mass. 360; *Northy v. Wailes v. Cooper*, id. 203; *Edwards Northy*, 45 N. H. 141; *Goodwin v. v. Morris*, 1 Ohio, 239, 13 Am. Dec. *Henney*, 49 Conn. 563.

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